



News & Types: Immigration Update

Public Charge Rule To Be Implemented – What Does That Mean For Employers?

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Practices: Immigration

On February 24, 2020, the Department of Homeland Security will begin implementing a Final Rule expanding the definition of public charge that will significantly impact employers and their nonimmigrant employees. The rule had been hurriedly implemented in October 2019 only to be halted by a slew of district courts. In January 2020, the U.S. Supreme Court reversed these injunctions and allowed the new law to proceed. The only exception is in the State of Illinois where the rule continues to be enjoined as of the date of this writing. The new rule affects petitions and applications post-marked after February 24, 2020.

On January 30, 2020, the U.S. Citizenship and Immigration Services (USCIS) officially announced the implementation of the rule. The rule expands the way in which the USCIS determines whether an alien is inadmissible to the United States based on public charge grounds. The Immigration and Nationality Act (INA) prohibits the admission and makes aliens ineligible for certain immigration benefits if the alien is deemed a “public charge.” The new law expands the definition of what constitutes a “public charge” and gives adjudicating officers a tremendous amount of discretion in performing this analysis. This ground of inadmissibility comes into play when aliens are applying for a visa (abroad or while in the United States) and adjustment of status (permanent residence) and physically entering the United States.

Employers filing a Form I-129 to change or extend the status of a nonimmigrant employee with the USCIS (for example, H-1B, L-1A, L-1B, or F-1 to H-1B) will have to request extensive information from the employee regarding their receipt of any public benefits. These include questions, among others, on whether the beneficiary has ever received federal, state or local cash assistance for income maintenance, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), food stamps, Section 8 housing or federally-funded Medicaid. Nonimmigrant dependent family members applying for a change or extension of their status on a Form I-539 will also have to answer these questions.

If you are an employer that is sponsoring a nonimmigrant for permanent residence and that employee is now applying for the final stage of the process, the Form I-485, the employee (and their nonimmigrant dependents) will have to complete a new Form I-944, Declaration of Self-Sufficiency. The 19-page form requests information on all household members, income from illegal activities, assets and resources, liabilities and debts, credit score and negative credit history, bankruptcy, health insurance coverage, any public benefits

received, education history, occupational skills and licenses, and English language skills. The adjudicating officer will then decide based on the totality of circumstances whether that applicant may be a public charge. If so, the application will be denied.

What does a denial mean for employers? Why should they care that they are working with legal counsel that can advise on the pitfalls and risks? A beneficiary whose petition or application is denied is generally no longer in status, and therefore, not eligible to remain in the United States and/or continue working. A U.S. employer cannot employ an individual that does not have authorization to work in the United States. If an employee loses their eligibility to work, the employer will have to terminate their employment. Whether the filing of a new application or petition is an option will necessitate an evaluation of the specifics of the case. However, even if this were an option, an employer is not only dealing with the unexpected termination of a valued employee but may also now have to pay for the processing of a new process (legal fee, government filing fees, miscellaneous expenses), as well as deal with the uncertainty of whether that new process will be approved. A determination that an alien is a public charge may be difficult to overcome barring new information or documentation about that alien's eligibility. In order to reactivate their status, the employee may also have to depart the United States, apply for a new visa stamp at their local U.S. Embassy/Consulate and re-enter the United States. It doesn't take much to see that this can get very expensive, very fast.

Employers might say, I only care about my employee, why should I care about whether their dependents are public charges? Great question. The denial of an application for a dependent family member has a significant impact on the employee, potentially causing stress and uncertainty, which may impact their work. The employee may have to unexpectedly take time off to travel internationally with their dependents so that they can reactivate their status. Even if the employee pays for these expenses, no one can return that lost time and revenue to the employer.

The Public Charge rule is a perfect example of how new laws can have a significant impact on employers. Employers should ensure that they understand the impact and risks associated with this new law. If you have any questions regarding this new law, please contact Esther Contreras at econtreras@masudafunai.com or 847-734-8811.