# CONSULAR PROCESSING PRACTICE ALERT ON PUBLIC CHARGE AND AFFIDAVIT OF SUPPORT ISSUES

*Advice for how to prepare consular processing clients given changes to public charge policy affecting immigrant visa applicants*

By Ariel Brown

There has been a lot of talk lately about the current administration's proposed changes to the public charge ground of inadmissibility at INA § 212(a)(4), including discussions of leaked versions and the purportedly imminent publication of the actual proposed regulatory changes, possibly as soon as later this month or next. For the time being, nothing has changed in regards to the public charge ground of inadmissibility *for adjustment of status* cases.

**However, guidance pertaining to public charge inadmissibility in the Foreign Affairs Manual (FAM), governing consular processing cases, was revised in January 2018. These changes have already gone into effect,** and practitioners are starting to see more visa denials based on public charge inadmissibility at the consular interview. This practice alert aims to summarize changes practitioners are starting to see in how public charge is being evaluated in consular processing immigrant visa cases, and to provide recommendations for how to prepare clients who will be consular processing in light of these changes. These changes in public charge policy mean that all consular processing cases will require additional documentation and preparation on this issue.

Some of the changes, to be discussed in greater detail below, that practitioners have started seeing:

- **Finding of public charge inadmissibility notwithstanding a qualifying Affidavit of Support,** now that the affidavit of support is no longer sufficient on its own to refute public charge inadmissibility;
- **Finding of public charge inadmissibility notwithstanding a qualifying Joint Sponsor Affidavit of Support**, based on the consular officer's doubts the joint sponsor will follow through on their promise to financially support the immigrant visa (IV) applicant; and
- **Revocation of a previously approved Provisional Unlawful Presence Waiver** when a consular officer determines the IV applicant may be inadmissible under the public charge ground.

Note these are emerging issues and the State Department's application of these provisions may change, but for now, the purpose of this practice alert is to make practitioners aware of these developments and to help practitioners adequately prepare clients attending consular interviews. CLINIC has produced more in-depth resources on this topic, which are cited below.[1]

## A. Change in the Sufficiency of the Affidavit of Support

One of the changes to the FAM decreased the weight accorded to the affidavit of support in deciding whether a person is likely to become a public charge. Previously, a qualifying affidavit of support was generally sufficient to establish that an immigrant visa applicant was not likely to become a public charge, and therefore was not inadmissible under the public charge ground of inadmissibility at INA § 212(a)(4).

An affidavit of support still must be submitted, where required, but the weight it carries has diminished. Now, a "properly filed and sufficient, non-fraudulent Form I-864 may not necessarily satisfy the INA 212(a)(4) requirements."[2] Instead, it is merely one, "positive factor" as part of the totality of the circumstances test.[3] The "totality of the circumstances" also involves consideration of other factors such as the applicant's age, health, family status, assets, resources, financial status, education, and skills.[4] This test is not new, but the fact that an affidavit of support that meets the financial requirements under INA 213A has been relegated to simply one factor of many *is* new. A sufficient affidavit of support generally was considered adequate evidence that the person had overcome any public charge concerns. It is now considered only a factor in the assessment. The new FAM guidance instructs consular officers to consider all factors and look beyond the facial sufficiency of the I-864.

An excerpt from a recent visa denial based on public charge explains how application of the totality of circumstances test has changed:

> *The guidelines have become more rigid. Our officers must now take a hard look at whether Applicants are likely to become public charges… Other factors that officers must consider include, but are not limited to: whether the Petitioner has recently been on public assistance, how close the Petitioner is to the poverty line, number of dependents, discrepancies between the claimed income and tax documents, and any class b medical conditions that may result in extensive medical bills.*

**How to prepare clients in light of this change:**

The consular officer is required to consider the full "totality of the circumstances" in determining whether your client is in danger of becoming a public charge, so you should submit evidence to establish positive factors beyond a qualifying affidavit of support, now that that is no longer enough.

Totality of circumstances factors:

- Applicant's age – according to the FAM, age is a negative factor if the applicant is under 18 and unaccompanied; advanced age may also be a negative factor if viewed as reducing applicant's employability and increasing applicant's possible healthcare costs
- Applicant's health – includes health issues that might affect employment, future medical expenses, and/or the applicant's ability to provide for themselves or dependents
- Applicant's family status – bears on the number of dependents for whom the applicant would have financial responsibility; having many dependents may be a negative factor
- Applicant's *and sponsor's* assets, other financial resources, and financial status - current or prior receipt of public assistance by applicant, sponsor, or their family members may be a negative factor and is "relevant" to determining whether the applicant is likely to become a public charge "*but* the determination must be made on the *present* circumstances,"[5] and if applicant's financial circumstances are much improved since past receipt of public benefits, that is a positive factor (whereas being in similar financial straits would be a negative factor); income above 125% of Federal Poverty Guidelines "generally constitutes sufficient resources"[6]

