DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[INS No. 1988–99]

Field Guidance on Deportability and Inadmissibility on Public Charge Grounds

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice.

SUMMARY: The Department of Justice (Department) is publishing a proposed rule in this issue of the **Federal Register** which proposes 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.

Before the proposed rule becomes final, the Immigration and Naturalization Service (Service) is publishing its field guidance on public charge issues as an attachment to this notice. This is necessary to help alleviate public confusion over the meaning of the term ''public charge'' in immigration law and its relationship to the receipt of Federal, State, and local public benefits. This field guidance will also provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.

DATES: This notice and field guidance are effective May 21, 1999.

FOR FURTHER INFORMATION CONTACT: Sophia Cox or Kevin Cummings, Immigration and Naturalization Service, 525 I Street, NW, Office of Adjudications, Washington, DC 20536, telephone (202) 514–4754.

SUPPLEMENTARY INFORMATION: Recent immigration and welfare reform laws have generated considerable public confusion about the relationship between the receipt of Federal, State, and local public benefits and the meaning of ''public charge'' in immigration statutes governing deportation, admissibility, and adjustment of status. The Department decided to publish a proposed rule defining ''public charge'' in order 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.

In addition, the Service has issued guidance to its field officers on a variety of issues related to public charge determinations. That field guidance is included as an attachment to this notice to provide additional information to the public on the Service's implementation of the public charge provisions of the immigration laws.

Dated: May 20, 1999.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

U.S. Department of Justice, Immigration and Naturalization Service

May 20, 1999.

Memorandum for All Regional Directors

From: Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations

Subject: *Public Charge: INA Sections 212(a)(4) and 237(a)(5)*

This memorandum provides guidance concerning the public charge ground of inadmissibility, section 212(a)(4) of the Immigration and Nationality Act (INA), and the related deportation charge under section 237(a)(5) of the INA. It also discusses the impact of these subsections of the new enforceable Affidavit of Support prescribed by section 213A of the INA, established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and welfare reform laws.[1]

IIRIRA and the recent welfare reform laws have sparked public confusion about the relationship between the receipt of federal, state, local public benefits and the meaning of ''public charge'' under the immigration laws. Accordingly, the Service is taking two steps to ensure the accurate and uniform application of law and policy in this area. First, the Service is issuing this memorandum which both summarizes longstanding law with respect to public charge and provides new guidance on public charge determinations in light of the recent changes in law. In addition, the Service is publishing a proposed rule for notice and comment that will for the first time define ''public charge'' and discuss evidence relevant to public charge determinations. Although the definition of public charge is the same for both admission/adjustment and deportation, the standards of public charge is the same for both admission/adjustment and deportation, the standards applied to public charge adjudications in each context are significantly different and are addressed separately in this memorandum. After discussing the definition and standards for public charge determinations, the memorandum goes on to discuss exceptions from public charge determinations and particular types of benefits that may and may not be considered for public charge purposes, in addition to other issues.

I. Definition of ''Public Charge''

The Service is publishing a rule for notice and comment that defines ''public charge'' or purposes of both admission/adjustment and deportation. That rule proposes that ''public charge'' means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) ''primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'' Institutionalization for short periods of rehabilitation does not constitute such primary dependence.

The Service is adopting this definition immediately, while allowing the public an opportunity to comment on the proposed rule. Accordingly, officers should not initiate or pursue public charge deportation cases against aliens who have not received public cash benefits for income maintenance or who have not been institutionalized for long-term care. Similarly, officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds. Supplementary guidance will be issued, as necessary, in conjunction with publication of a final rule.

See section 6, below, for a more detailed discussion of particular types of benefits that may and may not be considered for public charge purposes.

2. Admission and Adjustment of Status

Under INA section 212(a)(4), an alien seeking admission to the United States or seeking to adjust status to that of an alien lawfully admitted for permanent residence is inadmissible if the alien, ''at the time of application for admission or adjustment of status, is likely at any time to become a public charge.'' [2] IIRIRA amended section 212(a)(4) of the INA to codify the factors relevant to a public charge determination. Officers must consider, at a minimum, the alien's age, health, family status, assets, resources, and financial status, and education and skills when making a public charge inadmissibility determination. Every denial order based on public charge must reflect consideration of each of these factors and specifically articulate the reasons for the officer's determination.

