

Kate Kalmykov: Hello everyone, and welcome to the GT Immigration Insights Podcast. I'm Kate Kalmykov, an immigration shareholder at Greenberg Traurig, and I co-chair the Global Immigration and Compliance Group here at GT. Today, I'm joined by my colleague, [00:00:30] Jen Hermansky, from our Philadelphia office, who also chairs the AILA EB-5 committee. Jen focuses her practice on employment-based immigration and EB-5.

Hi, Jen. Thank you for joining us again today on the program.

Jen Hermansky: Thanks for having me. We have a new topic to talk about right now. Well, an interesting one.

Kate Kalmykov: Today's topic is one that's filling our inboxes. The final public [00:01:00] charge rule has been published by DHS, and it took effect just recently on September 18th. USCIS basically followed with new policy guidance after they initially published the rule in July, and they published guidance in August. And it replaces the 2022 public charge framework, which was fairly narrow and predictable. And this [00:01:30] allows the government a much broader discretionary review. And the interesting thing about the public charge rule is that it really impacts anyone who's applying for a gen card. There's no exempt category. That includes employment-based applicants, EB-5 investors, and their families, and family-based applicants, especially parents of US citizens. So DHS had said that it expects more denials [00:02:00] of green card applications under the new approach, which is really in line with sort of the agenda that the administration has laid out since they took office.

And Jen, I'll turn it over to you. What's the one thing you want listeners to take away from our episode today?

Jen Hermansky: I think that the one thing I want everyone to take away is that you're really going to have [00:02:30] to examine the finances happening underneath the application. So today I think we'll talk about a variety of applications, both employment-based green card applications, as well as family-based, many of which have different sponsorship rules. But in all of those cases, we're going to have to particularly look at, moving forward, the finances of the applicants [00:03:00] involved and the finances of the sponsors involved, as well as their financial history and their prospects in the future for earnings and income, because that's what the government, both the USCIS and the State Department are going to be looking at moving forward. What is everyone's earnings potential and how does that impact the approvability of green card applications?

Kate Kalmykov: So let's start with the basic framework. The statute [00:03:30] has always listed certain factors that officers need to take into account when deciding a green card application, but that has changed with this rule. Jen, what will USCIS officers look at now?

Jen Hermansky: So USCIS updated this public charge rule to be a totality of the circumstances test. And what that means [00:04:00] is they're going to be able to look at pretty much multiple factors for applicants about whether or not they might become a public charge. So the USCIS says that right now they're going to focus on five factors. That would be the applicant's age, their health, their family status. So whether or not they're married or maybe how large their household [00:04:30] is, how many people are in the household, and how many of those are income or wage earners. Also, assets of the applicants, other financial resources and financial status, so maybe savings and assets of the family. And then finally, education and skills, which is important for the government in evaluating whether or not individuals have their own earning capacity moving forward. So those are the [00:05:00] new factors under the totality of the circumstances test.

Kate Kalmykov: But those five factors have really been in the statute for decades. What does the new rule really change here?

Jen Hermansky: So prior to this rule becoming effective in 2022 under the Biden administration, there was a much more narrow definition of public charge. And basically the federal government really only [00:05:30] looked at whether or not the applicant was likely to receive federal means tested public benefits. And that's kind of a fancy phrase for just cash benefits from the federal government. So if you were going to be taking cash like welfare benefits from the federal government, then you would be considered a public charge and you might be inadmissible and ineligible for a green [00:06:00] card. And the important thing to remember is that under the prior guidance, they really focused on just federal benefits and whether or not it was cash assistance. And so it was very limited in the future whether or not you took those things in the past or you were likely to take them in the future.

But now by changing that and making an expansive definition, [00:06:30] a totality of the circumstances test, they can look at many factors and they are going to look at the factors that we just discussed. And importantly, they can look at benefits that individuals may have received in the past and not just federal benefits. So perhaps people have received state or local benefits and things like that. And those will now become a factor in [00:07:00] this totality of the circumstances test.

Kate Kalmykov: And is there any bright line left?

