AMERICAN IMMIGRATION LAWYERS ASSOCIATION

December 23, 2019

Ms. Megan Herndon
Deputy Director for Legal Affairs
Visa Services, Bureau of Consular Affairs
Department of State
600 19th St NW
Washington, DC 20006

Submitted via: www.regulations.gov
Docket Number: DOS-2019-0037

Re: 60-Day Notice of Proposed Information Collection: Public Charge Questionnaire Form DS-5540

Dear Ms. Herndon:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day notice of proposed information collection for the DS-5540 Public Charge Questionnaire, published in the Federal Register on October 24, 2019.[1]

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the use of DS-5540 form and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

I. The Proposed Information Collection is Not Necessary for the Proper Functions of the Department.

The DS-5540 is a paper form that the applicant must also complete and submit to the consular officer along with additional supporting documentation. In general, the information collected on the DS-5540 form is not necessary for the proper functions of the Department of State (DOS). The underlying basis of this information collection is legally flawed and even if it were to be found valid, the information requested on the DS-5540 is duplicative to existing information collection. Therefore, AILA opposes the finalization of the DS-5540.

[1] 84 Fed. Reg. 57142 (October 24, 2019).

II. The Proposed Information Collection Should Not be Finalized as the Policies that Form the Basis of the DS-5540 Have Been Enjoined.

Before identifying issues with the Form itself, it is important to note that this collection is a result of an interim final rule from the Department of State that will be implemented once this form and revisions to the Foreign Affairs Manual (FAM) is finalized.[2] The purpose of that interim final rule and the Form DS-5540 was to align the DOS standards for public charge with that set forth in the Department of Homeland Security (DHS) Final Rule on Inadmissibility on Public Charge Grounds.[3] However, the very DHS rule that DOS seeks to align itself with has been enjoined nationally.[4] As the DOS interim final rule states, "[c]oordination 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."[5]

Moreover, a federal judge in Oregon also issued a nationwide preliminary injunction to halt implementation of the President's October 4, 2019 Healthcare Insurance Proclamation[6], finding that it was issued without any properly delegated authority. This has further implications for Part 2. of the DS-5540, as the questions pertain to the applicant's current and potential future health care coverage in the United States.

Given that the policies on which DOS relies upon as the basis for this new information collection cannot lawfully be implemented, it is inappropriate for DOS to finalize this form until litigation challenging the DHS rule and the Healthcare insurance proclamation have been resolved. If DOS moves forward with implementation, not only could its action be unlawful it also undermines its own rationale to have consistent immigration standards.

III. The Time Estimate and Cost Burden, as well as the Validity of the Methodology and Assumptions for the Form are Insufficient.

The estimated time burden reported to the Office of Management and Budget for completion of the draft DS-5540 is 60 minutes. However, collection of the documentary evidence required to support the data request would take far in excess of 60 minutes and would place an undue burden on applicants, many of whom would need to seek legal assistance in order to ensure that they are adequately understanding what information they are required to collect and subsequently provide. In addition to completing the form, individuals and their attorneys will be required to expend additional time reviewing information, contacting and engaging with other government agencies and offices, and in some cases reviewing any past immigration applications for pertinent information. Some examples of documents that would need to be reviewed and collected include, but are not limited to, medical records, health insurance documentation, property assessments/valuations, tax returns or consolidated financial statements, and credit reports. A

[2] 84 Fed. Reg. 54996 (Oct. 11, 2019)
[3] 84 Fed. Reg. 41292 (Oct. 15, 2019)
[4] See Make the Road New York, et. al. v. Cuccinelli, 10/11/19 available at https://www.aila.org/File/Related/19101103b.pdf
[5] 84 Fed. Reg. 54996 (Oct. 11, 2019)
[6] 84 Fed. Reg. 53991 (Oct. 4, 2019)

minimum of an additional four hours would be a more likely preparation time to complete the form in its current version. It should be noted that the evaluation of the form and the information provided would also place an additional burden on consular officers, further adding to the estimated timeframe.

IV. In the Absence of Not Finalizing the Proposed Information Collection in the Absence, Certain Revisions are Necessary It

While the utilization of an additional public charge questionnaire seems unnecessary and overburdensome in its current form, there are several questions that can be improved or eliminated to enhance the quality and utility of the information collected, while also ensuring clarity on the part of the applicant and the reviewing consular officer. In the absence of the DOS not implementing this form, we offer our recommendations below:

Part 1 – Information about you.

