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STATE DEPARTMENT'S CHANGE TO PUBLIC CHARGE GUIDANCE IN FOREIGN AFFAIRS MANUAL WILL RESULT IN MANY MORE VISA REFUSALS

Posted on May 29, 2018 by Cyrus Mehta

The Trump Administration has opened another front in its war on legal immigration to the United States, which is to broaden the definition of who is likely to become a public charge. One who is likely to become a public charge can be refused a visa to enter the United States or denied adjustment of status to permanent residence within the United States. This proposal is still in draft format and has not yet become a rule. However, if and when it does become a rule, foreign nationals who rely on government benefits will be more at risk of being found inadmissible under the public charge ground. Current policy allows officials to consider only two types of public benefits that would result in a negative public charge determination: cash assistance for income maintenance and institutionalization for long-term care at government expense.

While the Trump administration's proposed regulatory change is winding its way through bureaucratic channels, the State Department's Foreign Affairs Manual (FAM), which is not codified law or regulation, but merely sub-regulatory guidance for consular officials abroad, has already made it easier to find visa applicants inadmissible under the public charge ground. The State Department can freely change the FAM at its choosing without even providing notice to the public or an opportunity to comment.

Under INA 212(a)(4), a foreign national seeking to be admitted to the United States as either a nonimmigrant or an immigrant will be found inadmissible if he or she is likely to become a public charge at any time. The law allows officials to look at a foreign national's age, health, family status, assets, resources and financial status; and education and skills.

Pursuant to INA 213A, a properly executed affidavit of support by a US sponsor, Form I-864, may overcome a public charge determination in all family immigration and in some employment-based cases. An I-864 clearly constitutes a contract between the sponsor and the government. See INA 213A(a)(1)(B).

The State Department at 9 FAM 302.8-2 (amended on 1/3/2018) broadened the ability of a consular officer to make a public charge determination, rendering it easier to refuse an immigrant visa. Specifically, new 9 FAM 3012.8-2(B)(2) provides:

1. In General:
    1. In making a determination whether an applicant is inadmissible under INA 212(a)(4)(B), in every case you must consider at a minimum the applicant's:
        1. Age;
        2. Health;
        3. Family status;
        4. Assets, resources, and financial status; and
        5. Education and skills.
    2. These factors, and any other reasonable factors considered relevant by an officer in a specific case, will make up the "totality of the circumstances" that you must consider when making a public charge determination.
    3. **Value of the Affidavit of Support: A properly filed, non-fraudulent Form I-864 in those cases where it is required, is a positive factor in the totality of circumstances. The applicant must still meet the INA 212(a)(4) requirements and satisfy the "totality of circumstances" analysis, which requires the consideration of the factors listed in paragraph (1) above.**

Under the new FAM guidance, a properly executed Form I-864 will only be considered "a positive factor in the totality of circumstances" even though it is a binding enforceable contract that allows the government agency to claim reimbursement of the cost of the benefit that was provided to the foreign national. Compare the new language with the January 19, 2017 version of the public charge definition in the FAM, available at https://web.archive.org/web/20170119231252/https://fam.state.gov/FAM/09FAM/09FAM030208.html, which was just before the start of the Trump

administration

The old 9 FAM 302.8-2(B)(3)(a.)(2) stated:

> 2. These factors, and any other factors thought relevant by an officer in a specific case, will make up the "totality of the circumstances" that you must consider when making a public charge determination. As noted in 9 FAM 302.8-2(B)(2), a properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the "totality of the circumstances" analysis. Nevertheless, the factors cited above could be given consideration in an unusual case in which a Form I-864 has been submitted and should be considered in cases where Form I-864 is not required.

See also the old 9 FAM 302.8-2(B)(2)(c):

> Effect of Form I-864 on Public Charge Determinations: A properly filed, non-fraudulent Form I-864, should normally be considered sufficient to overcome the INA 212(a)(4) requirements. In determining whether the INA 213A requirements creating a legally binding affidavit have been met, the credibility of an offer of support from a person who meets the definition of a sponsor and who has verifiable resources is not a factor - the affidavit is enforceable regardless of the sponsor's actual intent and should not be considered by you, unless there are significant public charge concerns relating to the specific case, such as if the applicant is of advanced age or has a serious medical condition. If you have concerns about whether a particular Form I-864 may be "fraudulent", you should contact CA/FPP for guidance.