The most significant change to section 212(a)(4) under IIRIRA is the creation of a new affidavit of support (AOS), which, coupled with new section 213A, imposes on the sponsor a legally enforceable support obligation. The law requires that sponsors demonstrate that they are able to maintain the sponsored alien at an annual income of not less than 125 percent of the federal poverty level. The AOS requirement applies to all immediate relatives (including orphans), family-based immigrants, and those employment-based immigrants who will work for a relative or for a firm in which a U.S. citizen or lawful permanent resident (LDR) relative holds a 5 percent or more ownership interest. Immigrants seeking

[1] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, as amended by the Balanced Budget Act of 1997, Pub. L. 105–33; the Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. 105–185; and the Noncitizen Technical Amendments Act of 1998, Pub. L. 105–306.

[2] See Section 4 below on categories of aliens who are not subject to public charge determinations.

admission or adjustment of status in these categories are inadmissible under subparagraphs (C) and (D) of the modified section 212(a)(4), respectively, unless an appropriate sponsor has completed and filed a new AOS if the application for an immigrant visa or adjustment of status was filed on or after December 19, 1997. Note that this requirement applies to these aliens *even if,* under the factors codified in section 212(a)(4)(B), the adjudicator would ordinarily find that the alien is not likely to become a public charge. The only exceptions from this requirement are for qualified battered spouses and children (and their eligible family members) and for qualified widow(er)s of citizens, *if* these aliens have filed visa petitions on their own behalf. Where such an AOS has been filed on an alien's behalf, it should be considered along with the statutory factors in the public charge determination.

The standard for adjudicating inadmissibility under section 212(a)(4) has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986. These decisions and regulations, and section 212(a)(4) itself, create a ''totality of the circumstances'' test.

In determining whether an alien is likely to become a public charge, Service officers should assess the financial responsibility of the alien by examining the ''totality of the alien's circumstances *at the time of his or her application* * * * The existence or absence of a particular factor *should never be the sole criterion* for determining if an alien is likely to become a public charge. The determination of financial responsibility *should be a prospective evaluation* based on the alien's age, health, family status, assets, resources and financial status, education, and skills, among other factors.[3] An alien may be considered likely to become a public charge even if there is no legal obligation to reimburse the benefit-granting agency for the benefits or services received, in contrast to the standards for deportation, discussed below.[4]

In addition, the Attorney General has ruled that ''[s]ome specific circumstances, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency.''[5] Under the new AOS rules, all family-based immigrants (and some employment-based immigrants) will have a sponsor who has indicated an ability and willingness to come to the immigrant's assistance.

Current Receipt of Cash Benefits for Income Maintenance and Current Institutionalization

If at the time of application for admission or adjustment an alien is receiving a cash public assistance for income maintenance or is institutionalized for long-term care (as discussed in section 6, below), that benefit should be taken into account under the totality of the circumstances test, along with the other statutory factors under section 212(a)(4)(B)(i) and any AOS. It is possible, for example, that an alien receiving a small amount of cash for income maintenance purposes could be determined not likely to become a public charge due to other positive factors under the totality of the circumstances test. Aliens should not be asked to repay the cost of any benefits received in order to qualify for admission or adjustment.

Current receipt of non-cash benefits or the receipt of special-purpose cash benefits not for income maintenance should not be taken into account under the totality of the circumstances test in determining whether the alien is likely to become a public charge.

Past Receipt of Cash Benefits for Income Maintenance and Past Institutionalization

Past receipt of cash income-maintenance benefits does not automatically make an alien inadmissible as likely to become a public charge, nor does past institutionalization for long-term care at government expense. Rather this history would be one of many factors to be considered in applying the totality of the circumstances test. In the case of an alien who has received cash income-maintenance benefits in the past or who has been institutionalized for long-term care at government expense, a Service officer determining admissibility should assess the totality of the alien's circumstances at the time of the application for admission or adjustment and make a forward-looking determination regarding the likelihood that the alien will become a public charge after admission or adjustment. The longer ago an alien received such cash benefits or was institutionalized, the less weight these factors will have as a predictor of future receipt. Also, the ''length of time an applicant has received public cash assistance is a significant factor.''[6] The longer an alien has received cash income-maintenance benefits in the past and the greater the amount of benefits, the stronger the implication that the alien is likely to become a public charge. The negative implication of past receipt of such benefits or past institutionization, however, may be overcome by positive factors in the alien's case demonstrating an ability to be self-supporting. For instance, a work-authorized alien who has current full-time employment or an AOS should be found admissible despite past receipt of cash public benefits, unless there are other adverse factors in the case.

