

Carl C. Risch
Assistant Secretary, Bureau of Consular Affairs, Department of State

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December 19, 2019

**Re: Docket Number: DOS-2019-0037: Agency Information Collection
Activities; Proposals, Submissions, and Approvals: Public Charge
Questionnaire**

Dear Mr. Risch:

The Asian & Pacific Islander American Health Forum submits this comment letter in response to the Department of State's Notice of Information Collection published in the Federal Register on October 24, 2019. **We strongly oppose the proposed public charge questionnaire and underlying policies as they are without merit and perpetuate racist immigration practices.**

APIAHF is the nation's leading health policy organization working to advance the health and well-being of over 20 million Asian Americans, Native Hawaiians and Pacific Islanders (AA and NHPI) across the U.S. and territories. APIAHF works to improve access to and the quality of care for communities who are predominately immigrant, many of whom are limited English proficient, and may be new to the U.S. health care system or unfamiliar with private or public coverage. We have longstanding relationships with over 100 community-based organizations in 34 states and the Pacific, to whom we provide capacity building, advocacy and technical assistance.

As such, we have a strong understanding of the needs and barriers in immigrant communities and the impact changes in immigration and public assistance policy would have on them. For over 32 years, APIAHF has worked extensively on both the issues of immigration and health; areas of policy that this proposed rule would upend. Through research, analysis and community partnerships, these issues are the core of our expertise. APIAHF and our partners have consistently advocated for the importance of access to health care and other public assistance for all families, regardless of their citizenship status. We know from experience that access to quality health care, not burdened by obstacles like finances, means families can thrive and contribute to their communities. At the same time, we are reminded that our country has a deep history of racial discrimination that has contributed to health disparities among communities of color, including AA and NHPis.

The proposed Public Charge Questionnaire (Form DS-5540) represents an onerous new form that would require applicants to supply the Department with substantial amounts of unnecessary information.

In terms of content and complexity, the Form DS-5540 is, in many ways, comparable to the Declaration of Self-Sufficiency (Form I-944) put forward by the Department of Homeland Security (DHS) in its own public charge rulemaking. If implemented, it will burden individuals and families in the United States who are seeking to have their family members immigrate to the United States, and staff at consular offices who will be asked to conduct reviews they have neither the expertise nor information to execute.

In addition to concerns about the information collection process, we have serious concerns about the underlying policies created by the DOS Interim Final Rule (IFR) on public charge and the President's Health Insurance Proclamation and urge the government to rescind the policies in their entirety.

These policies are part of a larger, coordinated strategy designed to sharply restrict family-based immigration and sends one message: if you're not white and you're not wealthy, you're not welcome in the United States. The resulting harm will especially affect people of color from nations where they historically have borne a disproportionate share of global income inequality.

In the comments that follow, we respond to the Agency's specific requests for comments and explain why the Department should immediately withdraw this proposed form and the underlying policies.

I. The primary justification offered for this Form DS-5540 does not apply while the DHS public charge rule is enjoined.

The primary justification offered for the DOS rule is alignment with the DHS public charge rule. As the DOS interim final rule states, at 84 Federal Register 55011, "Coordination of Department and DHS implementation of the public charge inadmissibility ground is critical to the Department's interest in preventing inconsistent adjudication standards and different outcomes between determinations of visa eligibility and determinations of admissibility at a port of entry." By the Department's own logic, it makes no sense to move forward with this form until litigation challenging the DHS rule is resolved.

At the time of this submission, the U.S. District Court for the Southern District of New York's nationwide injunctions against the DHS public charge rule, which serves as the basis of the DOS Interim Final Rule (IFR), remains in effect. Indeed, five federal court judges found that plaintiffs are likely to succeed in one or more of their claims that the DHS rule is unlawful. The injunction and rulings raise important questions that affect the implementation of the DOS IFR and the proposed Form 5540. For example, the IFR cites to a regulation that has been enjoined, and the form includes questions that are only relevant to the enjoined Health Insurance Proclamation.

Finalizing a form that implements enjoined policies is a waste of the Department's time and resources. At a minimum, any movement on the proposed form should be delayed until there is a final resolution of ongoing litigation. Like the DHS regulation, the DOS IFR on public charge and the President's Health Insurance Proclamation are arbitrary, abusive, and are likely unlawful. The proposed form to implement these policies is therefore equally problematic.

II. Specific Responses to the Agency's Request for Comments.

We respond below to your specific request for comments to assist the Department evaluating the information collection process.

