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A points-based immigration system hiding in plain sight: USCIS Authority to exercise discretion in denying I-485 adjustment of status filings

By Andrew M. Wilson

Andrew M. Wilson
New York, USA

awilson@lippes.com
+1 716 853 5100 x1345
www.lippes.com

Lippes Mathias Wexler Friedman LLP

The Trump administration periodically expressed a desire to transition into a merit-based points immigration system. In a discursive speech on immigration reform in May 2019, President Trump outlined a loose vision for a major overhaul of the U.S. immigration system that would explicitly award points for education, professional skills, English-language fluency and patriotic assimilation. Details were sparse, bipartisan support was limited, and the plan never gained any traction. I did not pay too much attention to something I knew would never survive the legislative process.

I should never underestimate, however, any administration's ability to circumvent Congress and the legislative process by implementing new regulatory rule changes and updated policy guidance memos. After analysing the Public Charge provisions and two recent policy guidance memo updates that greatly expand USCIS' discretionary authority to deny I-485 adjustment of status (green card) filings, I think the U.S. already has what is tantamount to a points-based immigration system in place right now. By quickly discounting the possibility the U.S. would ever adopt an official points-based system, perhaps I did not realise that one implicitly exists behind Trump's "Invisible Wall".

Public charge rule: All the trappings of a points system

Inadmissibility due to public charge concerns has been part of our U.S. immigration system for over 100 years. Under INA §212(a)(4), an individual seeking to adjust status to that of a lawful permanent resident is inadmissible if the individual, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge."[1] INA §212(a)(4) offers the following factors to be taken into account when assessing public charge concerns—age; health; family status; assets, resources and financial status; and education and skills. Compare that against the six selection factors under Canada's Federal Skilled Worker Program points system—language skills; education; work experience; age; arranged employment; and adaptability.

While the concept of public charge inadmissibility is not new, the expansion of its definition and scope was a prominent part of the Trump administration's immigration agenda. In 2019, the Department of Homeland Security (DHS) and the Department of State (DoS) published new rules attempting to revise the definition of public charge inadmissibility under INA §212(a)(4). Like many attempts to change immigration law, this one did not involve going through Congress. DHS and DoS implemented rules to circumvent that process and change the reach of public charge inadmissibility beyond congressional intent.

The roll out of the new public charge rules was rocky. Initial lawsuits delayed the rules taking effect until 24 February 2020. Subsequent lawsuits have made for halting periods of applicability based on when a case was filed, where someone is located in the U.S. or whether someone was pursuing a green card through I-485 adjustment of status in the U.S. or immigrant visa processing through a U.S. Consulate abroad.

1. There are certain exceptions to this rule, including those pursuing permanent residency as Refugees or Asylees.

Finally, on 10 March 2021, USCIS announced that it was abandoning the new 2019 Public Charge Rule. This does not mean that the public charge issue disappears. DHS announced that the 1999 interim field guidance on public charge inadmissibility would once again apply.[2]

Definition of Public Charge under 1999 Interim Field Guidance on Public Charge Inadmissibility

Prior to the 2019 rule change, USCIS Officers analysed whether a foreign national had utilised public cash assistance for income maintenance[3], or whether the individual had utilised long-term institutionalised care at the U.S. government's expense when determining whether someone is likely to become a public charge. USCIS provided additional transparency to public charge analysis on 29 April 2011 when it released a "Public Charge Fact Sheet". This fact sheet listed benefits that would and would not be subject to public charge consideration. The delineation was based on cash assistance for income maintenance versus non-cash benefits or special-purpose cash benefits that are not intended for income maintenance.

Definition of Public Charge under 2019 Public Charge Rule

The new rule, while it was applicable up until 10 March 2021, defined a public charge as an individual who receives one or more certain public benefits for more than 12 months, in total, within any 36-month period. For example, under the rule, receipt of two benefits in one month counts as two months.[4] The new rule also defines "likely at any time to become a public charge" to mean more likely than not at any time in the future to become a public charge (in other words, more likely than not at any time in the future to receive one or more of certain public benefits for more than 12 months, in total, within any 36-month period. In addition, the new rule expanded the list of publicly funded programs that are subject to public charge consideration.[5]

2. See Federal Register, Volume 64, No. 101, March 26, 1999.
3. Examples include SSI or General Assistance.
4. An individual could therefore be on the wrong side of public charge analyses if s/he used two benefits over a six month period.
5. Some benefits that were listed as not a problem in the 2011 Public Charge Fact Sheet were to become subject to public charge consideration (e.g. some Medicaid benefits, SNAP and Section 8 housing).