Jen Hermansky: Not really. I think this gives a pretty large amount of discretion to the government agencies who are going to decide this. And there will be a series of questions that could be asked of applicants to try to elicit not just [00:07:30] what they may or may not have received in the past, but also what they are likely to receive in the future. And so we can talk about that more in detail, but this I think is a pointed effort to give more discretion to the agency, which means the officer gets to ask these questions and the answers that the

applicants give will be key. And then they look to a totality of what those circumstances [00:08:00] are to decide whether or not they're going to approve a green card for people.

Kate Kalmykov: Now, a lot of times when we deal with clients, they have a very hard time understanding that the USCIS and the Department of State have so much discretion in adjudications that things aren't just black and white. And with this rule in particular, I think we're going to see more instances where different officers may reach different results on similar facts and [00:08:30] there's really going to be inconsistent requests for evidence, inconsistent adjudications, and it's not always going to be fair. I think that's a really important point for practitioners to consider.

Under this rule, we're not just checking boxes. We're building an affirmative record that shows that the applicant can support themselves in the United States. So we want to show income, but that's no longer enough. We want to show assets. We want to show that they [00:09:00] have medical insurance or will have medical insurance. We need to show educational level, as you said, their work history. In case they lose a job, we have to show that they have skills where they can easily find another one, that there's a credible plan for them to come to the US and be able to live here without government assistance. And the burden with this rule is really on the applicant to complete the record from start to finish.

Jen Hermansky: [00:09:30] Right.

Kate Kalmykov: So let's talk about benefits because I think that's where in our practice we get the most questions. Under the old rules, we really looked at federal cash benefits, and now we're getting a lot of questions. "I get lunch assistance money. I get insurance from my state, whether it's California, New York, Florida, and in part it is state Medicaid." We [00:10:00] get questions about all kinds of programs that exist. And I think people don't understand always what they're signing up for. They don't understand whether it's permitted or not. They don't necessarily always speak English well. And so you may have somebody who's an EB-5 investor who's invested hundreds of thousands of dollars in the United States who doesn't know that they aren't eligible for a certain type of benefit that may now fall into a public [00:10:30] charge analysis.

So Jen, can you talk a little bit about what the scope is now?

Jen Hermansky: Sure. And I think it's important for individuals to reach out to their lawyer and to check about things before signing up, Kate, because your point is well noted. For example, when people are newly immigrating to the US, they might have had a very good income and a large number [00:11:00] of assets abroad, but they're just starting out again in the US. They might not have US-based income yet and they might be eligible to actually receive some benefits in their states and they unknowingly qualify for these and sign up for it and it could harm them later

potentially. So again, because this administration has expanded the totality of the circumstances past, they're going to look [00:11:30] at these different types of both cash and non-cash benefits and from different sources, so federal, state, local governments. Some of the programs that are actually listed by name that would be problematic from the government are Medicaid, CHIP, the Children's Health Insurance Program, SNAP or food stamps, WIC, which is a nutritional program for women, infants [00:12:00] and children, also public or assisted housing, even maybe financial aid for college.

So things that you might not immediately think of could be used against you like financial aid. If that is based on being low income, that could actually harm an applicant in the future by applying for or receiving it. And I think this is important to say that [00:12:30] there is not really a delineation from the government's perspective, whether you applied for it or actually received it. Having just applied for it could signal a lack of income or resources that can then be used against you, even if you don't ultimately take advantage of that benefit.

Kate Kalmykov: Absolutely. And I also think the state piece is really significant. We get a lot of emails from clients, [00:13:00] especially EP5 investors, about state health-

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Kate Kalmykov: - Especially EP5 investors about state health insurance programs that they have been offered. A common one that comes up is Medi-Cal in California. And how should we answer those? Certainly, we're not experts in state medical insurance programs, and there's 50 states in the US. So what's a good rule of thumb for practitioners and for people who are considering applying [00:13:30] to keep in mind?

Jen Hermansky: Sure. So we think the key question moving forward under totality of the circumstances test is whether the program is based on low income. So if it is a means-tested benefit, if you would make over a certain amount of income, you would not qualify for the benefit, and then if you make under a certain amount of income, you would qualify for that benefit, then it could be means-tested [00:14:00] and then using it after September 18th can be weighed against you in a green card application in the future.

So that's a big change. Having things like state healthcare programs become part of the public charge analysis is a really big change, and it could contribute in the future to a green card denial if you are filing for an adjustment of status here in the US. [00:14:30] And importantly, the consulates who adjudicate also immigrant visa applications for people abroad will undergo the same sort of analysis, so it's going to apply to people who are both here and abroad.

