



December 23, 2019

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

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

To Whom It May Concern:

On behalf of the Human Rights Campaign's more than 3 million members and supporters nationwide, I write in response to the Department's Notice of Information Collection published in the Federal Register on October 24, 2019. HRC strongly opposes the questionnaire, and urges the Department to reconsider its publication. As the nation's largest organization working to achieve equal rights for the lesbian, gay, bisexual, transgender and queer (LGBTQ) community, we are deeply concerned that the proposed questionnaire would cause major harm to immigrants and their families and communities, with particular harm to LGBTQ individuals.

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.

Immigrants make up a significant population of the LGBTQ community. The Williams Institute estimates there are 637,000 LGBT-identified individuals among the adult authorized immigrant population.¹ There are an estimated 24,700 non-citizens who are part of a same-sex couple with a U.S. citizen; a quarter of the couples are raising children.

¹ Gary J. Gates, "LGBT Adult Immigrants in the United States," (The Williams Institute, 2013) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf> ("LGBT" rather than "LGBTQ" is used to reference the study's findings, which were limited to LGBT individuals.)

Assumptions that LGBTQ people are likely to become a public charge have historically been used to keep this community out of the U.S., even before immigration laws explicitly excluded LGBTQ people from entry.² While our country's immigration laws no longer explicitly exclude LGBTQ people and their families from equal treatment, income tests could once again put LGBTQ people at risk of being kept out of the U.S. and torn apart from their families. Discrimination and bias based on a person's sexual orientation and gender identity contribute to economic insecurity for LGBTQ people and their families and could be used against them under an income test.

LGBTQ people, including those who are immigrants, experience rampant workplace discrimination. At least half of the US population lives in a jurisdiction without explicit nondiscrimination laws prohibiting employment discrimination based on sexual orientation and gender identity.³ A 2017 survey found that 1 in 5 LGBTQ people experienced discrimination due to their sexual orientation or gender identity when applying for jobs and 22 percent reported experiencing this discrimination in pay or promotions.⁴ Sixteen percent of respondents to the 2015 U.S. Transgender Survey reported losing their job due to their gender identity or expression.⁵ Respondents to that survey also reported a 15 percent unemployment rate, which was three times higher than the unemployment rate for the total U.S. population at the time.⁶

Discrimination faced by LGBTQ people undermines their ability to attain and maintain economic security, making support systems that help them feed themselves and their families, access health care, and keep a roof over their heads critical to their basic wellbeing and safety. This is even more true for LGBTQ immigrants who face additional challenges due to their multiple and intersecting identities. Non-citizens in same-sex couples who are in the labor force have lower median annual personal incomes than their naturalized citizen counterparts.⁷

Due to family rejection and anti-LGBTQ discrimination in the workplace, education, housing, and healthcare, many LGBTQ people struggle to become economically secure in our country. Research shows that LGBTQ people, especially those who are black, transgender, and women, are more likely to live in poverty, be food insecure, and experience higher unemployment and homelessness than

² Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton University Press, 2011).

³ Persad, Xavier. 2018 Municipal Equality Index. Washington, DC: Human Rights Campaign Foundation.

⁴ Sejal Singh and Laura E. Durso, "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," (Center for American Progress, 2017)
<https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>

⁵ *Id.*

⁶ *Id.*

⁷ Gary J. Gates, "LGBT Adult Immigrants in the United States," (The Williams Institute, 2013)
<https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>.

non-LGBTQ people.⁸ LGBTQ people and their families are more likely to use SNAP, Medicaid, unemployment insurance and public housing assistance than non-LGBTQ people.⁹

Studies have shown that LGBT people are more likely than non-LGBT people to report experiencing food insecurity, and are more than twice as likely to report receiving SNAP benefits.¹⁰ LGBTQ people and their families, especially those with disabilities, are also more likely to receive Medicaid. While 12.9% of non-LGBTQ people surveyed reported receiving Medicaid benefits, 20% of LGBTQ people reported receiving Medicaid.¹¹ LGBTQ people with disabilities were over 3 times more likely to receive Medicaid than those without.¹² LGBTQ people and their families also rely on housing assistance at 2.5 times the rate of non-LGBTQ people.¹³ Below, 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.

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.

⁸ Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, Eds, *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A National Call to Action*, 2018 https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FI+NAL+PovertyReport_HighRes.pdf.

⁹ Caitlin Rooney, "Protecting Basic Living Standards for LGBTQ People," (Center for American Progress 2018) <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>

¹⁰ Taylor N.T. Brown, Adam P. Romero, and Gary J. Gates, "Food Insecurity and SNAP Participation in the LGBT Community," (The Williams Institute, 2016) <https://williamsinstitute.law.ucla.edu/research/lgbt-food-insecurity-2016/> ("LGBT" rather than "LGBTQ" is used to reference the study's findings, which were limited to LGBT individuals.); Caitlin Rooney, "Protecting Basic Living Standards for LGBTQ People," (Center for American Progress 2018) <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>

¹¹ Caitlin Rooney, "Protecting Basic Living Standards for LGBTQ People," (Center for American Progress 2018) <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>

¹² *Id.*

¹³ *Id.*

At this time, district courts in New York, Washington, and Maryland have issued nationwide preliminary injunctions against the DHS public charge rule, which serves as the basis of the Department of State's Interim Final Rule (IFR). 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. A federal judge in Oregon also issued a nationwide preliminary injunction to halt implementation of the Health Insurance Proclamation, finding that it was issued without any properly delegated authority. The injunctions 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 implementing policies that have been found legally specious is a misuse of the Department's time and resources. These cases also raise serious questions regarding the appropriateness of the underlying policies that serve as the foundation for this form. The Department must delay regulatory action dependent upon these cases 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.

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.

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.

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

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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.

1. 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.

2. The health insurance and public benefits systems in the United States are extremely complex.

Few prospective immigrants will understand how these systems work, 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 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.

3. 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 public charge IFR, 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.

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.

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.

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-incomes. 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, we strongly oppose the proposed Form DS-5540 and the underlying policies created by the 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 Human Rights Campaign appreciates the opportunity to weigh in at this time. you have any questions regarding our comments, please do not hesitate to contact Jeremy Kadden at (202) 216-1515.