Past receipt of non-cash benefits (other than institutionalization for long-term care) should not be taken into account under the totality of the circumstances test. Similarly, past receipt of special-purpose cash benefits not for income maintenance should be not taken into account.

Repayment of Public Benefits

IIRIRA did not create any requirement that aliens repay benefits received in the past in order to avoid being found inadmissible on public charge grounds, nor has such a requirement existed in the past. Accordingly, officers should not instruct or suggest that aliens must repay benefits previously received as a condition of admission or adjustment, and they should not request proof of repayment as a condition for finding the alien admissible to the United States. (See INS Memorandum. ''Public Charge. INA Sections 212(a)(4) and 237(a)(5)—Duration of Departure for LPRs and Repayment of Public Benefits,'' dated December 16, 1997, for further discussion.)

Repayment is relevant to the public charge inadmissibility determination only in very limited circumstances. If at the time of application for admission or adjustment of status the alien is *deportable* on public charge grounds under section 237(a)(5) of the INA due to an outstanding public debt for a cash benefit or the costs of institutionalization, then the alien is inadmissible. Only a debt that satisfies the three-part test under section 237(a)(5), described below, will render an alien deportable as a public charge and therefore ineligible for admission or adjustment. If the debt is paid, then the alien will no longer be inadmissible based on the debt, and the usual totality of the circumstances test would apply. While the Service may not demand

[3] 8 C.F.R. § 245a.4(b)(11)(iv)(B), and see INA § 212(a)(4)(B). The federal courts have also endorsed this ''totality of the circumstances'' test. See, e.g., *Zambrano* v. *INS*, 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds, 509 U.S. 918 (1993).*

[4] *Matter of Harutunian,* 14 I. & N. Dec. 583 (BIA 1974) (interpreting § 212(a)(15), recodified as § 212(a)(4)).

[5] *Matter of Martinez-Lopez,* 10 I&N 409, 421–422 (AG, Jan. 6, 1964).

[6] 8 CFR § 245a.2(k)(4).

that an alien repay a public debt which meets the three-part test, it may inform an alien that if the alien does not repay the debt, he or she will continue to be inadmissible to the United States. Adjudicators should make sure also to inform aliens that even if they pay the debt, they may still be determined to be inadmissible as an alien likely to become a public charge under the totality of the circumstances test.

If an INS officer finds evidence of possible benefit fraud in the course of performing his or her immigration duties, that information should be forwarded through official channels to the appropriate benefit-granting agency for possible investigation and enforcement action. In such cases, absent a determination of fraud by the benefit-granting agency, immigration benefits to which the alien is otherwise entitled should not be withheld or denied.

3. Public Charge Determination—Deportation

The determination of whether an alien is subject to removal under section 237(a)(5) is quite different from the determination of whether an alien is inadmissible under section 212(a)(4), although in both contexts the focus is on the receipt of cash benefits for income maintenance purposes. Section 237(a)(5) of the INA states that ''[a]ny alien who, within 5 years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.'' This section requires a two-step determination. First, the Service must determine whether the alien has become a public charge within 5 years after the date of entry.[7] Second, if the alien has become a public charge, then the Service must determine whether the alien has demonstrated that the circumstances that caused the alien to become a public charge arose after the alien's entry into the United States. An alien who can make such a showing is not removable under section 237(a)(5).