Kate Kalmykov: Interestingly, we've even seen the public charge analysis trickle down to non-immigrant visa adjudications, which it's not supposed to be a part of.

But I will give an example. [00:15:00] We had an applicant who came here on Uniting for Ukraine when the war broke out, got cash assistance and Medicaid, and then departed, and then found an employer who wanted to sponsor them for a work visa in E2 specifically. And it was for a high paying position, they had a master's level of education and a lot of work experience. And when they went for the consular interview, the E2 [00:15:30] visa was denied for this reason, because they thought that they would come to the US and be a public charge, even though the salary was well into the six figures. And this person was a professional with a lot of experience.

Fundamentally, we told these people when the war broke out, "Come, you've [fleed 00:15:54] your home country and we will help you." And we did that. And then later on in other adjudications, [00:16:00] it's being held against them. So that is something very important to think about.

Now, you mentioned student financial aid, and I can imagine that a lot of people gasped when they heard that that will be considered financial aid and loans. That's definitely coming up more and more. Can you talk a little bit about that?

Jen Hermansky: Sure. And I think the same analysis applies here as it did to [00:16:30] any state health benefits. So the USCIS guidance specifically lists financial aid for post-secondary education as a relevant benefit that they will consider for purposes of the public charge analysis.

So this guidance, it doesn't separate grants from loans. It's not going to list out specific sorts of things. But if it is student aid that is based on financial [00:17:00] need or income, it's possible that it could be treated as a means-tested benefit. And so applying for or receiving a federal loan or grant based on need is problematic, so that needs to be looked at carefully.

So doesn't mean that every scholarship out there available is no longer going to be able to be used by students in the US, international students [00:17:30] and things like that, you might still qualify for things from the school, but they can ask about whether or not you're receiving financial aid based on low income.

Kate Kalmykov: So Jen, here's a nuance that a lot of people miss. Does it matter if someone only applied for the benefit and never received it, or whether they used it? This is something you alluded to before.

Jen Hermansky: That's right. So in keeping with this more expansive [00:18:00] test, the government is going to take into account whether or not you applied for the public benefit, not even whether or not you received it.

Now, I guess from a practical perspective, if you applied for some sort of means-tested federal benefit or state benefit and you were denied because your income was too high, then maybe that [00:18:30] can't really be used against you, but they're saying that just applying for these types of benefits might be

used against you. So maybe you apply for it and you qualify, but then you just don't use it? That could still be used against someone in the public charge analysis. So even doing a minimal action such as applying for something can be held against you later under this test. And that's [00:19:00] quite unfortunate, but that is the reality of the government's guidance right now.

So again, when looking at whether or not someone who's a foreign national will take or apply for some sort of benefit, a question really needs to be asked even before you apply for that benefit, about whether or not it might hurt the prospect of getting a green card later.

Kate Kalmykov: And I think it's important for us to differentiate between earned benefits [00:19:30] and means-tested benefits and explain what's included there.

Jen Hermansky: Yeah. So things that are earned benefits, like if you are employed pursuant to a non-immigrant status that provides work authorization, and you're paying into social security and Medicare through your wages, which is common things that we would see on our forms W2. As being an employee, we would see our social security taxes, we'd see our Medicare taxes or unemployment [00:20:00] insurance, things like this. Those are earned benefits that we worked for and paid for, so those should not be considered means-tested public benefits. So those should, hopefully, be in the clear for the public charge analysis.

Kate Kalmykov: Right. And I also think that benefits received by family members are not counted against the principal applicant. [00:20:30] So for example, if the US citizen child is on Medicaid, that doesn't mean that the immigrant parent received Medicaid necessarily.

Jen Hermansky: Yeah, that's right. The family's overall finances are still going to be relevant. And I think an interesting point here, especially for people who are sponsoring their family members, is how this might impact family members. And [00:21:00] I think one of the classes of people that are going to be highly impacted, actually, are the older relatives, the older parents of US citizens, because those individuals... Parents of a US citizen are considered an immediate relative, and they are still considered subject to the public charge rule, and they're maybe aging and retired, and they're going to have to [00:21:30] be subject to this rule. So I think it'll be interesting to see how that plays out, how it's going to impact that specific class of people.