1. Evaluating whether the proposed information collection is necessary for the proper functions of the Department

The information collection is not necessary for the proper function of the Department. As explained above, the information collection attempts to implement two policies – a dramatically altered public charge policy, and the health insurance proclamation – that effectively impose a wealth test for individuals seeking to immigrate to the United States. These policies do not advance any legitimate objective of the State Department and far exceed the authority designated by Congress. The agency also fails to establish that the use of the Form is the least burdensome way to gather information necessary to make a public charge determination, as required by the Paperwork Reduction Act.

Consular officers play a vital role in screening prospective entrants to safeguard the interests of this country and its people. Adding a new, complex responsibility that, even if perfectly executed, will glean only tentative or speculative conclusions about whether prospective entrants will enroll in public benefit programs or receive uncompensated care, risks distracting these officers from their core functions.

2. Evaluating the accuracy of our estimate of the time and cost burden of this proposed collection, including the validity of the methodology and assumptions used

The Department's estimate is highly implausible for several reasons. Its three most serious flaws are in the likely number of respondents, in the number of times each prospective immigrant may be subject to the collection request, and in the likely time required to comply with it.

The estimated number of respondents fails to consider the many persons inside the U.S. who will assist with provision of information for the DS-5540.

The Department's estimate of 450,500 respondents assumes that only immigrants applying for entry to the United States will be subject to the information request.

That is incorrect. The agency fails to consider that much of the information sought will be available only from their sponsors in the U.S. or from organizations and their attorneys assisting immigrants and their families through the process. Although the request will formally be directed at the prospective immigrants or non-immigrants, other parties within the U.S. will also need to comply and should therefore be included as respondents in the burden assessment. It is inconsistent with the purpose and terms of the Paperwork Reduction Act to obscure the true burden of an information request in this manner. These respondents should be included in the estimate along with a reasonable approximation of the time associated with this assistance.

The health insurance and public benefits systems in the United States are extremely complex and different from many other countries. Few Americans understand this level of complexity and the types of programs they or members of their household are enrolled in. In our experience, many people are unable to identify that they are on Medicaid or CHIP or other programs. People who use benefits, especially immigrants, do not and should not spend time considering the exact name and nature of where their health insurance comes from. In fact, in many states, the programs are not called Medicaid at all, but some other name. This is similarly true for CHIP. What is important for these families is that they have health insurance they can rely on, not what it's called. 38 states have an alternative name for their Medicaid program. An individual on such a program may be much more familiar with this alternative name than with the term "Medicaid" and therefore might not be able to correctly identify whether they are receiving Medicaid. This could cause them to inadvertently incorrectly fill out the form. Research has demonstrated that this is true on federal surveys like the American Community Survey where a portion of respondents, who are enrolled in Medicaid, will indicate they are enrolled in some other type of coverage.

The proposed form requires prospective immigrants, who are arguably even less likely to understand the US health care system, to know the types of programs that are applicable to a public charge consideration, the eligibility criteria, and what steps are necessary to apply. Naturally, they will turn to the firms and community-based organizations, as well as their sponsors, assisting with their immigration application and prospective resettlement in the U.S. for guidance on these matters. The Department fails to acknowledge the complexity of these new forms and the documentation required, which will compel many applicants to obtain professional legal services to help complete the Form DS-5540.

In response, attorneys and other legal representatives -- in addition to preparing the form and gathering supporting documentation -- will need to assess every factor and consideration under the new framework (including evaluating household members), identify other issues not listed in the rule that might affect the public charge assessment, and sort out inconsistencies in real case scenarios in order to offer advice. Aside from the legal uncertainty this brings to every case, the time to advise, document and complete the forms will increase by at

least threefold. For example, immigration legal representatives will likely need to conduct additional research to determine if the prospective immigrant and dependents are eligible for health insurance through another family member's plan, and whether they may qualify to enroll in other public benefit programs. A separate search may be required to determine if any previous immigration applications have included a fee waiver request. These inquiries are likely to take several additional hours of preparation for many cases and will almost never be brief and simple. The proposed rule grossly underestimates the time burden.

The number of times each prospective immigrant will be subject to the collection is also underestimated.

The estimate assumes that each applicant will need to provide information only once. Under the policies described in the Public Charge Interim Final Rule and the President's Health Insurance Proclamation, however, that is unlikely. These policies offer little guidance as to what evidence suffices to obtain a consular officer's approval. In practice, because of the likelihood of miscommunications and misunderstandings, many applicants will need to supply information multiple times. The lack of coherent standards for consular officers to rely upon in assessing applicants' submissions means that many are likely to request additional information before making a decision. Many immigrants – when faced with the prospect of being barred from entry to this country, and perhaps the chance to reunify with their family – will need to make several efforts to produce sufficient evidence to satisfy the consular officer.

The average time per response is unrealistic and ignores the time-consuming and costly realities of collecting the requested information.