We respect to whether an alien has become a public charge, the Attorney General has determined that the mere receipt of a public benefit by an alien does not make an alien a public charge for purposes of deportation under section 237(a)(5). Rather, in *Matter of B,* 3 I. & N. Dec. 323 (BIA and AG 1948),[8] the Attorney General established a strict three-part test to determine if an alien has become a public charge. In order for an alien to become a public charge under section 237(a)(5), the following 3 requirements must be met:

(1) The state or other government entity that provides the benefit must, by law, impose a charge or fee for the services rendered to the alien. In other words, the alien or designated relatives or friends must be legally obligated to repay the benefit-granting agency for the benefits or services provided, if there is no reimbursement requirement under law, the alien cannot be said to be a public charge.

(2) The responsible benefit-granting agency officials must make a demand for payment for the benefit or services from the alien or other persons legally responsible for the debt under federal or state law (e.g., the alien's sponsor).

(3) The alien and other persons legally responsible for the debt fail to repay after a demand has been made.

The demand for repayment must be made within 5 years of an alien's entry in order to render the alien deportable as a public charge.[9] In addition, the Service has determined that, in order for an alien to become deportable as a public charge as a result of the failure of the sponsor to repay the agency, the benefit-granting agency must take all available actions to collect from the sponsor. This includes filing an action in the appropriate court and taking all steps available under law to enforce a final judgment against the sponsor or other obligated party.

Deportations based on public charge grounds have been rare, and the new immigration and welfare laws are not likely to change this. First, for aliens who are not sponsored under the new AOS, it is unlikely that there will be a legal obligation to repay public benefits or that the benefit-granting agency will make a demand for repayment. Thus, just as in the past, the first two prongs of the *Matter of B* test generally will not be satisfied. Only aliens who apply for immigrant visas or adjustment of status on or after December 19, 1997, may be sponsored under the new, enforceable AOS, which could satisfy the standards for deportation under *Matter B.* However, under the new welfare reform laws, these same aliens will generally be barred from receiving federal means-tested public benefits for the first 5 years after admission or adjustment—the critical period for purposes of deportability.

In addition, under the ''deeming'' rules, and the sponsor's spouse's income and resources will be attributed to the alien in assessing his or her eligibility to receive a means-tested benefit, which would normally raise the alien's income over the benefit eligibility threshold. Only if an immigrant receives a cash benefit for income-maintenance within 5 years of entry or is institutionalized for long-term care (despite the eligibility limitations), there is a demand for repayment by the benefit-granting agency, and the sponsor or other responsible party fails to repay, can the immigrant become deportable as a public charge. However, even in this case, the alien must be given an opportunity to prove that he or she became a public charge for causes that arose after entry. If an alien can make such a showing, he or she will not be deportable as a public charge. Thus, the Service is unlikely to see a significant increase in cases of deportability on public charge grounds.

4. Exceptions From Public Charge Determinations

Under the new laws, refugees and asylees remain exempt from public charge determinations for purposes of admission and adjustment of status pursuant to sections 207, 208, and 209 of the INA. Similarly, Amerasian immigrants are exempt from the public charge ground of inadmissibility for their initial admission.[10] In addition, various statutes contain exceptions to the public charge ground of inadmissibility for aliens eligible for benefits under their provisions, including the Cuban Adjustment Act (CAA), the Nigaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act (HRIFA).[11] These laws provide avenues of adjustment for certain aliens—including Cuban/Haitian entrants,[12] who remain eligible for many public benefits under welfare reform—without subjecting them to screening as potential public charges.

Most LPRs who have been outside the United States for 180 days or less are not applicants for admission and therefore are not subject to the grounds of inadmissibility, pursuant to section 101(a)(13)(C) of the INA.[13] Accordingly, absent an indication that they may be applicants for admission, such LPRs should not routinely be questioned on issues related to the likelihood that they will become a public charge.

Under section 249 of the INA, which allows aliens who have been in the United States since January 1, 1972, to ''register'' as LPRs, public charge is not a factor in determining eligibility. Receipt of public benefits is not an adverse factor in meeting the ''good moral character'' requirement for registry, absent evidence that an applicant procured or attempted to procure such benefits through fraud or misrepresentation.

5. Receipt of Benefits by Children and Other Family Members

The Service has addressed the issue of receipt of benefits by children and other family members in a number of memoranda on the issue of public charge for aliens applying for legalization under section 245A of the INA. The Service's approach to the receipt of benefits by family members in the legalization context has been upheld in federal court and should govern the question for general public charge determinations as

[7] The 5-year period states again each time an alien enters the United States after a departure, except for LPRs who are not applicants for admission unless they meet the terms of section 101(a)(13)(C).

