Proskauer

Compliance with Immigration-Related Requirements: The Interplay of COVID-19 and The Public Charge Rule

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Advice to U.S. Employers: Immigration Insights Series During COVID-19 Crisis

A Series of Advisories

Proskauer's Immigration Practice Group is advising clients on an array of challenges as companies find it difficult to comply with their Immigration and Reform Control Act (IRCA) obligations and maintain the legal status of the non-immigrant population during the Coronavirus pandemic.

We are publishing a series of alerts addressing the many issues that have been identified during the course of our representation to facilitate guidance to our clients and companies in general, given this ever-changing and challenging situation.

Our first alert related to the challenge of completing an I-9 form remotely, and was updated the next day as USCIS announced "flexibility" during the Coronavirus pandemic. The second alert reviewed compliance for telecommuting during the pandemic for H-1B and E-3 employees. In the third alert, we reviewed closings and changes the government is implementing during the pandemic. In our fourth and last alert we provided an overview of the limitations and compliance for H-1B employees when making personnel decisions regarding furloughs, reductions in hours and terminations.

On March 2, 2020 we provided a detailed client alert explaining the new Public Charge rule which historically had not applied to employment based petitions, but was recently expanded to cover such petitions by the current administration.

In this advisory, we address the interplay of Covid-19 and the Public Charge Rule, specifically testing and treatment of Covid-19 and accepting unemployment insurance as a result of job loss caused by the pandemic.

In most instances involving employment based petitions, considerations related to Public Charge are not a major concern but if there are salary reductions, furloughs, terminations or other work-related reductions, there could be possible implications to the foreign worker and thus, we provide the below guidance.

As always, our team is available to you to provide guidance and assistance in adapting to the challenges.

Advisory 5: Covid-19 and the Public Charge Rule

What Is the Public Charge Rule?

While still in litigation, in January 2020, the Supreme Court granted the federal government's request for permission to enforce a rule known as the "Public Charge" rule, which prohibits noncitizens from receiving certain benefits if the government believes that they are likely to rely on public assistance. On February 24, 2020, the United State Citizenship and Immigration Service (USCIS) and the Department of State (DOS) began implementing the new rule to determine who is "inadmissible" to the United States based on "Public Charge" grounds.

Under INA §212(a)(4)(A) any applicant who is likely at any time to become a public charge is inadmissible and, consequently, ineligible for a visa. All immigrant and nonimmigrant visa applicants, except those excluded (listed below), are subject to the public charge ground of inadmissibility. The expanded ground of inadmissibility defines a "public charge" as an applicant who receives one or more defined public benefit for more than 12 months in the aggregate within any 36 month period and receiving two benefits in one month counts as two months.

Receiving any of the below public benefits after February 24, 2020 for 12 months or more, means that, by definition, the applicant is a public charge and thus, could possibly be inadmissible and ineligible when applying for admission to the U.S. or adjustment of status in the U.S., as well as extending their nonimmigrant stay or changing their nonimmigrant status in the U.S.

What Benefits Will Be Considered Under the Public Charge Rule?

The following benefits are considered under the new Public Charge Rule:

- Any federal, state, local or tribal cash assistance for income maintenance, including Supplemental Security Income, Temporary Assistance for Needy Families and federal, state, local or tribal cash benefit programs for income maintenance (often called General Assistance in the state context, but can also exist under different names)
- Supplemental Nutrition Assistance Program (formerly called Food Stamps)
- Section 8 Housing Assistance under the Housing Choice Voucher Program
- Section 8 Project-Based Rental Assistance, including Moderate Rehabilitation
- Public Housing under Section 9 of the Housing Act of 1937, 42 U.S.C. 1437 *et seq*.
- Most forms of federally funded Medicaid, with certain exclusions as detailed below

What Public Benefits Will Not Be Considered Under the Public Charge Rule?

- Benefits received by U.S. service members if the foreign national service member received a qualifying public benefit while the foreign national is or was enlisted in the U.S. armed forces or was or is serving in active duty or in any of the Ready Reserve components of the U.S. armed forces
- Benefits received by the spouse or children of U.S. service members described above
- Benefits received by certain children born to or adopted by U.S. citizens living outside the U.S.
- Certain Medicaid benefits, such as those received:
    - for the treatment of an "emergency medical condition"
    - as services or benefits provided in connection with the Individuals with Disabilities Education Act
    - as school-based services or benefits provided to foreign nationals who are at or below the oldest age eligible for secondary education as determined under applicable state or local law
    - by foreign nationals under age 21
    - by pregnant women and by women within the 60-day period beginning on the last day of pregnancy
- Benefits received on behalf of a legal guardian

Who Is Excluded from the Public Charge Rule?