The Department asserts—without any evidence whatsoever—that the proposed Form DS-5540 would take only 1 hour for an applicant to complete. The estimate of one hour per inquiry is unreasonable and the estimate of 10 minutes per inquiry for applicants only completing the health insurance section is absurd. We have serious concerns about the validity of the methodology used for data collection and assumptions used. The Department of Homeland Security previously estimated that its comparable Form I-944 would require 4.5 hours to complete, and DOS does not even attempt to explain the large difference between these two estimates. For the great majority of applicants, gathering this information will require hours or days, not minutes.

The proposed form would also burden businesses and other government agencies, in addition to DOS. Under the Agency's IFR on public charge, applicants are required to request certifications or verifications from other local, state, and federal agencies - ranging from courts overseeing alimony and child support agreements, the Social Security Administration, the Internal Revenue Service, the Armed Forces, educational institutions, child welfare agencies, and social service organizations, as well as private entities including insurance

agencies, real estate appraisers, nonprofit organizations, banks and employers. The Agency does not consider the costs of requests for verification that accompany the Form, for both the applicant and the verifying agency or agencies involved.

- *Collecting information about future health insurance*

Many consumers will not be able to enroll in health insurance coverage until they enter and begin residing in the state in which they will obtain coverage. This means that they are unlikely to have detailed information about their future options for coverage at the time of the consular interview. With the vast majority of prospective immigrants unable to produce proof of health coverage, this information collection effectively requires them to gather sufficient pieces of circumstantial evidence to make the future issuance of health insurance appear likely.

If the anticipated health insurance coverage is from a prospective employer of the prospective immigrant, this will require gathering information indicating the likelihood that a given employer will hire this prospective immigrant as well as information on the coverage that employer provides to its employees, as well as any waiting period before such insurance becomes available. In cases where the immigrant expects to pursue opportunities with several possible employers, this may require gathering information on their labor needs and hiring practices as well as the insurance coverage that each of them provides when it does hire a worker. Where anticipated coverage is on the policy of a relative, prospective spouse, or other person, the prospective immigrant will need to obtain information on the rules for adding people to that coverage as well as the nature of the coverage itself. All of this will certainly require numerous contacts and extensive research to garner sufficient information, entailing many hours of compliance burden.

When a prospective immigrant cannot specify likely coverage, the applicant will need to gather other information that persuades the consular officer that she or he is likely to obtain coverage. Gathering this information is likely to be highly time-consuming. If prospective immigrants fail to persuade the consular officer that they are likely to obtain sufficient health insurance coverage in this country, they will need to try to persuade the consular officer that they can afford to pay for any care that they may need. This likely will require obtaining extensive information about the prospective immigrants' medical conditions, the treatments they will require, and the costs of those treatments in the U.S. Because health care providers routinely have very different price scales for private payers and various insurance plans, and these scales are not made available to the public, this will be a difficult and burdensome process.

- *Collecting information about past public benefit use and likelihood of future public benefit use*

The proposed DS-5540 directs applicants to indicate whether they have requested or received public benefits in the United States on or after October 15, 2019 and whether they are likely to request or receive certain public benefits in the future in the United States. The Department's estimate that it will only take applicants one hour to file Form DS-5540 **and** to receive information about past and future benefit receipt is both inaccurate and unrealistic about the burdens benefit recipients face when interfacing with state and local agencies. Obtaining the requested information may require outreach to state and local benefit agencies that administer benefit programs like SNAP and Medicaid, which can be incredibly time-consuming. For example, one study that found the average food stamp application took about five hours of time to complete, including two trips to a food stamp office.

In addition, compliance with the Form DS-5540 would create new challenges and impose tremendous burdens on state and local agencies that administer public benefit programs. In particular, the Form DS-5540 suggests that agencies would be asked to provide information on the exact dates an applicant received benefits. This would be extremely burdensome for agencies and will increase administrative costs delaying agencies in the performance of their core responsibilities. In addition, the Form asks applicants to provide the name of the benefits-granting agency, which suggests that DOS may contact the agencies for verification. This process will generate an enormous, unfunded workload for social services agencies.

- *Collecting Information about income, assets and debts*

The proposed DS-5540 directs applicants, many of whom have never lived or worked in the U.S. or who haven't done so for many years, to provide gross income information from U.S. federal tax returns filed in the last three years and either an IRS transcript or the most recent U.S. federal tax return. Additional income from any rent, stock dividends, foreign pension and child support must also be included and could take hours for individuals to locate. Applicants must also list every type of asset and debt or liability and include a description, along with the type of asset or debt, its value, and the location of any assets. This request is far more onerous than other Agency forms seeking similar information. Obtaining this level of detail could be difficult, time-consuming or even impossible for applicants to obtain. It could easily take an applicant many hours to locate and submit this income, asset and debt information alone.