[8] While this decision concerned the public charge provision of the 1917 Act, the test established continues to be valid under current law, which is substantially the same as the 1917 law. See *Matter of L.* 6 I. & N. Dec. 349 (BIA 1954), and **Matter of Harutunian** 14 I. & N. Dec. 583 (BIA 1974).

[9] *Matter of L,* 6 I. & N. Dec. 349 (BIA 1954).

[10] Amerasian immigrants are defined in section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988.

[11] See *Matter of Mesa,* 12 I. & N. Dec. (Dep. Assoc. Comm. 1967) (public charge exception under the CAA); NACARA, Pub. L. 105–100, section 202(a); HRIFA, Pub. L. 105–277, Title IX, section 902.

[12] Cuban/Haitian entrants are defined in section 501(c)(e) of the Refugee Education Assistance Act of 1980.

[13] Section 101(a)(13)(C) provides that an LPR seeking admission to the U.S. is not an applicant for admission unless the alien: (i) has abandoned or relinquished that status; (ii) has been absent for more than 180 days; (iii) has engaged in illegal activity after leaving the U.S.; (iv) left the U.S. while in removal proceedings; (v) has committed certain offenses in the U.S.; or (vi) is attempting to enter other than at a port of entry or has not been admitted to the U.S. after inspection and authorization.

well.[14] The rule is well summarized in an April 21, 1988, memorandum from the Associate Commissioner for Examinations to the Regional Commissioners.

As a general rule, the receipt of * * * benefits by a member of the * * * applicant's family is not attributable to the applicant for purposes of determining the likelihood that the applicant will become a public charge. * * * If, however, the family is reliant on the * * * benefits as its sole means of support, the * * * applicant may be considered to have received public cash assistance. This determination is to be made on a case-by-case basis and upon consideration of the totality of the applicant's circumstances.

Although this memorandum specifically addressed the receipt of cash assistance under the former Aid to Families with Dependent Children (AFDC) program, the rule is applicable generally to other cash benefit programs that may give rise to public charge determinations (See section 6.A below.) Accordingly, Service officers should not attribute cash benefits received by U.S. citizen or alien children or other family members to alien applicants for purposes of determining whether the applicant is likely to become a public charge, absent evidence that the family is reliant on the family member's benefits as its *sole* means of support.

6. Benefits That May and May Not Be Considered for Public Charge Purposes

The term ''public charge'' has not been defined in law or regulation and, in the past, the Service has not provided comprehensive guidance on all kinds of benefits that could cause an alien to be considered a public charge. In light of the new laws and the complexity of the federal, state, and local public benefits system, this issue now requires that the Service adopt uniform standards. Accordingly, the Service is publishing a proposed rule for notice and comment, as noted above. The proposed standards take into account the law and public policy decisions concerning alien eligibility for public benefits and public health considerations, as well as past practice by the Service and the Department of State.

It has never been Service policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge. The nature of the public program must be considered. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, or receiving emergency medical care would not make an alien inadmissible as a public charge, despite the use of public funds. While the Service has not previously issued guidance on a program-by-program basis, the Department of State did codify its policy in the Foreign Affairs Manual (FAM), excluding Food Stamps from consideration for public charge purposes because of its ''supplemental'' nature.[15] The Service is now taking a similar approach by adopting a definition of public charge that focuses on whether the alien is or is likely to become primarily dependent on the government for subsistence. After extensive consultation with benefit-granting agencies, the Service has determined that the best evidence of whether an alien is primarily dependent on the government for subsistence is either (i) the receipt of public cash assistance for income maintenance, or (ii) institutionalization for long-term care at government expense.

The Service is proposing this definition by regulation and adopting it on an interim basis for several reasons. First, confusion about the relationship between the receipt of public benefits and the concept of ''public charge'' has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive. This reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare. Second, non-cash benefits (other than institutionalization for long-term care) are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family. In addition to receiving non-cash benefits, an alien would have to have either additional income—such as wages, savings, or earned retirement benefits—or public cash assistance. Thus, by focusing on cash assistance for income maintenance, the Service can identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests. Finally, 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 public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus, participation in such non-cash programs is not evidence of poverty or dependence.