Question 3: Have you ever been to the United States before

This question is redundant as the information needed to answer the question is provided by the applicant on several prior occasions throughout the immigration petition and visa application process. In the family-based context, it is provided in the I-130 immigrant visa petition, as well as the immigrant visa application through the National Visa Center (NVC) and the consular post. In the employment-based context, this information is provided in the I-140 immigrant visa petition, as well as the immigrant visa application through the NVC and consular post.

Given that the applicant will have provided this information multiple times prior to completing this form, AILA recommends eliminating this question.

Part 2 – Your Health

The public charge statute at INA 212(a)(4) provides that the applicant's health is one of several factors to consider. It does not state that the applicant's health insurance coverage should be dispositive. Moreover, as noted at the outset these questions relate to the Presidential Healthcare Insurance Proclamation which has been enjoined from implementation. In addition, the questions posed within this section are speculative, vague, and without clear guidance could lead to applicants being subject to fraud and unnecessary burden. As such, AILA recommends eliminating this section in its entirety.

Question 4. Do you currently have health insurance coverage in the United States?

If this question is retained, DOS should clarify its standard for what types of health insurance coverage would be sufficient so that applicants do not become subject to potential fraud. Without specific guidance, health insurance companies may advertise insurance coverage and policies to foreign applicants with sub-par or limited coverage; none of which the applicant would be aware of due to his/her unfamiliarity with the U.S. health industry and the complex insurance

marketplace. Some applicants might also answer in the affirmative without understanding that certain coverage is not applicable. For example, it is unclear if travel insurance that includes catastrophic coverage in the US for up to 6 months would be sufficient to answer this question in the affirmative.

If you answered "Yes" to Item number 4, attach evidence of health insurance and skip to Part 3. If you answered "No" to Item number 4, proceed to Item A.

This question is overly broad and lacks specific guidance needed for the applicant to adequately provide the requested evidence/information. The specific forms of acceptable evidence should be provided to the applicant whether it is a copy of the insurance card, letter from employer along with copy of policy, etc. Without providing guidance or a list of acceptable documents, this requirement will not be applied with consistency, and the applicant may not be adequately prepared.

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

This question is overly broad and lacks specific guidance needed for the applicant to properly satisfy. The extent to which one may be able to predict whether or not they would have health insurance in the United States may be purely speculative. Insurance companies vary in their policies of a waiting period, grace period, enrollment periods, etc. This question does not account for individual variances in the insurance enrollment policies of U.S. insurance companies. Where an individual cannot provide evidence of coverage from a specific healthcare company, they will be required to obtain sufficient evidence to show their likelihood of being covered. To this extent, should the agency move forward with this section it would be helpful to provide clarity as to how an applicant might document this information for consular officer review.

PART 4 – YOUR ASSETS, RESOURCES, AND FINANCIAL STATUS

Question 8A. What is your current salary in U.S. dollars?

This question is overly broad, redundant, and provides no useful guidance as to whether someone is more likely than not to become a public charge once he or she enters the United States as a permanent resident.

The applicant is already required to provide employment and income for employment-based cases. For family-based cases, an applicant moving to the United States for the first time, may not have a job in place to be able to answer this question.

A methodology which includes an applicant's foreign salary in US dollars is not indicative of becoming a public charge in the United States. Comparing foreign wages to US wages also inaccurately portrays capacity for earnings for those applicants coming from a country where wage rates are low and imbalanced compared to citizens from other countries who may have in place a higher minimum wage or higher wage rates overall for the same type of work. This question also purports to place applicants who may be consular processing and who have held employment in

the United States at an unequal advantage compared to those who have been residing outside the United States. The avoidance of such a circumstance is cited throughout the Department of State's interim final rule on public charge.[7] While recognizing there are at times unique attributes to consular processing versus an adjustment of status application, this line of questioning, as proposed, provides a contradictory and biased approach. This question will effectuate a priority ranking of citizens of certain countries over others based on the general wage standards.

While assets, resources, and financial status are statutory components in the analysis, a question concerning resources should be broad and inclusive as well as reflective of the circumstances an applicant has no control over due to particularities of any given country.

AILA suggests eliminating this question.

Question 8B. If you currently have a job waiting for your arrival in the United States, who is the employer and what is the annual salary in U.S. dollars?