Kate Kalmykov: Absolutely. So let's talk about timing of the old rule versus the new rule. So the new rule, as I said when we began, took effect on September 18th, and it's not retroactive. So what does that mean for people who filed [00:22:00] before September 18th versus people who are filing after September 18th for a green card?

Jen Hermansky: Yeah. So the government has stated that this will not be retroactively applied to applications. So if a Form I-485 was filed before September 18th, 2026, it should

still be decided under our old rule and the more limited rule. [00:22:30] So that is true. Even if USCIS looks at the I-485 application much later, so after September 18th, 2026, it's the date of the I-485 filing that matters for this analysis.

Kate Kalmykov: So someone who filed an adjustment of status September 16th is in a better position, presumably, than someone who filed September 18th, but they're not really completely in the clear. I think we have seen, [00:23:00] particularly with this administration, but even past administrations, back to where we started, is adjudications are not consistent, and sometimes the standards that shouldn't be applied are still applied despite when a rule took effect. And so it's important for counsel to push back if there are requests being issued and to make sure that the officers understand that.

But sometimes [00:23:30] cases get denied or sometimes they get bounced back. With new USCIS electronic payment system that took effect last year, for example, it's been disastrous. A lot of applications have been erroneously rejected and then need to be refiled. And then if you're filing after September 18th, you're subject to this new rule.

Now, we've been talking a lot about I-485s. Let's talk about the consulate because I think that's [00:24:00] an area where it's uncertain. The rules specifically talked about public charge for adjustment of status applications, I-485s filed in the United States. So what about immigrant visa cases, Jen?

Jen Hermansky: Yeah, we believe it's really unclear. We do not yet have specific guidance from the state department exactly how they're going to roll this out for [00:24:30] applicants for immigrant visas abroad. So for those cases where, maybe, an EB-5 investor is abroad and will go to a green card interview at the US Consulate abroad, or for family-based cases or other self-petitioner employment-based cases, where they're living abroad and they're not eligible to file the I-485, and instead they go to the consulate to receive the immigrant visa.

So the [00:25:00] DHS rule, the Homeland Security rule that we've been talking about, it applies to applications filed before the USCIS or the I-485 application. So the immigrant visas are decided by the State Department and it will have its own guidance in the Foreign Affairs Manual, which is their document that is the sister document to the USCIS policy manual in the US.

So that [00:25:30] is the document that contains guidance for the consular officers, just like the USCIS policy manual contains the guidance for the USCIS officers. So we're watching closely for the State Department to update its guidance in the Foreign Affairs Manual. And basically the State Department came out and said that they're starting a pilot program, which was announced on August 5th, that will let the consular [00:26:00] officers require some immigrant visa applicants to -

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Jen Hermansky: ... consular officers require some immigrant visa applicants to post a public charge bond to overcome a public charge refusal. And USCIS has a similar program where they're announcing, "Oh, if we think you can't meet the public charge rule and you would otherwise be inadmissible, then the USCIS can invite you to post a bond [00:26:30] to cover the cost of any anticipated public benefits you might take." So we don't know exactly how the State Department is going to roll that out. And I don't think we've seen any real rollout of the bond program between the State Department or the USCIS. So I think this is-

Kate Kalmykov: Well, let me stop you right there.

Jen Hermansky: Oh.

Kate Kalmykov: Because while we haven't seen it in the immigrant visa context, they did roll out the bond program for nationals from [00:27:00] certain countries, specifically certain African countries, to post a bond where they felt that those individuals have a high rate of overstay of their B-1, B-2 visas last year. And so because I think that was successful, they're now trying to implement it in the immigrant visa category. I have to be honest, it's sort of treating immigrant [00:27:30] visa applicants right away as guilty of doing something before they even come here and sort of applies a criminal even standard to people just applying for a green card to come to the US. And we've never seen anything like it.

Jen Hermansky: No. And right now we're in an odd period of time where we really haven't seen immigrant visa interviews be scheduled by the State Department [00:28:00] since August. It's now October. We've had a pause of quite some time where immigrant visa interviews are not being scheduled.