In adopting this new definition, the Service does not expect to substantially change the number of aliens who will be found deportable or inadmissible as public charges. First, under the stricter eligibility rules of the welfare reform laws, many legal aliens are no longer eligible to receive certain types of public benefits, so they run no risk of becoming public charges by virtue of receiving such benefits. Many of those who remain eligible for federal, state, and local public benefits are LPRs, refugees, and asylees, who are unlikely to face public charges screening in any case in light of the section 101(a)(13)C) and the statutory exceptions.[16] Further, in light of the *Matter of B* test, deportations on public charge grounds have been rare and are expected to remain so. With respect to admissibility, the new AOS has already raised the threshold for many families to demonstrate that a sponsored alien is not likely to become a public charge. In addition, the statutory factors under section 212(a)(4)(B) continue to apply. This, while the Service will not take an alien's past or current receipt of non-cash benefits such as medical assistance into account for public charge purposes, the alien's age, health, and resources *must* be considered (along with the other statutory factors) in determining whether he or she is likely to become primarily dependent on the government for subsistence in the future.

The rules governing alien eligibility for federal, state, and local public benefits are complex and subject to change, including significant state-by-state variations. INS officers are not expected to know the substantive eligibility rules for different public benefit programs. Rather, this guidance and the proposed rule are intended to make public charge determinations simpler and more uniform, while simultaneously providing greater predictability to the public.

A. Benefits That May Be Considered for Public Charge Purposes

Cash assistance for income maintenance and institutionalization for long-term care at government expense may be considered for public charge purposes. Programs that provide such benefits include:

1. Supplemental Security Income (SSI) under Title XVI of Social Security Act;
2. Temporary Assistance for Needy Families (TANF) cash assistance (part A of Title IV of the Social Security Act—the successor to the AFDC program);[17]
3. State and local cash assistance programs that provide benefits for income maintenance (often called ''General Assistance'' programs); and
4. Programs (including Medicaid) supporting aliens who are institutionalized for long-term care *e.g.*, in a nursing home or mental health institution).[18]

Past or current receipt of such cash benefits does not lead to a *per se* determination that an alien is either inadmissible or deportable as a public charge. Rather, such benefits should be taken into account under the totality of the circumstances test for purposes of admission/adjustment and should be considered for deportation purposes under the standards of section 237(a)(5) and *Matter of B.*

Note that not all cash assistance is provided for purposes of income maintenance, and thus not all cash assistance is relevant for public charge purposes. For example, some energy assistance programs provide supplemental benefits through cash payments, in addition to vouchers or in-kind benefits, depending on the locality and the

[14] See *Perales* v. *Reno,* 48 F.3d 1305 (2d Cir. 1995).

[15] 9 FAM § 40.41 n.9.1

[16] See section 4, above, for a discussion of public charge exceptions.

[17] States have flexibility in administering the TANF program and may choose to provide non-cash assistance such as subsidized child care or transportation vouchers in addition to cash assistance. Such non-cash benefits should not be considered for public charge purposes. States may also provide non-recurrent cash payments for specific crisis situations under TANF. Such payments should not be considered for public charge purposes since they are not cash for income maintenance.

[18] Costs for imprisonments for conviction of a crime are not a basis for a public charge determination.

type of fuel needed. Likewise, cash payments could also be provided for child care assistance. Such supplemental, special-purpose cash benefits should not be considered in public charge determinations because they are not evidence of primary dependence on the government for subsistence.

B. Benefits That May Not Be Considered for Public Charge Purposes

Non-cash benefits (other than institutionalization for long-term care) should not be taken into account in making public charge determinations, nor should special-purpose cash assistance that is not intended for income maintenance. Therefore, past, current, or future receipt of these benefits should not be considered in deterining whether an alien is or is likely to become a public charge. Further, an alien need not repay benefits already received or withdraw form a benefit program in order to be eligible for admission or adjustment of status.

