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Re: Comments on Information Collection

OMB Control Number: 1405-0234

Form: DS-5540

Bureau of Consular Affairs, Visa Office

85 Fed. Reg. 33772

Docket Number Public Notice 11122

Document Number 202-11889

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Dear U.S Department of State:

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) to comment on the Department of State's (DOS) 30-Day Notice of Proposed Information Collection: Public Charge Questionnaire, initiating a 30-day public comment period under the Paperwork Reduction Act, 44 U.S.C. § 3507. The Department is seeking three-year approval of its Form DS-5540, which collects information for use in implementing the Department's October 2019 public charge rule, the use of which is currently approved until August 31, 2020.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has produced legal trainings, practice advisories, and other materials on immigration law and processes.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that unites private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers low-income individuals face when seeking to obtain immigration benefits.

The ILRC provides technical support for attorneys and non-profit programs that represent immigrants during consular processing, as well as producing webinars, trainings, manuals and practice advisories on this topic.. The DS-5540, required of all visa applicants subject to the public charge ground of inadmissibility under INA § 212(a)(4) with interviews at U.S. consulates or embassies abroad on or after February 24, 2020, will have a substantial impact on thousands of persons who the DOS will assess for public charge inadmissibility, and its content must fairly reflect the law and regulations that support it. Information collected in the DS-5540 will be used by consular officials to evaluate visa applicants under the new DOS public charge rule.

The ILRC comments favorably that the DS-5540 is not unduly lengthy and burdensome, as four pages is a reasonable length to supplement the picture of an applicant's finances for purposes of public charge assessment. However, we suggest below certain modifications to the existing language in the form where the current version is inaccurate, irrelevant, or misleading.<sup>1</sup> Specifically, the ILRC proposes changes to the questions having to do with health insurance, income and assets, and fee waivers.

**1. The DS-5540's Question Soliciting Information about Health Insurance Within 30 Days of U.S. Arrival Should Be Eliminated Because it is Arbitrary, Irrelevant, and Confusing, and Conflicts with a Federal Court's Injunction of a Presidential Proclamation**

Questions 4 and 4A of the DS-5540 inquire, "Do you currently have health insurance coverage in the United States?" and "Will you be covered by health insurance in the United States within 30 days of your entry into the United States?" These questions derive from Presidential Proclamation 9945,<sup>2</sup> which a federal court has enjoined<sup>3</sup> – yet DOS intends to continue to ask these questions. To the extent that a question about health insurance coverage is relevant to the public charge assessment,<sup>4</sup> Question 4 should be modified to eliminate 4A, removing the otherwise arbitrary and irrelevant reference to a 30-day window for obtaining health coverage. There is nothing in the new DOS public charge rule or guidance that says having health insurance coverage within 30 days will be viewed more favorably than coverage within 40 days, or 60 days, or 90 days.<sup>5</sup> Rather, the rule makes a distinction between public versus private health insurance, not when health insurance will be obtained.<sup>6</sup> Further, consular officers are directed to look at health insurance coverage *or other financial means* to cover "reasonably foreseeable" medical costs. Having health insurance within 30 days, or within any specific period of time, is mentioned nowhere in the DOS public charge rule or guidance. Thus, leaving in a question about whether the applicant will have health insurance within 30 days of arrival is misleading and confusing to applicants, who may mistakenly assume the Presidential Proclamation was not, in fact, enjoined.

The ILRC recommends revising Questions 4 and 4A as follows:

"4. Do you ~~currently~~ have health insurance coverage or other financial resources sufficient to cover reasonably foreseeable expenses related to a medical condition in the United States?"

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<sup>1</sup> Underline indicates an insertion. ~~Strikethrough~~ indicates a deletion.

<sup>2</sup> *Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System* ("Presidential Proclamation 9945") (Oct. 4, 2019).

<sup>3</sup> *Doe v. Trump*, No. 3:19-DV-01743-SI (D. OR.) (Nov. 26, 2019).

<sup>4</sup> DOS claims in the June 2, 2020 Federal Register notice that it will instruct officers to rely on the enjoined health insurance information, "only to the extent that it is relevant to the public charge assessment and not to implement Presidential Proclamation 9945." 85 Fed. Reg. 33772, 33774 (June 2, 2020).

<sup>5</sup> See, e.g. DOS, *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54996-98, 55002 (Oct. 11, 2019) [hereinafter *DOS Rule*]; 9 FAM § 302.8-2(B)(2)(c)(3), (e)(1)(c)(iii).