And we suspect it might be the State Department saying they're training officers on how to ask questions about the public charge rule. So there's maybe some internal training happening right now. Interestingly also, the State Department updated the form [00:28:30] DS 260 recently to ask additional questions for immigrant visa applicants about whether or not they've had prior citizenships that were relinquished, to collect some additional information about travel history and also to collect information about siblings that might be throughout the world or in the US. But there are no corresponding updates to questions about public charge on the form to date. So maybe that is still [00:29:00] in the process of being analyzed and rolled out by the State Department.

Kate Kalmykov: And of course there's litigation already. So we have three lawsuits that have been filed related to this rule. A group of states and the District of Columbia sued in September, a group of cities sued, including New York, Chicago, San Francisco, and Seattle. And the rule hasn't been enjoined because the lawsuits have been filed, but [00:29:30] we're watching those lawsuits carefully to see the impact that they will have.

Okay. Let's move on to our favorite topic, EB-5 investors and their families. Many people assume that this is the millionaire green card, that it's not an issue for EB-5 investors. These people invested \$800,000 or \$1,050,000 to get a green card. Why would public charge [00:30:00] impact them?

Jen Hermansky: I think the short answer is that the EB-5 investors are employment based applicants for green cards. They are expressly subject to the public charge ground. So it is allowable for the government to ask these questions of those applicants. So having some wealth helps, but it doesn't expressly just exempt a whole class of green card applicants from this rule.

In a lot of our cases, [00:30:30] as we see, we have investors, they get loans, they get gifts from people. They themselves might not actually have a lot of wealth separate and apart from the gift that they've been given for the EB-5 green card. And this presents an interesting challenge for these people. They're going to have to justify that despite receiving a gift or a loan to do the source of funds for the EB-5 investment, that they [00:31:00] have the earning capacity beyond that investment to live in the US and not become a public charge. So it definitely is still going to implicate those EB-5 investors.

And like I mentioned before, when they're moving to the US, they're new here, they might have had a large income abroad, but they might not have a large income here in the US yet. And qualifying for certain state benefits might be problematic. So they're really [00:31:30] going to have to watch out in that regard moving forward.

Kate Kalmykov: Yeah. I think some of the common examples that we see is, for example, Medi-Cal or the state Medicaid programs. Families enroll because their income is low in the US, as you mentioned, and they didn't think of it as public assistance. They think they're entitled to it.

Plus many of them come from countries where they get free medical care. And so they just assume that in the US, [00:32:00] the government also provides it. They have no concept that this is something that is federal means tested benefits.

I'd say the second example that we see a lot of is student loans. A lot of our investors get a gift from their parents to do the EB-5, but they are here in college and they are getting student loans. And sometimes, again, the income is low.

Maybe they came with their parents [00:32:30] and so they're entitled to need-based or income-based aid from a university standpoint. And the university has no concept when they're pressing these types of financial aid programs with the students of the immigration consequences. So any of those things can now deny an I-485 or potentially an immigrant visa. And I think we really explained how [00:33:00] somebody who's invested in EB-5 can also be considered low income,

which I think for many people who aren't involved in EB-5 is a very novel concept that just doesn't seem feasible, but in fact it is.

So going to the EB-5 investment, an EB-5 investor makes an \$800,000 investment most commonly in the US. That investment in order to satisfy the requirements of EB-5 has to create 10 [00:33:30] US jobs. They've benefited the US economy at no cost to the taxpayer.

They've created jobs, they've brought in foreign direct investment. So what do you think? Does that EB-5 investment help the totality analysis you talked about earlier?

Jen Hermansky: I think it can. It is an asset of the investor. I think overall there maybe will be some expectation from the government that an [00:34:00] individual doing this program should meet a totality of the circumstances test. However, it doesn't just tell us the entire story like we've been talking about here.

The officer is going to look at the entire picture. So what is your age? How will you live and support yourself in the US after making the investment? Because many of the EB-5 investments are illiquid and undiversified. They [00:34:30] carry a high amount of risk. The entire investment may be lost. It might not be liquid to you for many years.

And so there are other factors that the government will look at. They will look at remaining assets of the investors or what other foreign income streams might they still have ongoing. Maybe they own businesses abroad that continue to operate. Maybe they own a series of properties abroad. [00:35:00] Maybe they can afford their own private health insurance or education.