Under the new FAM guidance, a non-fraudulent I-864 will no longer be considered sufficient to overcome the public charge requirements under INA 212(a)(4). Pursuant to the old FAM guidance, the credibility of an offer of support from a person who met the definition of a sponsor and who had verifiable resources was not a factor. A DOS official at the Federal Bar Association's Immigration Conference on May 18 and 19, 2018 in Memphis, TN confirmed that the I-864 is now just one part of the holistic determination, which includes family ties, work history, health issues and other factors. DOS will look behind the affidavit of support if the consular officer believes that the sponsor is not likely to comply with his or her obligations. By way of an example, according to the DOS official, if a co-sponsor has already executed

other I-864s in the past, then that will be viewed as an adverse factor. (See Lily Axelrod's excellent summary of the proceedings of the FBA immigration conference on the Cool Immigration Lawyers page on Facebook).

The I-864 has always been thought of as a binding contract between the sponsor and the government, and thus discrediting an I-864 that is otherwise non-fraudulent seems to undermine the contractual nature of the I-864. Even if a sponsor has executed other I-864s in the past, that should not result in an adverse credibility determination if the sponsor has sufficient documented income to meet 125% of the federal poverty guidelines based on his or her household size. Under the new FAM provisions, deeming a properly executed I-864 as overcoming public charge will no longer be the case.

Indeed, the change to the public charge definition in the FAM is causing additional havoc to otherwise eligible applicants for immigrant visas. Those who already got approved I-601A provisional waivers to overcome the 3 or 10 year bars under INA 212(a)(9)(B)(i) and have proceeded overseas to process their immigrant visas are now finding themselves being found inadmissible for likely becoming a public charge under INA 212(a)(4). If the visa applicant is found inadmissible for another ground other than under INA 212(a)(9)(B)(i), the I-601A waiver is revoked and the applicant has to file a new I-601 to again overcome the 3 or 10 year inadmissibility bars under INA 212(a)(9)(B)(i) even if the applicant is able to overcome the public charge ground by providing additional evidence. This can cause a delay of at least a year and result in uncertainty until the new I-601 is approved. One suggested way to ameliorate this unnecessary hardship is to issue an INA 221(g) letter requesting evidence to overcome the public charge ground rather than a flat out refusal under INA 212(a)(4).

The new FAM assessment of public charge also appears to run contrary to 8 CFR 213a.2(c)(2)(iv), which provides:

> Remaining inadmissibility on public charge grounds. Notwithstanding the filing of a sufficient affidavit of support under section 213A of the Act and this section, an alien may be found to be inadmissible under section 212(a)(4) of the Act if the alien's case includes evidence of specific facts that, when considered in light of section 212(a)(4)(B) of the Act, support a reasonable inference that the alien is likely at any time to become a public charge.

While it may be permissible under 8 CFR 213a.2(c)(2)(iv), to find public charge inadmissibility despite a proper affidavit of support, it has to be based on "evidence of specific facts" that "support a reasonable inference that the alien is likely . . . to become a public charge." The new FAM guidance on the other hand considers a non-fraudulent I-864 only as a positive factor in the totality of circumstances, which includes the foreign national's age, health, family status, assets, resources and financial status and education and skills.

Applicants should no longer assume when they process an immigrant visa at a US consulate that an I-864 will be deemed to overcome a public charge finding. The visa applicant must also demonstrate his or her own history of employment, or ability to obtain employment, along with prior tax filings. The visa applicant must also be ready to demonstrate a meaningful relationship with a co-sponsor, if there is one. Finally, the I-864 must be accompanied by the required corroborating documentation pertaining to the sponsor such as tax returns, employment documents and evidence of assets, if applicable. Nothing should be taken for granted under the Trump administration, whose avowed objective is to restrict legal immigration to the United States. Until the administration can get its way in Congress by restricting immigration to only a select few under a Merits-Based immigration system, it will try every other way to restrict immigration, including expanding the definition of public charge.