- Applicant's education, work experience, and skills – includes length of employment, frequency of job changes, employment plans, and job offers
- "[A]ny other reasonable factors considered relevant by an officer in a specific case"[7]

Screening questions, and red flags, for your client related to public charge inadmissibility:

Try to look at these factors from the point of view of a consular officer, who may not be as generous as you might be in evaluating your client's situation. Additionally, if any red flags or factors of particular concern apply to a client who has an approved I-601A, you will want to be especially cautious about sending your client to their consular interview. It may be best to delay the interview (by delaying submission of all the documents to the NVC or, if you have already submitted all the documents, trying to postpone scheduling of the consular interview), to see if the issue of I-601A revocation is resolved (see Section C below).

- Is your client especially old or young? (younger than 18 or older than 60, roughly)
- Explore any serious health conditions or disabilities for the sponsor and beneficiary that require costly care, and how they pay for that care
- How much money does your client have in their bank account?
- If employed, how much are they earning? How much are other contributing family members earning?
- Are they able to get a job, if not currently employed?
- Make sure that affidavit of support sponsors do not have a lot of household members or other dependents they are already responsible for supporting
- Does the affidavit of support just barely meet the financial requirements?
- Who is the joint sponsor? If a joint sponsor is not a family member, explore how long the IV applicant has known this individual and how they know them
- Discuss the IV applicant's educational history, training, degrees, and licenses to assess their "employability"
- Check whether the immigrant visa applicant has a history of unemployment during periods of time when they were old enough to work, and if so, explore reasons why—was it because they were pursuing higher education (a positive factor), or because they were temporarily disabled?
- Are any family members or sponsors receiving public benefits?
- Have any family members or sponsors received public benefits in the past? If so, explore whether their financial situation has changed since then

Examples of documents to bring to the consular interview, beyond the I-864:

- *For young applicants: proof that they are accompanied by family members, such as a brief statement or declaration from accompanying adults, attesting to their means to support the young applicant
- *For older applicants: health records showing they are in good health despite advanced age, and/or proof of private health insurance to cover any medications or other healthcare costs or other evidence of how they pay for healthcare
- Proof of private medical insurance, or other proof of how the applicant pays for healthcare, if applicable
- Proof of relationship of the joint sponsor, if not already in evidence (i.e. through a birth certificate showing same parents, already submitted)
- If joint sponsor is not related, declaration of joint sponsor briefly explaining their commitment to support the IV applicant and their relationship with the IV applicant (see next section for more details)
- Proof of IV applicant's job offer or job with decent salary, as well as substantial savings in bank accounts, if available

- Copies of IV applicant's degrees, licenses, etc. to show education, skills, and overall "employability" (also, although this information will already be submitted as part of the DS-260, you may want to prepare a bullet-point list documenting the IV applicant's employment history that can be given to the consular officer at the IV interview)
- You may also consider preparing a brief written argument, a half-page or less, and including a cite to the FAM at 9 FAM 302.8-2(B)(3)(a)(2), which directs consular officers that they "must be able to point to circumstances which make it not merely possible, but likely, that the applicant will become a public charge…," to bolster arguments that a public charge finding should not be a capricious determination based solely on speculation or opinion. This written argument may be the type of document that you would want to instruct your client only to provide to the consular officer if it appears that the officer is not satisfied that the affidavit of support and related documents do not demonstrate the IV applicant is not likely to become a public charge (see inset).[8]

**Practice Tip: Preparing Clients to Present Certain Documents at the Consular Interview Only if it Appears Necessary.** There are situations when a practitioner may prepare packets of legal arguments and supporting documents that, if all goes well, the client will never need to submit to the consular officer. However, because a practitioner in most cases is unable to accompany clients to their consular interviews, you may want to arm your clients with additional documentation that, were you there and judged the situation required it, you would want to submit to forestall a negative conclusion and visa denial.

In the context of possible public charge inadmissibility, we recommend preparing legal arguments and/or declarations from joint sponsors (see next section) that you may instruct your client to keep "in their back pocket" and only present to a consular officer if it seems necessary. You should coach your client as to what kinds of questions by a consular officer might prompt the decision to present these additional documents. With a joint sponsor, this may be if the consular officer seems to be asking a lot questions about who the joint sponsor is and how the joint sponsor is related to the immigrant visa applicant, and seems to be doubting the joint sponsor's likelihood that they will follow through on their promises in the affidavit of support. In that situation, you should instruct your client to present the joint sponsor declaration you have prepared. Similarly, if you prepare arguments regarding public charge inadmissibility that should only be resorted to if public charge inadmissibility seems to be at issue, make sure to explain to your clients when and how to ascertain that they should turn over these additional documents.

