



## What Artists Need to Know About The New Public Charge Rules

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### *Introduction*

On February 24, 2020, the U.S. Department of Homeland Security’s Citizenship and Immigration Services (USCIS) and U.S. Department of State (DOS) put new rules into effect that expand the U.S. government’s power to deny the visa petitions and applications of some foreign nationals whom they think are likely to become reliant on public benefits in the U.S.

### *How does the Public Charge Rule work?*

In enforcing this rule, USCIS now requires many visa applicants to answer additional questions on the I-129 and other forms regarding about their past use of public benefits in the U.S. The new questions will only be required of individuals who are:

- in the U.S. and extending their stay;
- in the U.S. and changing from one visa status to another; or
- in the U.S. and seeking permanent residence.

If a foreign individual is in the U.S. and seeking to extend their status, change status, or become a permanent resident, they will need to answer new questions from USCIS that disclose whether they have used any of several federal, state, local, or tribal public benefit programs in the three years after February 2020, and prior to the filing of their petition. USCIS will evaluate the individual’s disclosure to determine if the individual has used *too many* disqualifying benefits. If the individual has, their benefit use might count against them, could lead to a USCIS officer finding the individual “inadmissible,” and USCIS might deny the extension, change of status, or application for permanent residency.

Meanwhile, over at the U.S. Department of State, they are enforcing their own version of the rule when visa applicants apply for visas at U.S. embassies or consulates abroad. While DOS has instructed its officers that O or P visa applicants should generally be treated as less likely to become public charges, there is no guarantee that O and P visa applicants will not hit a problem. When artists apply for visas at U.S. consulates and embassies, officers may demand that they complete the DS-5540 Public Charge Questionnaire. And to be clear, just because USCIS has approved an artist's O or P petition, it doesn't mean that the consular officer will not deny their visa. DOS's interpretation of the public charge rule largely tracks USCIS's approach, but there are some significant differences. The DOS test for evaluating public charge contains far fewer definitive classifications (positive and negative) than USCIS's, making it less standardized and arguably more subjective. One big difference is that when a visa applicant receives a DS-5540, they are generally not required to submit *supporting* documentation showing that they are unlikely to become a public charge—unless the DS-5540 specifically requires it.

***Would seeking unemployment benefits put me at risk under the new “public charge” rule?***

Many people have been asking whether collecting unemployment benefits would count against them under the public charge test. The good news is that the answer is “no” under the USCIS test. For USCIS's purposes, unemployment does not count as a “public charge” benefit, so it should not affect a future green card case, nor should it affect a pending change of status or extension of stay petition, in terms of USCIS's assessment of whether you are likely to become a “public charge” (i.e., reliant on public benefits). The bad news is that under the more subjective Department of State rules, a consular officer has the right to deny a visa to an artist who has received unemployment benefits.

***In the context of the COVID-19 pandemic, what do I need to know about how seeking healthcare in the U.S. might put me at risk under the new “public charge” rule?***

Again, there is some good news here -- at least from USCIS. USCIS has stated that medical treatment or preventive services "will not negatively affect any [foreign national] as part of a future public charge analysis." The Department of State has not yet addressed whether COVID-19 treatment or services will be taken into consideration as part of *its* public charge analysis.

***How many benefits is “too many” benefits?***

The USCIS rule requires the adjudicator to calculate the number of months that an individual received disqualifying benefits. They do this by assigning one “point” for each month the individual used a benefit. If an individual has accrued twelve points in the last three years, potential grounds for inadmissibility is triggered. So, if an individual used three benefits every month for four months they will have accrued twelve “points.” It's important to note, however, that USCIS will only look back as far as February 24, 2020, so if a person is using one benefit,

they can use it through January 2021 without triggering the inadmissibility. If, however, a person is using six different benefits, they will trigger inadmissibility in two months!

***Who is exempt from this new rule?***

Fortunately, many individuals who are particularly vulnerable are exempt from this rule. There are many individuals who are exempt, and the rules around exemption are complex, but the several of the most critical exempt groups include asylees, refugees, T & U nonimmigrants/applicants, and VAWA self-petitioners.

***Which are the “disqualifying benefits” that count against a person for USCIS purposes?***

- Any federal, state, or local cash assistance for income maintenance
- Supplemental Security Income (SSI)
- Temporary Assistance for Needy Families (TANF)
- General Assistance (GA)
- Supplemental Nutrition Assistance Program (SNAP/food stamps)
- Section 8 Housing Assistance under the Housing Choice Voucher Program
- Section 8 Housing Project-Based Rental Assistance (including Moderate Rehabilitation)
- Public Housing under Section 9 of the Housing Act of 1937, 42 USC 1437
- Federally-Funded Medicaid (recipients of Medicaid need to determine if their program is funded in part or wholly by federal funds; programs funded wholly by state funds do not count against an individual.)

***Which are the benefits that DO NOT count against a person for USCIS purposes?***

- Public benefits above received before 02/24/2020
- Public Benefits received by individuals exempt by law - see “Individuals Exempt from Public Charge” below
- Public benefits received by active duty service member and their spouses/children
- Public benefits received by children of U.S. Citizens being admitted to complete processing for acquiring citizenship
- Medicaid for an emergency medical condition
- Medicaid for pregnant women (up to 60 days after pregnancy)
- Medicaid for children under 21
- School based benefits available up to the oldest age for secondary education under State law
- Services under Individuals with Disabilities Education Act (IDEA)
- Subsidies on Individual Marketplace
- State or local low-cost insurance plans
- Healthcare services at a clinic
- Medicaid funded ONLY by a State (Not sure? Contact your health insurance provider.)

- Advanced premium tax credit (APTC)
- State premium assistance
- Cost-sharing reduction (CSR)

***Why is this of particular concern to international performing artists?***

Many foreign performing artists are in the U.S. for extended periods of time. Many of these artists receive low compensation, and may be accustomed to receiving public benefits in their home countries. As such, it is likely that under the new rule, many foreign performing artists' use of certain public benefits in the U.S. could put their immigration status at risk.

***What should I do, and who can help me with this?***

Don't panic. If you are not sure if you are on federal Medicaid or receiving any other public benefits, contact your State Department of Health. Your State Department of Health should be able to explain what benefits "count" toward the public charge determination and provide you with additional resources.

If you are a foreign performing artist in the U.S. on an O or P visa, and you do not have access to the advice of an immigration attorney, TamizdatAVAIL can provide you with limited *pro bono* legal counsel, and may be able to help you answer your question. If, after carefully reading this guide, you still have questions about how the new public charge rules can affect you, see TamizdatAVAIL for more information about getting free legal assistance.

If you plan to extend or change your status while in the U.S., or apply for permanent residency, and you are using public benefits, do not stop using those benefits. Do contact us so we can help you evaluate whether your use of public benefits could put you at risk.

**Contact TamizdatAVAIL for free legal assistance:**

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**phone: +1 (718) 541-3641**