They're going to look specifically at the work history of each applicant and how can they continue working in the US. And this might also include each of the derivatives. So we already know that USCIS is collecting information about the total household size of the investor and their family. So that would be people [00:35:30] that are dependent on the investor and generally included in their tax returns as dependents.

And then they're going to look to what is that family's income, what is that family's liability level, and also what are the assets that the family has? And the USCIS does also collect information about the individual's education and other skills or licensures or certifications. So all of those types of things, the [00:36:00] USCIS is already collecting in the context of an I-485 application.

Kate Kalmykov: And I think consistency is going to be really important, especially for newer EB-5 practitioners. You can't describe the family as having a high net worth and saying that the investor whose net worth you actually have to list in the 526 is one thing and then it doesn't match the 485 and then it doesn't match what

they actually do when [00:36:30] they come here. So this is going to be something that may even come up in I-829 petitions.

When investors go to apply for the permanent green card, USCIS can say, "Well, hey, you wrote in the 526 your net worth was \$5 million and then you came here and you said you're low income and took benefits." And I could see a situation where they can reopen and try to deny the green card for that reason.

Jen Hermansky: [00:37:00] This is a really interesting point, Kate, because for investors, an I-829 and having an approval of that is still an admission, which means you have to be admissible to the US. So even though right now there's no specific question on the form I-829 about this, it's possible that USCIS could revise forms in the future and make those forms available for public comment and collect information about this, just like they collect up information [00:37:30] about continued admissibility of investors otherwise. For example, they still put the investors through a background check and investors do biometrics so that the government can make sure that they have not committed a crime that would otherwise make them inadmissible to the US and then stop the I-829 from being approved.

Kate Kalmykov: Absolutely. So let's pivot to employment based cases, EB-1, EB-2 [00:38:00] and EB-3. These are our extraordinary ability aliens, our multinational managers and executives, people who are here in the national interest, and then our employees that are being sponsored by their employers through the Department of Labor per certification process. So in these cases, they will always have a job offer from an employer who wants them to remain in the US permanently and is sponsoring them for a green card to work here. How [00:38:30] does that now impact the 485 and this type of analysis?

Jen Hermansky: So I'm still hopeful that many of these applicants will be in a very strong position under this new rule. I think their job, their salary, the education or specialized background or skills that they might have are all very important to the analysis. And again, that information is collected on the Form I-485. Also, many people who are employed also will receive employer [00:39:00] health insurance benefits, right? So all of those things are counted-

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Jen Hermansky: ... employer health insurance benefits. So all of those things are counting in the applicant's favor, but the government can still look at the entire person and their family. And we're going to have to look closely at spouses or children who might have had benefits, who are also maybe derivative applicants applying for a green card on the basis of their relationship with the primary applicant. And also individuals who might be between [00:39:30] jobs. So there are certain people, such as extraordinary ability foreign nationals, that just have to give a certification as to the type of job that they're going to have in the US. They might not even have a current place of employment. So there might be more

evidence that needs to be submitted in those types of cases moving forward. And also there might be some scrutiny for other [00:40:00] employment-based categories where there are lower wage roles. So those are still going to be taken into account by the USCIS.

And then finally, there could also be some factors affecting older applicants. If you're approaching a retirement age, that could be difficult, or applicants with significant health conditions. And as someone who is applying for [00:40:30] a green card, you need to go and get a medical examination as part of your application process. That is true both through the I-485 process as well as the immigrant visa process abroad, because we're also screening for significant health concerns and diseases that could be a public problem. So these health conditions might come up [00:41:00] now in the context of this totality of circumstances analysis. So those individuals with those specific conditions should be talking to their lawyer about how to present that information.

Kate Kalmykov:

Yeah, and these issues are going to come up. We shouldn't think employment based applicants are immune from this. I recently had a client who's in the US on an H-1B through an employer. It's a part-time H. Their spouse is not entitled to work authorization, [00:41:30] and they are supporting the spouse and two children working 20 hours per week. So they have gotten these types of benefits and we had to have a tough discussion about what that could mean for a future green card application.

But I think for employers, the takeaway should really be that human resources should not be giving individual advice about public benefits. We definitely don't want the company to look [00:42:00] like it's giving advice to employees. This is something that they should discuss and they should retain their own immigration counsel. Sometimes there's going to be a conflict if they have taken those things and the employer's paying for a perm process and they later may not be eligible for the green card, so they may need their own counsel in that situation.