Advocates prefer this approach in order to avoid unnecessarily flagging an issue by submitting such documentation in advance. Additionally, as a field, we do not want extraneous documentation, which should not be required in all cases, to become ordinary.

How to prepare your client for questions at the consular interview relating to public charge inadmissibility:

Make sure your client can explain, *if asked*…

- Their relationship to the joint sponsor—who the joint sponsor is, how they know them or are related to them, what work the joint sponsor does or how the joint sponsor otherwise supports themselves, etc.; they should also be prepared to answer questions about whether the joint sponsor already helps financially support the IV applicant
- How both they and their sponsor pay for healthcare
- Long periods of not working when of working age, if applicable

- Whether the sponsor or any family members currently receive or have received public benefits, and if in the past but no longer, how their financial situation has improved, or if currently, why that does not necessarily indicate that the IV applicant is likely to become a public charge

### B. Issues with Joint Sponsors and the Affidavit of Support

Another change practitioners are starting to see is consular officers making 212(a)(4) public charge findings even when the immigrant visa applicant has a qualifying joint sponsor, who was able to prove they had more than enough in income or assets to meet the financial requirements. Below is an excerpt from a denial of an immigrant visa application based on doubts the joint sponsor would follow through on the affidavit of support:

> *Previously, if an Applicant did not clearly overcome public charge concerns on their own but could with a joint sponsor, the visa could be issued. Today, if an Applicant does not clearly meet public charge concerns on their own, but could with a joint sponsor, the officer must evaluate the likelihood that the joint sponsor would voluntarily meet his or her financial obligations toward the applicant in order to prevent governmental assistance (9 FAM 302.8-2(B)(3)(b)(1)(b)).*

The State Department has indicated that one of the things they look to in evaluating likelihood the joint sponsor will voluntarily meet their obligations under the affidavit of support is the number of other immigrants for which the joint sponsor has already filed affidavits of support. Other indicators may be if the relationship between the joint sponsor and the immigrant visa applicant appears attenuated and there is no family relationship between them, or if the joint sponsor has fairly limited financial resources themselves and may not seem to be in a position to readily fulfill their financial support obligations under the affidavit of support, should it be required.

**How to prepare clients in light of this change:**

We recommend preparing—and giving to clients to present at the consular interview *only if* the joint sponsor affidavit of support appears to be an issue (see inset above)—brief declarations from the joint sponsor. The declaration confirms the joint sponsor's willingness and intention to follow through on their promises in the affidavit of support, if necessary, and explains their relationship to the immigrant visa applicant to show that the joint sponsor has strong and longstanding ties to the applicant.[9]

You may also want to cite to the FAM, at 9 FAM 302.8-2(C)(1)(d)(1), where it states that the Form I-864 is a binding, enforceable contract, and therefore under contract law the DOS should not be able to question the joint sponsor's intent to fulfill their promises when they execute the I-864.

### C. Effect on Previously Approved Provisional Unlawful Presence Waivers (I-601A)

Practitioners have reported that immigrant visa applicants with previously approved I-601A provisional unlawful presence waivers who are determined at their consular interview to be likely to become a public charge are being requested to submit not only additional evidence to overcome public charge inadmissibility, but also a new I-601 waiver for unlawful presence because their I-601A has been revoked. The State Department believes this position is justified by the provisional unlawful presence waiver regulations, which state that an I-601A may be revoked if the consular officer determines at the immigrant visa interview that the applicant is inadmissible under any other inadmissibility ground besides 212(a)(9)(B).[10]

The FAM distinguishes between 221(g) and 212(a)(4) visa refusal grounds on the basis that 221(g) pertains to "documentary problems" while 212(a)(4) reflects more substantive problems with the affidavit of support, that cannot be fixed simply with the submission of new or additional documents.[11] The tension here, of course, is that a 212(a)(4) finding can always be overcome with new or additional documents, so this distinction does not reflect how public charge inadmissibility operates. In any case, for now it appears that all public charge-related visa refusals are being treated as 212(a)(4) refusals, resulting in I-601A revocation. The State Department has expressed willingness to look into this issue that revocation of the provisional unlawful presence waiver perhaps should not apply in all cases where it appears an immigrant visa applicant may overcome a public charge concern with additional documents, but it is unclear if we will have more precise guidance going forward.[12]

**How to prepare clients in light of this change:**

As explained in the other two sections of this practice alert, you should do as much as you can to avoid a 212(a)(4) finding to begin with. Under the new public charge guidance in effect at U.S. consulates, this will include not only filing a qualifying affidavit of support, but also submitting evidence of as many positive factors as possible, to avoid a public charge finding under the totality of the circumstances test. In addition, if you are submitting an affidavit of support from a joint sponsor, especially one who is not related to the IV applicant, you may want to prepare a declaration from the joint sponsor, attesting to their intention to voluntarily and willingly meet their obligations under the affidavit of support.

