Assistant Secretary for Legislative Affairs
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

February 8, 2013

The Honorable Jeff Sessions
Committee on the Budget
United States Senate
Washington, DC 20510

Dear Senator Sessions:

Thank you for your August 6, 2012 letter to Secretary of Homeland Security Janet Napolitano and Secretary of State Hillary Clinton regarding the interpretation of section 212(a)(4) of the *Immigration and Nationality Act* (INA) concerning aliens inadmissible under the public charge ground of inadmissibility. In addition to answering your questions below, we have also provided you with more detailed information on the public charge provisions.

As you may know, public charge has been part of U.S. immigration law for more than 100 years as a ground of inadmissibility and deportation. With limited exceptions, an individual who is likely at any time to become a public charge is inadmissible to the United States and ineligible to become a lawful permanent resident.[1] Under Section 212(a)(4) of the INA, an individual seeking admission to the United States or seeking to adjust status to that of an individual lawfully admitted for permanent residence (green card) 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." If an individual is inadmissible, admission to the United States or adjustment of status is not granted.

Section 212(a)(4)(C) of the INA requires that family-based and certain employment-based immigrant visa and adjustment applicants provide a satisfactory affidavit of support from a sponsor, as described in section 213A of the INA. The affidavit of support must demonstrate that the sponsor meets certain specific income criteria. Section 213A also requires sponsors to reimburse the costs of certain public benefits if the sponsored individual should receive those benefits in the future. It also expressly allows for joint sponsors and co-sponsors if the income of the petitioner is insufficient to meet the section 213A criteria.

Determination of whether an immigrant has or is likely to become a public charge is not part of the statutory eligibility rules for citizenship. For aliens who are subject to the public charge grounds, the determination is made pursuant to INA section 212(a)(4) when they seek admission or adjustment of status. Such aliens may also be found deportable on public charge grounds in accordance with INA section 237(a)(5), but only if they became public charges within the first five years after entry for causes that have not been affirmatively shown to have arisen since entry.

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[1] Certain aliens, such as refugees and asylees, are statutorily exempt from the public charge ground of inadmissibility. *See, e.g.,* INA, sections 207(c)(3)(refugee admission); 209(c)(refugee and asylee adjustment).

Although it is a very significant factor, information within the affidavit of support does not provide the sole basis for determining whether an immigrant visa applicant is likely to become a public charge. While most family-based and certain employment-based immigrant visa and adjustment of status applicants must have an approved affidavit of support, it is only one factor that the officer considers when making a public charge determination. An applicant who presents a satisfactory affidavit of support can still be found inadmissible as a public charge if other negative factors are found to outweigh the affidavit. Department of State consular officers and DHS officers must, at a minimum, consider the alien's age, health, family status, assets, resources, financial status, and education and skills. INA § 212(a)(4)(B).

Your letter asks about denials of visas relating to a public charge determination through the Visa Waiver Program (VWP). The VWP permits eligible citizens or nationals of designated countries to travel to the United States for tourism or business for stays of 90 days or less without first obtaining a visa, so there are no visa denials for VWP travelers. However, from Fiscal Year (FY) 2005 through August 9, 2012, a total of 9,796 applicants for admission under the VWP were denied admission as likely to become a public charge based on INA 212(a)(4). See attached year-by-year statistics; we do not have relevant data prior to FY 2005.

From FY 2005 to August 9, 2012, there have been a total of eight referrals to secondary inspection by the initial inspecting CBP officer for public charge reasons. There is no record that those individuals were admitted.

Historical data responsive for the number of aliens issued visas or otherwise admitted into the United States from 2001 to 2011 who became public charges and who were later issued Notices to Appear is unavailable. This is due to data entry quality and system changes that did not account for statistical tracking at this level. A case by case review for FY 2012 as of August 9, 2012, found only one case where the charge of public charge was lodged. However, the charge was later withdrawn. U.S. Immigration and Customs Enforcement is currently addressing these data tracking issues and intends to capture such data in a reliable manner in the future.

Again, thank you for your letter. I appreciate your inquiry and look forward to working with you on these issues in the future. An identical response was sent to the other Senators who co-signed your letter. Should you need additional assistance, please do not hesitate to contact me at (202) 447-5890.

Respectfully,

Nelson Peacock
Assistant Secretary for Legislative Affairs

Enclosure