I just think employers need to be aware that the questions on the 485 are now [00:42:30] extremely broad related to this and that they may have hired somebody who did this in the past and they have no idea, but that may impact a sponsorship process where they spend a lot of money on the employee and they ultimately may not be able to adjust. So it's very important that counsel is involved early.

Now let's wrap up by talking about family based applications, parents [00:43:00] and spouses. So as you noted correctly when we began, parents of US citizens are considered immediate relatives. And a lot of times we see parents are sponsored, they're already retired, they don't have income, but the family wants to be together. Maybe they're getting on in age, their health is a concern, and so their US citizen children are sponsoring to bring them here. And now [00:43:30] these health conditions are in particular, I think, may weigh against

them. And it is definitely going to be something to consider when you're filling out an affidavit of support that you really have to do an analysis beforehand.

And the US citizen also needs to know that when they're signing an affidavit of support, this is a contract that you are signing that the government can enforce. [00:44:00] If your parent or your spouse needs benefits because they become low income, you are on the hook financially by signing the affidavit of support and you are responsible for that, and the government can collect from you and they can actually enforce that. And I think a lot of people sometimes sign, they don't think about it, but this is enforceable.

And sometimes you have a situation [00:44:30] where maybe your child who is in college fell in love with somebody, they decide to sponsor them for a green card, they don't make enough money. And so you as the parents sign off as a co-sponsor, you're on the hook because you're a co-sponsor now.

So Jen, when we're preparing these types of applications, what do we need to prepare and what kind of new evidence do you think we should be showing in our 485 [00:45:00] or immigrant visa applications, especially related to medical care and who is paying for that?

Jen Hermansky:

Yeah. So in the past, we really only needed to maybe give tax returns or other things like that. But now, those documents might not tell the full story about how someone will live in the US and support themselves. So we think we should maybe broaden the types of evidence that are submitted in cases. [00:45:30] Maybe for older individuals such as parents of US citizens, we want to gather up pension records, bank statements, assets and other retirement 401(k) benefits or property records that can show that these individuals have assets of their own.

Also a plan for healthcare, so a plan for paying for private health insurance [00:46:00] or a plan for getting that coverage. So that seems like a big focus of the government, how people will afford healthcare and it is quite expensive as we know.

So I think people will need to be also prepared to explain to the consular officer or maybe at an interview at USCIS how they're going to live in the US and who will they live with and what income streams do they have [00:46:30] and who will pay for their everyday expenses and their medical care and how will you pay for those things? So this is going to be an area of preparation before people attend any interviews if those are scheduled. And so again, like we talked about before, things like Social Security or government pensions are earned benefits, so those things shouldn't be used against you. They can be used in favor of these arguments that you're not going to be a public charge.

Kate Kalmykov:

[00:47:00] So I think, Jen, we can wrap up here, but I want to leave our listeners with three primary takeaways. First is we now really have a true totality of the

circumstances test for 485 applications and the affidavit of support is a starting point. It's definitely not the finish line. You have to start looking at a lot more when you're preparing these applications.

Second, [00:47:30] any federal, state, or local benefit based on low income can now count against you in the I-485 process, and that includes state health programs and need-based student aid. So it really matters now, as you said, not just that you've received it, but that you have applied for it. So if you have applied for it and you haven't received it, you need to be prepared to address that [00:48:00] and the information that was presented in that application.

And third, timing really matters. I-485s that were filed before September 18th are under the old rule. And if you see adjudications contrary to that, we have to push back on that and remind USCIS of that. And consular cases are still unsettled. We do expect that the FAM will be updated and that this will [00:48:30] percolate through immigrant visa adjudications. And if anyone is concerned that they are going to get caught up in the public charge rule, it is critical that they speak to counsel prior to filing an application or, if they have already filed an application, to prepare how to address a government request. One other change we had in the past month was that the time period for request for evidence has [00:49:00] been shortened by the government from 87 days to 30 days. So there is a very limited time period now to respond to the government if they do have follow up questions. So gathering documentation ahead of time in anticipation of a request is going to be very important now.

Thank you so much for joining me as always, Jen.

Jen Hermansky:

My pleasure.

PART 4 OF 4 ENDS [00:49:28]