- *Collecting information about past fee waivers*

Collecting information about a fee waiver may require review of past immigration applications and, in some cases, outreach to legal counsel that assisted with previous applications. Furthermore, consideration of fee waiver

usage is fundamentally improper and unfair. Fee waivers help a person improve their immigration status, and therefore generally improving the individual's earning capacity. Collect this information from U.S. applicants who must go through consular processing while injunctions prohibit collection from U.S. applicants in adjustment will result in inconsistent outcomes for applicants, depending on where their application is processed.

3. Enhancing the quality, utility, and clarity of the information to be collected

The Department can enhance the quality, utility, and clarity of the information to be collected by limiting the request to information readily known by the prospective immigrant. Asking immigrants to speculate about future health insurance and use of public benefit programs is of little if any practical utility.

As currently drafted, many of the questions on the DS-5540 don't make sense, particularly when reviewed against the DOS Interim Final Rule (IFR) on public charge and the President's Health Insurance Proclamation. Below is a non-exhaustive list of the many issues with the draft form that will inhibit quality, utility and clarity of the information collected.

- Part 3 requires the applicant to include as part of the household "anyone physically residing with you," which is inconsistent with the definition of household in the IFR. Part 3 also asks if the household member is on active duty, but doesn't clarify whether that person was on active duty when they received any benefits, which is the relevant time for purposes of the public charge inadmissibility test as outlined in the IFR.
- Part 4 requests information about the applicant's salary, which is different from income. This question fails to allow for reporting of hourly, weekly, or monthly income, as well as income from self-employment. Part 4 also requests information about the reason for requesting or receiving certain public benefits (which is not relevant to the public charge determination) and fails to ask if the request for public benefits was granted or withdrawn.
- Part 5 asks whether the applicant has any occupational skills, but only seems to recognize certification and licenses obtained, which is inconsistent with the broader totality of the circumstances test in the IFR.

4. Minimizing the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology

As noted above, the information sought in this instrument is mostly speculation, and cannot be gathered through automated collection or other forms of technology. To the extent that information about past receipt of fee waivers can

be collected through a review of Department files, we recommend that the agency, rather than the applicant, bear the burden of supplying this information.

III. The Form DS-5540 would extract additional costs from people who can least afford them.

The information requested by the Form DS-5540 further skews the public charge determination balance in a negative direction, penalizing low- and moderate-income applicants in multiple ways. Requiring such onerous levels of information makes it especially hard for the most vulnerable applicants, who have less time, resources and access to legal counsel to navigate the application process. This unjust proposal places an unnecessarily high price tag on lawful status, effectively imposing a wealth test on prospective immigrants.

The Form DS-5540 does not account for individuals who might need assistance obtaining these documents, due to lack of access to a computer or delays involving delivery of mail. Workers earning low- and moderate wages may lack reliable transportation and could face logistical barriers in securing documents from agencies far from their home. In order to meet the requirements of the proposed Form DS-5540, many potential applicants would either be dissuaded from pursuing consular processing or a visa due to accompanying costs, time, and resources attached to the application process.

Many immigrants will suffer corollary financial harms resulting from the high costs associated with completing the Form DS-5540. This form could undermine the stability and economic security of immigrants and their families who pay for expenses that they cannot afford, with severe financial repercussions. Studies show that “financial shocks,” or necessary expenses that an individual cannot afford, can have devastating consequences for families with low-income. For expenses deemed critical by an individual or family -- a quality foreseeably ascribed to immigration applications -- research shows that people living in or near poverty will forego other needs to make those payments.

Processing delays – likely to occur if this form is finalized and implemented – will further upend the lives of immigrants and their families. Lengthy wait times can result in applicants losing their jobs, thus depriving their families—including families with U.S. citizen children—of income essential to secure necessities like food and housing. Delays also prolong the separation of families who are dependent on case approval for their reunion.

In conclusion, APIAHF opposes the proposed Form DS-5540 and underlying policies created by the DOS IFR on public charge and the President’s Health Insurance Proclamation. These policies will disproportionately impact immigrants with low incomes, effectively denying them a path to come to the U.S. and ultimately gain citizenship. The data collection is onerous, without merit and unnecessary given the underlying policies are blocked by several injunctions. APIAHF’s experience with immigrant communities and the

community-based organizations that serve them tells us that the proposed form will severely impact vulnerable Asian American and Pacific Islander immigrants. For questions, please contact Juliet K. Choi, APIAHF Chief of Staff and Senior Vice President for Government and External Relations at jchoi@apiahf.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathy Ko Chin', with a long horizontal line extending to the right.

Kathy Ko Chin,

APIAHF President & CEO