<sup>6</sup> *DOS Rule*, 84 Fed. Reg. at 54998.

~~“4A. Will you be covered by health insurance in the United States within 30 days of your entry into the United States?”~~

This language would more accurately reflect DOS’s regulations, which focus on health insurance coverage *or other financial resources* to pay for reasonably foreseeable medical costs, without mention of a specific timeframe for securing coverage.<sup>7</sup>

## **2. The DS-5540 Questions on Income and Assets Should Clarify that DOS Rule and Guidance Direct Consular Officers to Consider Household Income and Assets**

Question 8A requests applicant’s personal income (“current yearly compensation”) and then Question 8C directs applicants to “list below any income not listed above that you will continue to receive after your arrival...” Question 9 instructs the visa applicant to “list assets available to you in the table below.”

However, the DOS rule and guidance, as with the Department of Homeland Security (DHS) new public charge rule and guidance, directs officers to consider both the *applicant’s* and *household’s* income and assets.<sup>8</sup> Unlike the DHS public charge form, though, the DS-5540 does not notify applicants that they can and should list household income and assets on the DS-5540 for consideration as part of their public charge assessment.<sup>9</sup>

The ILRC recommends revising Questions 8C and 9 as follows:

“8C. List below any income not listed above that you will continue to receive after your arrival in the United States (for example, rent, stock dividends, foreign pension, child support). You may also include household income. Consular Officers may request additional information or evidence for confirmation.”

“9. List the assets available to you or other members of your household in the table below.”

## **3. The DS-5540 Question on Fee Waivers Exceeds the Parameters of the DOS Regulations**

Question 14 of the DS-5540 asks, “Have you ever received a fee waiver when applying for an immigration benefit from USCIS?” This question exceeds DOS’s regulations and consequently unnecessarily burdens applicants by requesting information about all fee waivers, ever, potentially going back decades, even though only fee waivers

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<sup>7</sup> See, e.g., *DOS Rule*, 84 Fed. Reg. 54997 (“...the consular officer will consider evidence of health insurance or the ability to pay for reasonably foreseeable medical expenses... lack of health insurance alone would not make an alien more likely than not to become a public charge at any time, but would instead be considered in the totality of the alien’s circumstances.”); *DOS Rule*, 84 Fed. Reg. 54998 (heavily weighted factors: “The alien has no health insurance for use in the United States and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition”; “The alien has private health insurance (other than health insurance obtained with premium tax credits under the Affordable Care Act) for use in the United States covering the expected period of admission.”); *DOS Rule*, 84 Fed. Reg. 55002.

<sup>8</sup> See, e.g., *DOS Rule*, 84 Fed. Reg. at 54997 (multiple references to household assets), 54998 (heavily weighted positive factor if “The alien’s *household* has income, assets, resources, or support of at least 250 percent of the Federal Poverty Guidelines...” (emphasis added), 55004 (“Some aliens may have sufficient assets and resources, *including a household member’s income and assets...*”) (emphasis added); 9 FAM § 302.8-2(B)(2)(e)(1).

<sup>9</sup> Cf. USCIS Form I-944 at page 3, Part 3, clearly identified as “Your and Your Household Member’s Assets, Resources, and Financial Status” with subheadings below, “Household Income” and “Your Household’s Assets and Resources.” (emphasis added).

received after the February 24, 2020 effective date of the rule, and only those for which the public charge grounds of inadmissibility applies, will actually be considered as part of the public charge assessment.<sup>10</sup> Thus, the DS-5540 request for information about any fee waivers received at any time, which also requests the underlying form number and receipt number for each fee waiver application the applicant has ever sought, is unduly burdensome.

The ILRC recommends revising Question 14 as follows:

“14. On or after February 24, 2020, have you ever received a fee waiver when applying for an immigration benefit from USCIS?”

“If you answered ‘Yes,’ provide the information in the table below. List only fee waivers received since that date and the form type of the benefit to which public charge inadmissibility applied.”

These changes will help bring the DS-5540 in compliance with the law and regulations, and also resolve questions that are confusing, misleading, or overly burdensome.

Thank you for your consideration of our comments.

Sincerely,

The Immigrant Legal Resource Center

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<sup>10</sup> *DOS Rule*, 84 Fed. Reg. 54996, 55013. *See also* 9 FAM § 302.8-2(B)(2)(e)(c)(iv). The public charge inquiry with regard to fee waivers is further limited to only those fee waivers for immigration benefits to which the public charge inadmissibility ground applied.