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What Artists Need to Know About the Status of the New Public Charge Rules & Unemployment Benefits/Maintenance of Visa Status

Note: This advisory, dated September 16, 2020, supersedes all prior advisories.

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

Since then, there has been a lot of confusing back-and-forth in the federal courts over whether or not the government could implement these rules. A new court ruling on September 11, 2020, confirmed that USCIS can implement the new rule, while DOS cannot (for now), creating a very confusing situation for foreign nationals who are in the U.S., or hoping to come to the U.S. This will take a bit of explaining...

How is the government implementing this rule?

USCIS can (and almost certainly will) resume requiring many visa applicants to answer additional questions about their past use of certain public benefits in the U.S. on certain visa petition forms, including the Form I-129, which is used to request O and P performing artist visa classifications (among others). As of now, USCIS has not yet resumed requiring this information, but it can do so at any time.

The new questions at the USCIS petition stage 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 (green card).

Meanwhile, thanks to a federal court ruling, DOS (meaning the U.S. embassies and consulates around the world) cannot implement the new rule—for now, anyway. If you are outside the U.S. and are looking to get a visa issued by an embassy or consulate, it is unlikely that the use of non-cash public benefits will negatively impact you. However, consular officers have a huge amount of discretion, so at the present time we cannot know with 100 percent certainty that there will be no impact on your visa application.

How will USCIS's implementation impact people?

Foreign individuals *in the U.S.* who seek to extend their status, change status, or become a permanent resident will need to answer new questions that disclose whether they have used any of several specific federal, state, local, or tribal public benefit programs in the three years 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, and USCIS might deny the extension, change of status, or application for permanent residency. The petition might still be approved for visa processing abroad, which would require the foreign national to depart the U.S. in order for DOS to make a decision on their admissibility.

Would seeking unemployment benefits put me at risk under the new "public charge" rule?

On the petition side, unemployment benefits do not count under the USCIS test, so receipt of these should not affect change of status, extension of stay, or future green card petitions in terms of USCIS's assessment of whether individuals filing these types of petitions are likely to become reliant on public benefits. However, accepting unemployment benefits carries other potential risks; see our [FAQ on unemployment benefits for O and P visas holders](#) for more information.

On the consular side, unemployment benefits are not generally considered by officers in screening for public charge concerns; however, they may be in terms of general visa eligibility, meaning that prior use of unemployment benefits still may put the applicant at risk of being denied a visa.

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?

USCIS has stated that medical treatment or preventive services ["will not negatively affect any \[foreign national\] as part of a future Public Charge analysis."](#) DOS has not yet addressed whether COVID-19 treatment or services might be taken into consideration as part of *its* public charge analysis.

How many benefits is “too many”?

On change of status, extension of stay, and green card petitions, USCIS calculates the number of months that an individual received disqualifying benefits. They do this by assigning one “point” for each month the individual used a particular benefit. If an individual has accrued twelve points in the three years prior to filing the petition, potential grounds for inadmissibility are triggered. So, if an individual uses three benefits every month for four months they will accrue twelve “points.”

It’s important to note, however, that the use of these certain benefits only counts against the individual as of February 24, 2020*, so if a person started using one benefit even in 2018, they could continue to use it through January 2021 without triggering the inadmissibility. If, however, a person is using six different benefits, they would trigger the inadmissibility in two months.

*This date may change depending on how USCIS decides to eventually implement the rule.

Who is exempt from this new rule?

Fortunately, many individuals who are particularly vulnerable are exempt from this rule. These include:

- U.S. Citizens;
- Asylees/Refugees;
- T & U nonimmigrants/applicants & VAWA self-petitioners;
- Afghans and Iraqis with special immigrant visas;
- Special immigrant juveniles; and
- Anyone to whom the Department of Homeland Security has granted a Public Charge waiver.

Which are the “disqualifying benefits” that can count against a person?

- 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; and
- 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?

- Public benefits discussed above BUT were received before February 24, 2020;
- Public benefits received by individuals exempt by law;
- Public benefits received by active duty U.S. service members 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);
- State or local rental assistance that has no federal funding related to Sec. 8 & 9 Public Housing.
 - Before requesting rental assistance, applicants must confirm the qualifying immigration status that are accepted for eligibility;
- And more.

I received a stimulus check during the COVID-19 pandemic. In terms of the public charge rule, does that count as federal cash assistance/income maintenance?

Fortunately, it does not. The economic impact stimulus payment is a "tax credit" under the CARES Act, and the public charge regulations specifically exclude tax credits from the federal, state, local, and tribal cash assistance that they consider "negative factors" for public charge determinations.

Can I take advantage of a rental assistance program during the COVID-19 pandemic, or would that count against me as a public charge factor?

Those seeking rental assistance need to determine 1) whether they are eligible in their current immigration status, and 2) whether their program is funded in part or wholly by federal funds; programs funded wholly by state/local funds do not count against an individual.

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

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.

Receiving Unemployment Benefits and Maintaining Visa Status

Would seeking unemployment benefits be a violation of my visa?

Probably, but not necessarily. This is a little complex: O and P visa holders are issued their visas to allow them to do specific work in the U.S. If you fail to do that work, the government generally sees it as a violation of your visa, called a “failure to maintain status.” If you fail to maintain your status, this could remain on your record forever, and could make it difficult to get visas, green cards, and ESTA. The problem with seeking unemployment is that you are telling the government that you are not working, which strongly suggests that you are “failing to maintain your status.” But there are some loopholes, so you need to read this carefully:

For O-1 visa holders:

If you lose your job while on an O-1, you technically *may* have up to a 60-day grace period in which you can find other work, and it *might* be okay for you to collect unemployment during those 60 days. The catch is that at the end of 60 days you must discontinue the unemployment benefits and depending on your specific situation, either (1) have some new work starting, (2) have a new visa petition filed for you, or (3) depart the U.S. Given these uncertainties and limitations, we advise against applying for unemployment if at all possible, unless you can find *some way* to continue to do some work. Please talk to your attorney about your specific situation in order to decide whether seeking or accepting unemployment benefits is advisable.

For O-2 and P visa holders:

The 60-day grace period that O-1 holders enjoy is not available to O-2 or P visa holders. O-2 and P visa holders must maintain some degree of work, even if they seek unemployment benefits. In the event that USCIS or a consular officer wants proof of maintenance of status down the line, you will want to be able to produce records that you were still working. Given these uncertainties

and limitations, we advise against applying for unemployment if at all possible, unless you can find *some way* to continue to do some work.

For other kinds of visa holders:

We are talking about O and P visas here. It may be possible for holders of other kinds of employment visas to accept unemployment benefits and still maintain their status.

How much work do I need to do to maintain my status?

If your visa was arranged through a specific employer, and you are only allowed to work for that employer, then failing to maintain your contracted employment with that employer would be a failure to maintain status. If, however, you are on an agent-based O or P visa, any authorized work you can do—paid or unpaid, in real life or online—will help you maintain status; any documentation you can save of that work (contracts, screen shots, publicity materials, reviews) will help you at a later date prove that you maintained status. While there is no rule about how much work is needed to maintain status, the more authorized work you can prove you have undertaken, the more you can defend against an assertion of “failure to maintain status.”

Contact TamizdatAVAIL for free legal assistance:

email: avail@tamizdat.org

phone: +1 (718) 541-3641