The Public Charge Rule does not apply to the following:

- U.S. citizens
- Congressionally exempted Foreign nationals such as:
    - Refugees
    - Asylees
    - Afghans and Iraqis with special immigrant visas
    - Certain nonimmigrant victims of trafficking (T visa) and crime (U visa)
    - Foreign nationals applying under the Violence Against Women Act (VAWA)
    - Special Immigrant Juveniles (SIJs)
    - Those to whom DHS has granted a waiver of public charge inadmissibility

Will Getting Tested, Treatment or Preventative Care for Covid-19 Impact One's Immigration Application Under the Public Charge Rule?

On March 13, the U.S. Citizenship and Immigration Services (USCIS) announced that it will not consider "testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19" as part of a public-charge determination, or for applications/petitions related to nonimmigrants seeking an extension of stay or change of status, even if such treatment is provided or paid for by one or more public benefits (e.g., federally funded Medicaid). USCIS also indicated that such treatment or preventive care "will not negatively affect any alien as part of a future public charge analysis."

Will Obtaining Unemployment Insurance Impact One's Immigration Application Under the Public Charge Rule?

First, what is Unemployment Insurance? Unemployment insurance is a joint state-federal program that provides cash benefits to eligible workers. Each state administers its own unemployment insurance program, including its own eligibility criteria and benefit amounts, while following guidelines established by federal law.

Before we discuss the implications of obtaining unemployment insurance, we address who is eligible for unemployment insurance. The answer really depends on the state one is in since each state handles unemployment insurance differently and has different criteria as to when one is eligible to receive unemployment compensation. In most states, in order to be eligible for unemployment insurance, the unemployed individual must be able to establish that they are able to work, available for work and actively looking for work. This could be nearly impossible for many nonimmigrants such as H-1B or L-1 beneficiaries who are generally only authorized to work for a specific employer in the United States. So, if a nonimmigrant loses their job with the petitioning employer, they generally would not qualify because they may not be considered "able and available to work" while unemployed. Even though H-1B and some other nonimmigrant workers have flexibility to change employers, federal law requires the new employer to file a new visa petition before the employee may work (and for some visa categories, the petition must be approved first). Thus, without a new visa petition filed by a new employer, the foreign worker is not "able and available" to work and does not qualify for unemployment insurance benefits. Exceptions may include foreign workers employed in the United States pursuant to an employment authorization document (EAD), such as certain H-4 spouses of H-1B workers, and adjustment of status applicants, whose status is not tried to a specific employment.

Assuming one qualifies for unemployment insurance, these payments are not generally taken into consideration by the USCIS for purposes of making a public charge determination. DHS explained this in its final rule by stating "DHS would not consider federal and state retirement, Social Security retirement benefits, Social Security Disability, post-secondary education, and unemployment benefits as public benefits under the public charge inadmissibility determination as these are considered to be earned benefits through the person's employment and specific tax deductions."

Will Receiving a Recovery Rebate Under the CARES Act Impact One's Immigration Application Under the Public Charge Rule?

President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020. This $2 trillion dollar economic recovery package offers relief to state and local governments, individuals, small and large businesses, and hospitals affected by the Covid-19 pandemic. The CARES Act provides for the issuance of one-time payments, called recovery rebates, (or commonly known as "stimulus checks") to help individuals recover from the economic impacts of the Covid-19 pandemic. Eligible individuals with an adjusted gross income up to $75,000 can receive a one-time payment of $1,200. Married couples filing a joint tax return are eligible to receive a payment of $2,400, as long as their adjusted gross income is less than $150,000. Eligible individuals can also receive an additional $500 for each eligible child under the age of 17.

The recovery rebates are structured as automatically advanced tax credits to be disbursed by the Treasury Department. The final Public Charge rule clearly indicates that tax credits are not taken into account for the purpose of a public charge determination and only means-tested programs like Medicaid and cash assistance for income maintenance as noted above will be considered, which does not include tax credits.

What Is the U.S. Department of State's Position?

The U.S. Department of State (DOS) has not yet confirmed whether Covi-19 treatment or care will be considered as part of its public charge totality of the circumstances analysis or how the receipt of unemployment benefits will affect applications by foreign nationals being processed at U.S. Embassies and Consulates.

Conclusion

USCIS has identified which public benefits are considered in determining whether an applicant is a Public Charge, it may or may not directly impact the nonimmigrant population but it is something they should be aware of. If you have any questions, please be in touch with your Proskauer professional.