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Interestingly, the new rule also added totality of the circumstances criteria to consider when calculating positive and negative factors within the public charge equation. In addition, the new rule required many green card applicants to complete the Form I-944, Declaration of Self-Sufficiency. While a large portion of the I-944 entailed an enquiry about any prior public benefits usage and overall financial health, it also includes questions about credit score, health insurance, education, occupation skills, and language skills.[6]

Even though the 2019 Public Charge rule is history now, public charge inadmissibility still exists under the law. While there is no clear direction on how a USCIS Officer should quantify positive and negative factors for a final score, this is inherently a points-based system that provides authority to subjectively determine whether an individual is likely to become a public charge. Beyond the individual's underlying eligibility for a green card under our employment-based and family-based preference systems, a USCIS Officer technically still has authority to deny an adjustment of status applicant due to perhaps a perceived risky financial status.[7]

Updated USCIS policy guidance regarding discretionary factors for adjustment of status applications

A more recent change that walks, talks and smells like a points system to me is a USCIS Policy Manual update from 17 November 2020 regarding the use of discretion in adjudicating I-485 adjustment of status filings.[8]

This policy update makes the I-485 review process almost a points-based system open to capricious determinations. For example, it is unsettling that the updated guidance update reads:

> *"The favorable exercise of discretion and the approval of a discretionary adjustment of status application is a matter of administrative grace, which means that the application is worthy of favorable consideration."*

> *"An applicant who meets the other eligibility requirements contained in the law is not automatically entitled to adjustment of status. The applicant still has the burden of proving that he or she warrants a favorable exercise of discretion."*

I find it disconcerting that the memo basically reads that meeting green card eligibility requirements is not enough. USCIS can also assign positive or negative valuations to family and community ties; business and employment skills; community standing etc. when making a decision. A USCIS Officer can be the final arbiter and deny the I-485 application, even if the individual is otherwise eligible under the criteria, if the USCIS Officer feels "a favorable exercise of discretion is not warranted" based on the characteristics of a points-based system review.

6. At one I-485 interview the USCIS Officer requested a monthly budget – itemised list of monthly expenses to compare against income. The USCIS Officer wanted to see not only total income, but also how much is spent on bills.

7. For example, if an individual has high debt or low savings, would a USCIS Officer view that as too risky and consider the person likely to become a public charge? Could a USCIS Officer's personal risk tolerance for financial decisions color their judgement? How will USCIS use the public charge rule going forward?

8. See USCIS Policy Manual, Chapter 10, Legal Analysis and Use of Discretion.

This is yet another subtle attempt to discourage individuals from pursuing permanent residency, and an attempt to change the law without ever changing the law. These completely subjective factors provide almost unilateral authority for a USCIS Officer to give a thumbs up or thumbs down to an adjustment of status applicant.

Updated USCIS policy alert on "Inadmissibility Based on Membership in a Totalitarian Party"

Another recent change that can be depicted as the equivalent of a negative factor in a subjective points-based system analysis is the 2 October 2020 USCIS Policy Alert on "Inadmissibility Based on Membership in a Totalitarian Party".[9] In this case, the factor that could go on the negative side of the ledger and render someone inadmissible is simply being a Chinese national.

This policy guidance is clearly targeted at Chinese nationals and aimed at discouraging them from applying for permanent resident status. Most Chinese nationals feel the need to enrol as a member of the Communist party in order to have access to job opportunities and other resources in the country. Some feel it is an absolute must. Many Chinese nationals pay membership dues, but are never involved in the party itself. Many of these individuals eventually stop paying dues after arriving in the U.S., but there is never an acknowledgement from the government that they have left the party. USCIS' circular and confusing guidance on what is considered "meaningful" membership or affiliation in a totalitarian party leaves the door wide open for a USCIS Officer to deny the I-485 application.

9. See USCIS Policy Manual, Chapter 3, Immigrant Membership in Totalitarian Party.

Conclusion

While some may question whether the Trump administration tested the ultimate tensile strength of our country's overall democracy, there is no doubt in my mind that parts of our immigration laws have been stretched and pulled to extremes. While analysing evidence of a points-based programme hiding in plain sight within our immigration system, diving into the recent rule and policy changes that grant expansive authority to USCIS to exercise discretion in denying I-485 applications has elevated my already heightened sense of unease. How will these policy changes be applied not only over the next four years, but beyond as well?

Andrew M. Wilson *is a Partner and Immigration Practice Group Co-Leader with Lippes Mathias Wexler Friedman LLP. He is listed in Best Lawyers in America for Immigration Law, the International Who's Who for Corporate Immigration Law, the International Who's Who of Business Lawyers and New York Super Lawyers—Upstate. He has been named Buffalo Immigration Law "Lawyer of the Year" by Best Lawyers in 2013, 2018 and 2021. He currently serves as an AILA Local CBP Liaison and has also been active in SHRM as a Panel Member on its Global Special Expertise Panel and Corporate Social Responsibility Special Expertise Panel.*

Rather than taking a transactional approach, Andrew focuses on building long-lasting relationships with clients as a trusted advisor. He represents companies, major league sports teams and individuals in all areas of immigration law.