Further, you should consider whether your I-601A clients who are vulnerable under this new guidance, for example because they have serious health issues that may raise concerns about how they will pay their medical bills, or who are older and retired so they will be unable to show that they will be able to find a job in the United States, should wait to go forward with consular processing.

There are special considerations, even at earlier stages in the process, for avoiding public charge inadmissibility in an I-601A case. Most likely, you will want to submit (or have already submitted) proof of financial and health-related hardship for the provisional waiver. If you have already submitted extensive documentation as part of the extreme hardship waiver showing medical issues, limited financial resources, and possibly even family member receipt of governmental assistance, you will want to evaluate what evidence you can arm your client with to counter assumptions that these issues trigger public charge concerns. Be mindful of the sponsor's health, and any evidence that you can bring to show they receive private health benefits. By the time they are attending their immigrant visa interview, it is probably nearly a year since the hardship waiver was filed, so your client's situation may have changed or other facts developed. Make sure to flesh out any steps the family has taken to ensure the applicant is not likely to need government services. If you are earlier in the process, and have not yet submitted the I-601A, you will want to approach your provisional waiver already thinking about the evidence you will be submitting and how it might be used against your client in a public charge context. This may mean emphasizing serious health problems through the lens of access to care, in the United States as compared to the country of origin, rather than the cost of that care, or emphasizing extensive work history and diminished wages for similar work (or lack of job opportunities) in the country of origin, rather than dependence on governmental assistance to supplement meager U.S. earnings.

If nonetheless your client is found inadmissible under 212(a)(4) at their consular interview, and they had previously been granted a provisional waiver which is now revoked, you will want to submit new affidavit of

support documents while trying to argue that revoking the I-601A in this context is inappropriate, and/or asking that the I-601A grant be reinstated if your client ultimately overcomes the 212(a)(4) finding. Because your client is overcoming the public charge finding with a new affidavit and other documents you will be submitting, the I-601A grant should be intact (or able to be reinstated) because ultimately the applicant is not inadmissible under any other ground. It is possible that this issue of I-601A revocation will be resolved, so this may not be a continuing problem, but for now practitioners need to be prepared to respond. You should also warn your clients, in advance, of this possibility so that they are aware there is a risk that they may have to be outside the country much longer while they wait for a new unlawful presence waiver to be approved.

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[1] CLINIC Legal also has several helpful resources on public charge and consular processing, available at https://cliniclegal.org/resources/public-charge-updates-what-your-client-facing-consulate.
[2] 9 FAM 302.8-2(B)(3)(b)(1)(a).
[3] 9 FAM 302.8-2(B)(2)(a)(3), "Value of the Affidavit of Support."
[4] 9 FAM 302.8-2(B)(1)(a)(2). For details on the "totality of circumstances" test, see 9 FAM 302.8-2(B)(2).
[5] 9 FAM 302.8-2(B)(2)(f)(1)(b) (emphasis added).
[6] 9 FAM 302.8-2(B)(2)(f)(2)(a).
[7] 9 FAM 302.8-2(B)(2).
[8] See also a sample outline for a personal statement covering the totality of circumstances factors that you might prepare for your IV applicant, developed by CLINIC Legal and available at https://cliniclegal.org/sites/default/files/resources/webinars/Outline-for-Personal-Statement-to-Present-at-Consular-Interview.pdf.
[9] Note, however, that there is no required relationship between the immigrant visa applicant and the joint sponsor. See 9 FAM 302.8-2(C)(7)(a).
[10] 8 CFR § 212.7(e)(14). See also 9 FAM 302.8-2(B)(5) ("The determination of whether INA 221(g) or INA 212(a)(4) is the appropriate ground of refusal is determined by whether or not you have decided that you have enough information to make a finding of whether the applicant is likely to become a public charge under INA 212(a)(4)").
[11] 9 FAM 302.8-2(B)(5)(1)–(2).
[12] State Department officials have acknowledged that I-601A revocations in all immigrant visa cases where public charge is at issue may not be appropriate, and have noted 221(g) might be a way to initially refuse some visas where public charge inadmissibility may be at issue, but may be resolved with new or additional documentation, thereby avoiding an inadmissibility finding and attendant I-601A revocation.