It is not possible to list all the supplemental non-cash benefits or special-purpose cash benefits that an alien may receive that should *not* be considered for public charge purposes, but common examples include:

1. Medicaid and other health insurance and health services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health clinics, short-term rehabilitation services, and emergency medical services) other than support for long-term institutional care,[19]
2. Children's Health Insurance Program (CHIP);
3. Nutrition programs, including Food Stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch and School Breakfast Program, and other supplementary and emergency food assistance programs;
4. Housing benefits;
5. Child care services;
6. Energy assistance, such as the Low Income Home Energy Assistance Program (LIHEAP);
7. Emergency disaster relief;
8. Foster care and adoption assistance;
9. Educational assistance, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;
10. Job training programs; and
11. In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter).

State and local programs that are similar to the federal programs listed above should also be excluded from consideration for public charge purposes. Note that states may adopt different names for the same or similar publicly funded programs. In California, for example, Medicaid is called ''Medi-Cal'' and CHIP is called ''Healthy Families.'' It is the underlying nature of the program, not the name adopted in a particular state, that determines whether or not it should be considered for public charge purposes.

In addition, and consistent with existing Service practice, cash payments that have been earned, such as Title II Social Security benefits, government pensions, and veterans' benefits, among other forms of earned benefits, do not support a public charge determination.

7. Affidavit of Support

The new AOS form, Form I–864, asks whether the sponsor or a member of the sponsor's household has received means-tested benefits within the past 3 years. The purpose of this question is *not* to determine whether the sponsor is or is likely to become a public charge, but to ensure that the adjudicating officer has access to all facts that may be relevant in determining whether the 125-percent annual income test is met. Any cash benefits received by the sponsor cannot be counted toward meeting the 125-percent income threshold, but receipt of other means-tested benefits, such as Medicaid, is not disqualifying for sponsorship purposes. As noted above, public benefit programs are increasingly available to families with incomes above 125 percent of the poverty line.

The regulations implementing the new AOS requirement are found at 8 CFR part 213a. Separate guidance has been issued on adjudicating applications including an AOS.

Continued Use of Form I–134

The use of the *new* AOS (Form I–864) is mandatory for those categories of immigrants listed in section 212(a)(4)(C) and (D), and a Service officer *may not* accept a Form I–134 in place of the new AOS for these immigrants if the application was filed on or after December 19, 1997. In those cases not governed by sections 212(a)(4)(C) and (D) and 213A (*e.g.*, parolees, nonimmigrants, or diversity immigrants) in which the Service has traditionally accepted Form I–134, Service officers may continue to do so on a discretionary basis. Use of Form I–361 will continue in cases involving Amerasians under Public Law 97–361.

8. Naturalization

There is no public charge test for purposes of naturalization. There are two narrow circumstances under which the public charge issue can arise in a naturalization case. First, the alien's admission for permanent residence may not have been ''lawful'' pursuant to section 318 because, *at the time of admission or adjustment,* the alien was subject to exclusion as an alien likely to become a public charge. This would generally occur only if the Service can show that the alien withheld or misrepresented material facts relating to the public charge issue at the time of admission or adjustment. Secondly, the alien's initial admission may have been lawful, but later the alien became deportable as a public charge, under the test described in section 3, above. This would not be a bar to naturalization unless the Service actually instituted deportation proceedings against the alien. As a practical matter, neither of these situations is likely to occur.

The Service has no authority to make the repayment of public assistance a condition for granting naturalization, and officers should not request proof of repayment from applicants in connection with a naturalization adjudication.

9. Public Charge Bonds

Section 213 of the INA, Admission of Certain Aliens on Giving Bond, was amended by IIRIRA only by including a parenthetical reference to the new AOS prescribed in INA section 213A. Where appropriate, officers may use the public charge bond option pursuant to section 213 as has been done in the past.

10. Points of Contact

Questions concerning this memorandum should be referred to Sophia Cox or Kevin Cummings, Headquarters Office of Adjudications, at 202–514–4754, through appropriate channels.

[FR Doc. 99–13202 Filed 5–25–99; 8:45 am]
BILLING CODE 4410–10–M

[19] The Service's decision not to consider Medicaid, CHIP, and Food Stamps for public charge purposes does not affect the authority of benefit granting agencies to seek repayment for benefits received by an alien from the alien's sponsor under the new AOS.