This question is redundant and burdensome. In employment-based cases, this information is provided in the underlying approved immigrant visa petition, as well as the immigrant visa application documents submitted to the NVC and consular post.

AILA suggests eliminating this question.

Question 9. List the assets available to you in the table below. For example, cash assets may include checking and savings accounts, etc. Non-case assets may include equity in real estate, annuities, securities, etc.

This question is overly broad and burdensome. Evaluating assets often requires appraisals. Appraisals will vary in their complexity and availability. The additional hours required for this section alone add to an already overly burdened process. This evaluation will also force consular officers into the role of determining asset values, which will add an increased burden on adjudication and further add to processing backlogs.

AILA suggests eliminating this question and adding supplement pages to the electronically filed Form I-864, Affidavit of Support wherein the system allows any additional information concerning the applicant, including assets, to be included. This would be a more efficient mechanism than a separate paper-based questionnaire.

Question 10. List your liabilities and/or debts in the table below.

This question is overly broad, non-probative, and burdensome. First, it must be clarified and defined with specificity what constitutes a "liability" and/or a "debt". Countries around the globe

[7] 84 Fed. Reg. 54996 (Oct. 11, 2019).

will vary in their interpretations of these terms, as well as how these amounts are tracked and calculated.

Further, a great number of applicants will have mortgages and/or some revolving credit debt. This is actually in many instances a positive indicator as it shows credit worthiness and contributions to the local economy and financial institutions. The request to list liabilities is more akin to a credit check that one would go through for a mortgage or loan application, and do not seem to be relevant to a public charge determination. Finally, questions regarding personal liabilities and debts also present privacy concerns for the applicant and will require additional privacy precautions by consular officers when transmitting and reviewing information.

AILA suggests eliminating this question and adding supplement pages to the electronically filed Form I-864, Affidavit of Support wherein the system allows any additional information concerning the applicant, including assets. This would be a more efficient mechanism than a separate paper-based questionnaire.

Question 11. Have you requested or received public benefits in the United States from a Federal, state, local or tribal government entity on or after October 15, 2019?

The DOS interim final rule states that the public benefits focus would be in regard to the applicant only. Any request for information about the use of public benefits needs to make clear that the request only applies to the applicant and not to other household or family members Therefore, AILA recommends that the question be rephrased to ask "Has the applicant requested or received public benefits …".

PART 5 – YOUR EDUCATION AND SKILLS

For employment-based cases this information is already provided in various stages of the immigrant and nonimmigrant petition process. We suggest this section be omitted for employment-based immigrant visa cases as redundant since this information has already been provided.

V. DOS should Minimize the Reporting Burden on Respondents, by using Automated Collection Techniques or Other Forms of Information Technology.

A much more efficient overall approach in obtaining any supplemental public charge information concerning the applicant would be in the form of an electronic submission simultaneously with the Form I-864, Affidavit of Support. Any supplemental requests should minimize time and burden. It is questionable overall of the need to obtain what seems to be largely redundant information. While age; health; family status; assets, resources and financial status; and education and skills are determinative factors in a public charge analysis in accordance with INA 212(a)(4) much of this information is currently required in existing forms for both immigrants and nonimmigrants. Simply allowing an applicant to supplement any information pertaining to the statutory requirements above without the specific parameters and burdens the questionnaire poses is a much more effectual and efficient approach.

VI. Conclusion

We appreciate the opportunity to provide comments on the Form DS-5540. At this time, AILA opposes the finalization of the DS-5540. First, it is not appropriate to finalize this form while injunctions on both the public charge rule and the healthcare proclamation remain in place. In addition to the possibility of being unlawful, by DOS' own words, it is critical for DHS and DOS to coordinate its policies concerning the adjudication of public charge inadmissibility ground. Finalizing a new form and moving forward with its implementation of the public charge rule will result in confusion amongst stakeholders and agency officials.

We have also raised several issues with the collection itself. These concerns demonstrate that the collection in its current form is overly burdensome on both applicants and attorneys, redundant in its collection of information previously solicited from applicants on other forms available to agency officials, and unclear and vague in its request for certain information from applicants.

AILA recommends that DOS eliminate this form and rely on information provided in other collections currently available. Should DOS continue forward in finalizing the DS-5540 it must reduce redundancies and clarify how applicants may adequately satisfy the questions included on the form.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION