

**SUPPORTING STATEMENT FOR
PAPERWORK REDUCTION ACT SUBMISSION**

Public Charge Questionnaire

OMB Number 1405-0234

DS-5540

A. JUSTIFICATION

1. Why is this collection necessary and what are the legal statutes that allow this?

The Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, *et seq.*, sets out application and eligibility requirements for aliens seeking to obtain immigrant visas, including diversity visas, or nonimmigrant visas.

INA § 221(a), 8 U.S.C. § 1201(a), provides that a consular officer may issue an immigrant visa, including a diversity visa, or a nonimmigrant visa to an individual who has made a proper application, subject to applicable conditions and limitations in the INA and related regulations.

INA § 222(a), 8 U.S.C. § 1202(a), states that every immigrant visa applicant must provide certain identifying particulars – name, age and sex, date of birth and birthplace – and “such additional information necessary to the identification of the visa applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.” Under regulations set out in Title 22 of the Code of Federal Regulations (“CFR”), diversity immigrants under INA § 203(c) are entitled to immigrant classification. *See* 22 CFR 42.52(b)(4). INA § 222(c), 8 U.S.C. § 1202(c), provides that every nonimmigrant visa applicant must provide identifying information, including his or her full name, date and place of birth, nationality, purposes and length of stay and such additional information as necessary to determine the visa applicant’s eligibility for a nonimmigrant visa.

Under 22 CFR 42.63, every immigrant visa applicant must submit one of two standard visa application forms, and adjudicating consular officers “may require the submission of additional necessary information or question an alien on any relevant matter whenever the officer believes that the information provided in [the application] is inadequate to determine the alien’s eligibility to receive an immigrant visa.” Nonimmigrant visa applicants must submit a standard nonimmigrant visa application form and any additional information as the consular officer may determine is necessary to determine the visa applicant’s eligibility to receive a visa. *See* 22 CFR 41.103(b).

Under INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A), a consular officer may find a visa applicant inadmissible, and thus ineligible for a visa, because he or she is likely to become a public charge. In determining whether visa applicants are inadmissible on this basis, INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B), requires consular officers to consider a variety of factors, including: age; health; family status; assets, resources, and financial status; and education and skills. Consistent with the authorities listed above, visa applicants may generally be asked to provide additional financial information, including supporting documentation. *See* INA § 221(a), 8 U.S.C. § 1201(a) and INA § 222(c), 8 U.S.C. § 1202(c). The Department of State (“Department”) proposes the DS-5540, Public Charge

Questionnaire (“DS-5540”), for collecting additional financial information from immigrant visa applicants and certain nonimmigrant visa applicants subject to the public charge ground of inadmissibility.

2. *What business purpose is the information gathered going to be used for?*

Consular officers will use the information provided to determine a visa applicant’s eligibility for a visa under the INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A). Fully informed determinations of the likelihood certain visa applicants will become a public charge would not be possible without collecting the information requested on the DS-5540. Collection of this information in a standardized format through the DS-5540 will assist consular officers in making consistent applications of the law and significantly reduce the need for visa applicants to provide additional information during and after their interview with a consular officer.

3. *Is this collection able to be completed electronically (e.g., through a website or application)?*

Yes, this form will be available online to visa applicants in fillable PDF format and may be submitted electronically or in person, as directed by the consular officer. Nonimmigrant visa applicants who are required to submit this form will be able to do so via email or in hard copy.

4. *Does this collection duplicate any other collection of information?*

The health insurance coverage questions on the DS-5540 would be duplicative of the DS-5541, Immigrant Health Insurance Coverage form (“DS-5541”), which was intended to implement Presidential Proclamation 9945, Suspension of Entry to Immigrants Who Will Financially Burden the United States Healthcare System (“Health Care Proclamation”). However, the Department is currently enjoined from implementing Presidential Proclamation 9945 and therefore cannot utilize the DS-5541. *See Doe v. Trump*, 418 F. Supp. 3d 573 (D. Or. 2019), *appeal filed*, No. 19-36020 (9th Cir.). As reflected in the March 9, 2020, notice of approval of the DS-5540 based on emergency processing, OMB approved use of the DS-5540 for visa applicants subject to the public charge ground of visa ineligibility.

5. *Describe any impacts on small business.*

This information collection does not involve small businesses or other small entities.

6. *What are consequences if this collection is not done?*

This information collection is essential for determining the likelihood of certain visa applicants becoming a public charge. The principal applicant completes the form once per visa application. It is not possible to collect the information less frequently, as consular officers need up-to-date information to determine efficiently whether a visa applicant is eligible to receive a visa.

7. *Are there any special collection circumstances?*

No special circumstances exist.

8. *Document publication (or intent to publish) a request for public comments in the Federal Register*

The Department published a notice in the *Federal Register* on October 24, 2019 (84 FR 57142) soliciting public comments on the DS-5540, Public Charge Questionnaire, for 60 days. The comment period closed on December 23, 2019, at 11:59PM. The Department received 92 comments and has considered and responded to substantive comments below.

The Department also published a notice of request for emergency processing and approval by OMB on October 30, 2019 (84 FR 58199) soliciting public comments on the DS-5541, Immigrant Health Insurance Coverage (OMB Control No. 1405-0231), relating to implementation of the currently enjoined Health Care Proclamation. This collection related to questions about certain immigrant visa applicants' intended health insurance coverage in the United States pursuant to the currently enjoined Health Care Proclamation, which would require certain immigrant visa applicants to establish, to the satisfaction of a consular officer, that the visa applicant will be covered by an approved health insurance plan within 30 days of entry into the United States, unless the visa applicant possesses sufficient financial resources to cover reasonably foreseeable medical costs, or if an exception applies. The comment period closed on October 31, 2019, at 11:59 PM, and the Department received 293 comments.

The Department additionally published a notice of request for emergency processing and approval by OMB on March 09, 2020 (84 FR 13694) of the DS-5540. With this 30-day notice and comment period, the Department intends to complete the ongoing PRA process for three-year approval of the DS-5540, since approval based on emergency processing under the PRA was only granted for a maximum of 180 days, until August 31, 2020.

While the Department is currently enjoined from implementing the Health Care Proclamation and therefore cannot utilize the DS-5541, this statement includes relevant responses to comments received on the DS-5541 that pertain to the health-insurance related questions in the DS-5540, as those questions are also relevant for the purposes of making a public-charge assessment.

The Department has received 92 comments on the DS-5540, Public Charge Questionnaire ("DS-5540"). Thirty-two comments were either non-responsive or generally opposed the information collection without further explanation. Many commenters attached comments submitted to the Department of Homeland Security, U.S. Citizenship and Immigration Services. In this document the Department will only consider comments related to the Department of State's proposed information collection.

The Department is currently enjoined from implementing Presidential Proclamation 9945 and therefore cannot utilize the DS-5541, *see Doe v. Trump*, 418 F. Supp. 3d 573 (D. Or. 2019). The DS-5540 also contains questions related to health-insurance that are relevant for the purposes of making a public-charge assessment.¹ Insofar as both the DS-5540 and DS-5541 include questions regarding health insurance, many of the 293 comments received on the DS-5541 pertain to the questions on the DS-5540 regarding the applicant's health insurance, and are therefore addressed here. Two hundred and nineteen comments were non-responsive, simply opposing the proposal without detailed explanation, or opposing the substance of the

¹The government is also challenging the injunction of the Proclamation before the Ninth Circuit and is awaiting a ruling. *See Doe v. Trump*, No. 19-36020 (9th Cir.).

Health Care Proclamation and not the proposed information collection itself. Numerous comments were substantively similar or raised multiple issues and commenters raised many overlapping issues. Below are descriptions of the comments received during the comment period, followed by Department responses as they potentially apply to the public charge visa ineligibility. At this time, the Department is not responding to comments on the Health Care Proclamation that are not relevant to the current process regarding the DS-5540.

- The Department received several comments expressing concern that the DS-5540 disproportionately and negatively affects visa applicants from low socio-economic backgrounds or poorer countries with unstable economies. One comment states that certain fields on the DS-5540 will unfairly disadvantage visa applicants from certain countries who will not have assets or resources comparable to persons living in the United States. For example, the comment argues that the fields pertaining to health, family status, assets, resources, financial status, education, skills, health insurance coverage, and tax history on the DS-5540 are “discriminatory and illegally target and racially profiles [sic] applicants from third-world countries...[and] applicants from countries with unstable economies and low financial health....”
 - **Response:** This information collection is intended to aid consular officers in the uniform application of INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). Section 212(a)(4)(B) of the INA, 8 U.S.C. § 1182(a)(4)(B), requires consular officers to take into account at a minimum: (a) age, (b) health, (c) family status, (d) assets, resources, financial status, (e) education and skills, and (f) an affidavit of support when required. The Department intends to seek information in the DS-5540 that will inform the consular officer’s assessment of whether applicants are ineligible on public charge grounds, based on factors that Congress requires consular officers consider in INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B). The DS-5540 does not ask applicants about country of origin, sex, or race. The Department intends the DS-5540 to help identify visa applicants likely to become a public charge based on their current and prospective circumstances, without regard to the visa applicants’ backgrounds, the demographics of their country of nationality, or the stability of the country’s economy. Consular officers are required to consider, among other factors, a visa applicant’s age, assets, resources, financial status, education, and skills, in public charge determinations. In implementing the interim final rule on the public charge visa ineligibility, which was published in the Federal Register on October 11, 2019, consular officers will consider prior receipt of certain public benefits, but those alone are not a basis to determine that an alien is likely to become a public charge. For example, other factors may indicate that the applicant’s financial situation has improved or will improve.
- One commenter opposed an English language proficiency requirement, stating that many individuals in his family gained proficiency through school or were able to find work that did not require English proficiency.
 - **Response:** The Department would like to clarify that neither this information collection, nor the Department’s public charge rule, mandate English proficiency

as a determinative factor within the public charge ineligibility assessment. The Department did not include on the DS-5540 a question about English proficiency. Use of a translator does not necessarily mean the individual is not proficient in English, and consular officers will be instructed not to conclude that use of a translator in completing the DS-5540 indicates a visa applicant's lack of proficiency in English. If a translator was used to complete the DS-5540, applicants must provide the translator's information in the event a consular officer needs to confirm the accuracy of information provided on the DS-5540.

- Three commenters opposed the requirement that the DS-5540 only be filled out by principal applicants. For example, one commenter had concerns for cases where the principal applicant does not work or has a low income job and relies predominantly on their spouse or children's income, and suggested that the DS-5540 should instead ask about the income of the whole family immigrating and not just the principal applicant.
 - **Response:** When consular officers assess family status, the size and particular members of a household will be taken into consideration. The Department defined household to account for both the individuals whom the visa applicant is supporting and those contributing to the household to support the applicant, and therefore to the visa applicant's assets and resources. If a visa applicant is 21 years old or older, or under the age of 21 and married, a household includes: the visa applicant; the visa applicant's spouse, if physically residing or intending to physically reside with the visa applicant in the United States; visa applicant's children, as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), if physically residing or intending to physically reside with the visa applicant in the United States; visa applicant's other children, as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), not physically residing or intending to reside with the visa applicant for whom the visa applicant provides or is required to provide at least 50 percent of financial support; any other individuals to whom the visa applicant provides, or is required to provide at least 50 percent of the individual's financial support, or who are listed as dependents on the applicant's U.S. federal income tax return (if the applicant has a federal income tax return); and any individual who provides the visa applicant at least 50 percent of the visa applicant's financial support, or who lists the visa applicant as a dependent on his or her federal income tax (if the applicant has a federal income tax return). Therefore, any individual's income, including a spouse or child, may be considered as part of the visa applicant's household gross income in the DS-5540, if the spouse or child provides at least 50 percent of the applicant's financial support, or lists the applicant as a dependent on his or her federal income tax. There is a separate definition of applicant's household if the visa applicant is a child, but it similarly considers the assistance of any individual providing, or legally required to provide, at least 50 percent of the applicant's financial support. Requiring only principal applicants to fill the DS-5540 also limits both the time and cost burden on the public and the Department.
- One commenter requested to see a copy of the DS-5540.

- **Response:** A draft of the DS-5540 is publicly available on www.regulations.gov, and can be located using the ID: DOS-2019-0037-0001.
- The Department received one comment asking how this information collection would apply to visa applicants coming to the United States to study, where the student would be supported by his or her family, and not requesting assistance from the U.S. government.
 - **Response:** An applicant applying for a student visa under INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) or INA § 101(a)(15)(M), 8 U.S.C. § 1101(a)(15)(M) will not routinely be required to fill out the DS-5540, because among other things, he or she must demonstrate possession of sufficient funds to meet his or her financial needs to qualify for a student visa. If an applicant fails to meet the criteria for a student visa, he or she is ineligible under INA § 214(b), 8 U.S.C. § 1884(b). However, consular officers could ask some or all questions on the DS-5540 from student visa applicants if necessary to determine whether that individual is more likely than not to become a public charge. The Department's interim final rule, Visas: Ineligibility Based on Public Charge Grounds (84 FR 54996), adds that consular officers will consider the visa classification sought (noting that in many cases visa applicants may not be eligible for public benefits in the United States). In this respect, the visa classification, including the purpose and duration of travel, and, as mentioned by this commenter, support provided by family, are all relevant to assessing the likelihood that a visa applicant would avail himself or herself of public benefits.
- The Department received one comment stating that the Federal Poverty Guidelines are too low for new immigrants, specifically noting the posted poverty guidelines are not livable in the United States. This commenter also suggested the Department should request credit checks from U.S. citizens because "even a person making \$150,000 may not be able to handle money and support a fiancée or spouse."
 - **Response:** The Department uses the Federal Poverty Guidelines to maintain consistent standards for income requirements between sponsors on the I-864 Affidavit of Support, under INA § 213A, 8 U.S.C. § 1183a, and principal visa applicants on the DS-5540. The Department does not determine U.S. Federal Poverty Guidelines, which are issued by the U.S. Department of Health and Human Services ("HHS") on an annual basis. In response to the suggestion that the Department require credit checks for sponsoring U.S. citizens, the Department notes that the respondent for the DS-5540 is the visa applicant, not any sponsor.
- The Department received 4 comments expressing concerns for the difficulty applicants will face in proving self-sufficiency. For example, one commenter stated that "[t]he new immigrants who have never been in this country are being asked to produce all of this information which in many cases is not readily available to them at their interview. How can they be expected to produce evidence of self sufficiency when they have not yet lived or worked in this country." Another commenter suggested that the Department should

consider the cost of living based on local area averages, because income is so varied between cities and states.

- **Response:** The Department understands the additional time and cost burden associated with this information collection and discusses this in greater detail below (*see* Questions 12 and 13). Individuals who have previously lived and worked in the United States are required to provide information on the DS-5540 regarding their previous U.S. federal tax returns, and those who have a job awaiting their arrival in the United States are required to list their employer and annual salary. However, the Department does not expect or require visa applicants to have lived in the United States previously or to have already obtained employment upon arrival in the United States, with the exception of certain employment-based visa applicants. Not having previously lived in the United States would not make an applicant likely to become a public charge under the rule. Instead, consular officers are assessing the totality of an applicant's current circumstances to assess whether the visa applicant is more likely than not to become a public charge at any time in the future in the United States. Another commenter suggested that consular officers should consider the local cost of living associated with an applicant's intended residence. The Department does not have the resources to determine local cost of living across all U.S. cities and states and instead uses the Federal Poverty Guidelines as a basis for determining cost of living. Furthermore, INA § 212(a)(4) and § 213A, 8 U.S.C. § 1182(a)(4) and § 1183a, set the Federal poverty line as the governing standard regarding the sponsor's ability to provide support for sponsored visa applicants.
- One comment recommended that the form be completed by visa applicants seeking B nonimmigrant visas valid for 10 years, noting that some B visa holders stay for extended periods of time. For example, the comment notes that some B visa holders "come here every six months and manage over four to five years stay in 10 years [sic]."
 - **Response:** Consular officers could ask some or all questions on the DS-5540 from B nonimmigrant visa applicants if necessary to determine whether that individual is more likely than not to become a public charge. The interim final rule adds that consular officers will consider the visa classification sought (noting that in many cases visa applicants may not be eligible for public benefits in the United States). A consular officer's public charge analysis of an applicant for a B-1 nonimmigrant visa, who plans to attend a week-long business meeting, would differ from a longer term nonimmigrant applicant, such as an H-1B nonimmigrant specialty worker, who would reside and work in the United States for years at a time, and would differ even more from an immigrant visa applicant who intends to reside permanently in the United States and may not have pre-arranged employment. In this respect, the visa classification, including the purpose and planned duration of travel, are relevant to assessing the likelihood that a visa applicant would avail himself or herself of public benefits, and therefore consular officers must evaluate these factors on a case-by-case basis. That is not to say that a B-1 nonimmigrant applicant is subject to a lower standard than an H-1B nonimmigrant or immigrant under the statute or this interim final rule, but the

immigration status sought by the applicant will be highly relevant context for the consular officer's totality of the circumstances determination.

- Another comment states that visa applicants must already provide information addressing many of the fields listed on the DS-5540 through the DS-260, Immigrant Visa Electronic Application, and I-864, Affidavit of Support under Section 213A of the INA, and that this new form is creating repetition with those. The comment notes that the DS-260 “already includes fields regarding the Applicant's health, family status, education, and skills (employment history).”
 - **Response:** The DS-5540 aims to collect information not captured in other elements of the visa application necessary to make a public charge determination. While the Department collects information relevant to the visa applicant’s ability to support him or herself in the United States in the DS-260 (or the DS-160, where relevant), the DS-5540 will allow collection of additional relevant information. For example, the principal applicant might have indicated prior work or education on the DS-260, and the DS-5540 will enable that applicant to add supplemental information about occupational skills, including certifications and licenses, as well as about the visa applicant’s ability to support himself or herself. The I-864 serves a different purpose, allowing a sponsor to provide information on his or her income and assets that will be used to support the visa applicant(s) in case the visa applicant is unable to support himself or herself without relying on public benefits.
- Three comments noted concerns with the field asking for information on U.S. federal tax returns, generally stating that the question appears directed to a minority of visa applicants who have previously worked in the United States. For example, one commenter notes that “this form is for people outside the United States and doesn't seem to cater to that well.” Another commenter noted that “most immigrants cannot file federal taxes because they do not have socials or work permits to legally work.”
 - **Response:** The Department appreciates the comments and understands that many visa applicants will not have prior U.S. federal tax returns to report on the DS-5540. Such visa applicants should check the “no” box under the question “Did you file a Federal tax return.” However, for visa applicants who do have prior U.S. federal tax returns, this information provides consular officers with valuable background on the financial status of visa applicants as they make public charge determinations. For applicants who have never resided or worked in the United States, the question will not be relevant to making a public charge determination in their case.
- Two comments expressed concern with the Department asking about an applicant’s “liabilities and/or debts,” stating, for example that it’s not clear “what the amount of debt and bills they have has anything to do with being allowed to immigrate and being self-sufficient.”

- **Response:** INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B), requires that, in order to consider an applicant’s ineligibility under the public charge ground, a consular officer must take into account a number of factors, including the applicant’s assets, resources, and financial status. Information regarding an applicant’s outstanding debt is relevant to these factors. Other than an absent or insufficient affidavit of support, where required, however, a consular officer will not find a visa applicant ineligible based on any single factor without consideration of all of the other factors and the totality of the circumstances regarding an applicant’s likelihood of becoming a public charge at any time in the future.
- One comment recommended that consular officers consider public charge ineligibility solely on the basis of an applicant’s ability to support him or herself, noting that sponsors may lose their ability to support anyone, and could pass away, retire, lose a job, or become disabled.
 - **Response:** INA § 212(a)(4)(B)(ii), 8 U.S.C. § 1182(a)(4)(B)(ii), authorizes consular officers to consider information submitted by a sponsor through the Affidavit of Support under INA § 213A, 8 U.S.C. § 1183a.
- Several commenters opposed the inclusion of questions regarding future health insurance coverage for visa applicants on the DS-5540. While some commenters oppose the Healthcare Proclamation without further explanation, other commenters provided specific feedback on the DS-5540 itself. One commenter suggested the Department list out types of acceptable health insurance coverage. The same commenter also suggested that the Department provide the public with specific forms of acceptable “evidence of health insurance,” such as a copy of a health insurance card. Many commenters found the proposed Question 4A “Will you be covered by health insurance in the United States within 30 days of your entry into the United States?” as overly broad and lacking in specific guidance for visa applicants to properly satisfy a consular officer. One commenter noted that this question does not account for variances in insurance enrollment policies, such as waiting periods or grace periods. Commenters also asked the Department to provide clarity on how visa applicants should document sufficient evidence to show likelihood of insurance coverage in the future for consular review, if they cannot provide evidence of existing coverage at the time of interview. In response to the DS-5541, one commenter also noted that the question “leaves unclear whether the oral interview will be the first time an intending immigrant learns about this new obligation.” Many comments also expressed concerns that consular officers do not have the expertise to properly implement this information collection. For example, some commenters noted that consular officers are not health insurance experts and cannot be expected to know about medical costs or procedures.
- - **Response:** First, the Department is currently enjoined from implementing the Health Care Proclamation. *See Doe v. Trump*, 418 F. Supp. 3d 573 (D. Or. 2019), *appeal filed*, No. 19-36020 (9th Cir.). However, the health insurance related questions are also relevant for assessing a visa applicant’s eligibility under the public charge inadmissibility ground, so the Department continues

to propose these questions only for the public-charge determination. For example, if a visa applicant has a medical condition that requires treatment in the United States, the applicant's ability to cover the associated costs are relevant to whether the applicant is more likely than not to become a public charge. Private insurance is one way that a visa applicant would not rely on public benefits in the United States to cover reasonably foreseeable medical costs, but is not the only way. The applicant's visa classification and intended duration of stay are also relevant. Consular officers may also consider an applicant's statements, and any additional information or documents provided by the applicant, including a copy of a health insurance card. Consular officers may also review the medical and financial documentation that is already part of the applicant's case file and may request additional information or documentation if needed. Additionally, the Department disagrees with comments that Question 4A is overly broad, because the question is sufficiently clear for applicants to answer in the affirmative or negative, and that will inform the consular officer's assessment of other factors that are considered in public charge assessments, including age; assets, resources, financial status; education and skills.

- One commenter stated that the questions posed on the DS-5540 would be more effective if applicants were asked after immigrating to the United States. This commenter suggested that upon immigration, there should be a second interview where immigrants should be required to prove they are working.
 - **Response:** The Department assesses visa eligibility, including the public charge assessment, at the time of the visa application that occurs before the applicant has entered the United States. As a result, consular officers must assess the totality of circumstances when assessing whether an applicant is likely at any time in the future to become a public charge prior to the issuance of a visa. *See* INA § 212(a)(4), 8 U.S.C. § 1182 and INA § 291, 8 U.S.C. § 1361.
- Several commenters expressed concerns regarding the time and cost burden for the information collection, noting that it underestimates both the amount of time and the total cost to visa applicants for completing the DS-5540. Many commenters highlighted that DHS' Declaration of Self-Sufficiency, Form I-944, had a time burden estimate of 4.5 hours. One commenter indicated that the proposed I-944 and DS-5540 would take an average visa applicant approximately 18 hours to complete. Some commenters also expressed concern regarding the Department's estimate that approximately 450,500 visa applicants would file the DS-5540 per year, stating that the number of respondents is actually much higher when taking into consideration U.S. sponsors and/or attorneys who assist in filling out these forms. For example, one commenter stated that the Department "fail[ed] 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 requests will formally be directed at the prospective immigrants or nonimmigrants, other parties within the U.S. will also need to

comply and should therefore be included as respondents in the burden assessment.” Another commenter estimated that the Department would likely demand the DS-5540 “from 577,000 immigrant visa applicants per year, plus some fraction of over 12.4 million nonimmigrant visa applicants per year.” The Department received similar comments in response to the DS-5541, questioning the time and cost estimate for an applicant to understand and comply with the requirement for health insurance coverage. For example, some commenters claimed that the familiarization time, in addition to the time it takes for immigrants outside of the country to acquire health insurance, can amount to hours or days, but did not provide any more specific input on what the time burden may actually be. Other commenters claimed that the respondents to this form will be not only immigrant visa applicants, but that sponsors also must be considered. Some commenters also noted that the Department made an inaccurate assumption that visa applicants will only need to provide this information once when asked verbally. For example, one commenter highlighted that language barriers and confusion may require consular officers to repeat questions in order for visa applicants to understand and answer. Another commenter stated that “because few prospective immigrants can prove extant coverage before entering the [U.S.], they will have to each [sic] a level of suggestive evidence that suffices to win the consular officers’ approval” and that “[i]n practice, many immigrants [...] will need to make several efforts to produce sufficient evidence to win over the consular officer.”

- **Response:** The Department is adjusting the time burden estimate on the DS-5540 to include familiarization time for applicants. The Department is increasing the estimated time burden from 1 hour to 4.5 hours, but cannot provide a more specific estimate of the time and cost to applicants given the varied circumstances of each applicant. For example, some applicants speak English and will require less time to procure health insurance coverage than visa applicants with lesser English proficiency as it will be fast for them to work through the application process in English. While the Department is not factoring the time that is necessary for an applicant to become eligible for a visa, e.g., by procuring health insurance, it acknowledges that some visa applicants with sufficient means to cover foreseeable medical conditions may not need to acquire health insurance coverage at all, requiring much less familiarization time with the form’s fields. The Department is also adjusting the number of estimated respondents to the DS-5540 to 397,814. This number is based on the total number of immigrant visa principal applicants from FY2019 and excludes those individuals not subject to public charge (visa: AM, SU, SI, SQ, SL, IB, IB1, IB2, IB3, IW; non-visa: YY, ZZ, CP1, and HP1). While the Department acknowledges that some visa applicants may seek assistance to complete the DS-5540, the Department only considers the number of respondents to be based on the estimated number of DS-5540s submitted per year. The additional assistance that applicants may seek is included in the time and cost burden estimate, not the number of estimated respondents. The Department will require certain nonimmigrant visa applicants to submit the DS-5540, but does not anticipate requiring this of a large percentage of nonimmigrant visa applicants. For example, the comments of Boundless Immigration, Inc. provided cost and burden estimates based on the average 12.4 million nonimmigrant visa applicants per year. Consular officers will consider the

visa classification sought, and the visa applicant's ability to financially support himself or herself and the members of his or her household while in the United States. For example, a consular officer's public charge analysis of an applicant for a B-1 nonimmigrant visa, who plans to attend a week-long business meeting, would differ from a longer term nonimmigrant applicant, such as an H-1B nonimmigrant specialty worker, who would reside and work in the United States for years at a time, and would differ even more from an immigrant visa applicant who intends to reside permanently in the United States and may not have pre-arranged employment. In this respect, the visa classification, including the purpose and duration of travel, are relevant to assessing the likelihood that a visa applicant would avail himself or herself of public benefits (noting that in many cases visa applicants may not be eligible for public benefits in the United States), and therefore consular officers must evaluate these factors on a case-by-case basis. That is not to say that a B-1 nonimmigrant applicant is subject to a lower standard than an H-1B nonimmigrant or immigrant under the statute or this interim final rule, but the immigration status sought by the applicant will be highly relevant context for the consular officer's totality of the circumstances determination. Therefore, the Department will not require all nonimmigrant visa applicants to file the DS-5540, and some nonimmigrants may be asked only select questions from the form necessary for the consular officer to assess whether the applicant is more likely than not to become a public charge in the United States. As a result, the time and cost burden estimates based on the number of all nonimmigrant visa applicants are inaccurate. Additionally, the Department disagrees that it will be collecting this information more than "once per application" in situations where there is confusion between the consular officer and visa applicant, or where the visa applicant has not provided a complete or adequate response. The Department considers this information collected "once per application" because the Department does not ask visa applicants on any other form to demonstrate that they will be covered by approved health insurance within thirty days of entry into the United States or that they possess the financial resources to pay for reasonably foreseeable medical costs. To the extent that consular officers orally ask affected visa applicants to demonstrate coverage, there may technically be some visa applicants to whom consular officers will be required to repeat the question due to language or hearing impairment, but the Department still considers this asking "once per application" in order to obtain the necessary information for consular officers to determine an affected visa applicant's health insurance status.

- Many commenters expressed concerns regarding the additional burden the DS-5540 would place on the public. These commenters suggested that if the Department will not forego this information collection, that the Department should minimize the reporting burden on respondents by using "automated collection techniques." One commenter specified that a more efficient approach would be to obtain any supplemental public charge information concerning the applicant in the form of an electronic submission simultaneously with the Form I-864, Affidavit of Support. *See* Comments of American Immigration Law Association ("AILA").

- **Response:** The Department acknowledges that some information collected elsewhere in the interview and application process may seem duplicative of the DS-5540, but the proposal of the DS-5540 asks unique questions specific to the applicant and ensures that consular officers receive comprehensive information for thorough assessment of the public charge ineligibility. Further, not all applicants have petitioning sponsors who are required to submit an I-864 as a part of the visa application process. The DS-5540 then becomes the only source of information specific to an applicant’s financial status in the United States.
- Many comments stated that the primary justification for the DS-5540 does not apply while the DHS public charge rule is enjoined and that the Department should not move forward with its own form until the litigation is resolved, because the DHS rule serves as the basis of the Department’s interim final rule. Several commenters also raised the nationwide preliminary injunction to halt the implementation of the Health Care Proclamation’s immigrant health insurance requirement.
 - **Response:** The Department acknowledges there is ongoing litigation surrounding the Department’s rule, DHS rule, and the Health Care Proclamation. A universal preliminary injunction has been issued by the U.S. District Court for the District of Oregon halting implementation of the Health Care Proclamation. *See Doe v. Trump*, 418 F. Supp. 3d 573 (D. Or. 2019), *appeal filed*, No. 19-36020 (9th Cir.). While that injunction remains operative, this form will be used only with respondents who are visa applicants subject to the public charge ground of visa ineligibility for assessing whether the applicant is ineligible for a visa under INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).
- Many commenters provided feedback that the DS-5540 is “not necessary for functions of the Department.” These commenters found that the DS-5540 does not advance the legitimate interests of the Department and exceeds the Department’s authority as designated by Congress. These commenters also believe that the DS-5540 is not the “least burdensome way to gather information necessary to make a public charge determination, as required by the Paperwork Reduction Act.”
 - **Response:** While the Department collects additional information relevant to the applicant’s ability to support him or herself in the United States on other visa application forms, the collection of these fields in the DS-5540 will allow consular officers to review the information in a streamlined manner and assess whether a visa applicant is more likely than not to become a public charge. The Department created the DS-5540 to collect information unavailable in other elements of the visa application and necessary to make a public charge determination.
- Many comments expressed concern regarding the collection of past public benefit information and the likelihood of future benefit use. These comments specifically raised concerns regarding the possibility that this may require outreach to state and local benefit agencies that administer benefit programs, which could increase the time burden on the

public. The comments also stated that the increase in burden would not only be on applicants, but potentially on the state and local agencies if they are asked to provide information on the exact dates applicants received benefits. This could “increase administrative costs delaying agencies in the performance of their core responsibilities.” Because the DS-5540 also asks applicants to provide the name of the benefits-granting agency, commenters believe this suggests that the Department may contact agencies for verification, and that this will “generate an enormous, unfunded workload for social services agencies.”

- **Response:** For the purposes of the DS-5540, the Department does not anticipate an increased burden on other federal or state agencies providing public benefits. The Department anticipates that applicants are aware of receipt of the listed benefits on the DS-5540 on or after February 24, 2020, and as a result do not expect applicants to have to regularly reach out to other federal or state benefit granting agencies. The Department does not plan to instruct consular officers to consult with federal or state benefit granting agencies when completing a public charge assessment.
- Many commenters raised concerns regarding the Department’s collection of information about future health insurance, stating that many applicants cannot enroll in health insurance coverage until they enter and begin residing in states in which they plan to obtain coverage, which means many applicants are unlikely to have detailed information about future coverage at the time of the consular interview. Without detailed information on future coverage, these applicants will have to gather sufficient financial and medical information to persuade a consular officer regarding their future acquisition of health insurance coverage. These comments also stated that employment-based health insurance coverage will require numerous contacts with existing or future employers, increasing the burden, and that some employee health insurance plans have waiting periods before coverage is available.
 - **Response** The Department has not changed the form of the question about health insurance in light of this comment, but notes that the consular officer is charged with determining a visa applicant’s credibility. INA § 291, 8 U.S.C. § 1391, puts the burden of proof on a visa applicant to establish eligibility to the satisfaction of the consular officer. A visa applicant’s credible representations about the plan to obtain private insurance that would cover reasonably foreseeable medical expenses would suffice, although for the purpose of the public charge ground of visa ineligibility, the lack or existence of health insurance would not be the only relevant factor. Visa applicants do not necessarily need to provide detailed information about the insurance plan or his or her health conditions. However, visa applicants should provide credible statements regarding both the insurance plans he or she intends to purchase or assume coverage under, and his or her health conditions. The status of a visa applicant’s health conditions and insurance coverage alone are not determinative and is only one factor, among others, that consular officers are consider in public charge assessments, including age; assets, resources, financial status; education and skills.

- Some commenters found consideration of information on past fee waivers unfair, because fee waivers were meant to help applicants improve immigration status and earning capacity. Other commenters noted that review of past immigration applications may require outreach to legal counsel, increasing the time and cost burden on applicants. Some commenters suggested that because this is particularly burdensome, to the extent that receipt of fee waivers can be collected through the Department of State, that the Department rather than the applicant should bear the burden of supplying this information.
 - **Response:** The Department's consideration of fee waivers for immigration benefits as part of the visa process is only one evidentiary consideration in the totality of circumstances and it is not heavily weighted. Because fee waivers are based on an inability to pay, a past fee waiver for an immigration benefit may have a bearing on the visa applicant's current assets, resources, and financial status. A recently granted fee waiver is potentially relevant to whether an applicant is likely to become a public charge, although a past fee waiver is less relevant if the visa applicant's financial status has materially improved since the waiver was granted. Additionally, a fee waiver granted by DHS is not considered as a factor in the public charge inadmissibility determination if the visa applicant applied for and was granted a fee waiver as part of an application for a benefit request for which a public charge inadmissibility under INA § 212(a)(4), 8 U.S.C. § 1182(a)(4), was not required.
- Many commenters stated that the DS-5540 is comparable to the DHS Form I-944, Declaration of Self-Sufficiency, put forward by DHS's public charge rulemaking.
 - **Response:** The Department was required to create its own information collection for the assessment of public charge ineligibilities by consular officers, instead of relying on the DHS Form I-944, Declaration of Self-Sufficiency ("I-944"). While the Department of State's DS-5540 may be comparable to DHS' I-944, the information collected by the Department of State is tailored specifically to the unique aspects of visa adjudication.
- The Department received several comments expressing concern regarding an inconsistency between the Department's definition of a "household" in the interim final rule and DS-5540. These commenters specifically stated that the DS-5540 requires applicants to include "anyone physically residing with you" as a part of the household, which is not consistent with the interim final rule. These comments also noted that the DS-5540 asks if a 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 period for purposes of a public charge assessment.

Response: The Department is amending the DS-5540 to ask applicants to list members of their household, consistent with the interim final rule's definitions of who constitutes a member of the household, including any individuals to whom the aliens provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's

U.S. federal income tax return, and any individual who provides at least 50 percent of the applicant's financial support or who listed the visa applicant as a dependent on his or her U.S. tax return. The Department will take into consideration both individuals living in the visa applicant's home and individuals not living in the visa applicant's home, including aliens living outside the United States, for whom the visa applicant, and/or the visa applicant's parents or legal guardians are providing, or are required to provide, at least 50 percent of financial support. Consular officers will not focus on the location of the financially supported person, but on the fact that the person is receiving more than 50 percent of financial support from the visa applicant or the visa applicant's parents or legal guardians, rendering those funds unavailable to the applicant for his or her own support and self-sufficiency.

For purposes of the a visa applicant's, or alien's household, the Department's interim final rule defines an "alien's household" if the alien is 21 years of age or older, or under the age of 21 and married, to include: (i) The alien; (ii) The alien's spouse, if physically residing or intending to physically reside with the alien in the United States; (iii) The alien's children, as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), if physically residing or intending to physically reside with the alien in the United States; (iv) The alien's other children, as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), not physically residing or not intending to physically reside with the alien for whom the alien provides or is required to provide at least 50 percent of financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien; (v) Any other individuals (including a spouse not physically residing or intending to physically reside with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's United States federal income tax return; and (vi) Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return. If the alien is a child as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), the alien's household includes the following individuals: (i) The alien; (ii) The alien's children as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), physically residing or intending to physically reside with the alien in the United States; (iii) The alien's other children as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), not physically residing or intending to physically reside with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien; (iv) The alien's parents, legal guardians, or any other individual providing or required to provide at least 50 percent of the alien's financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial

support to be provided to the alien; (v) The alien's parents' or legal guardians' other children as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), physically residing or intending to physically reside with the alien in the United States; (vi) The alien's parents' or legal guardians' other children as defined in INA § 101(b)(1), 8 U.S.C. § 1101(b)(1), not physically residing or intending to physically reside with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and (vii) Any other individual to whom the alien's parents or legal guardians provide, or are required to provide at least 50 percent of each individual's financial support, or who is listed as a dependent on the parent's or legal guardian's federal income tax return.

The Department is also amending the DS-5540 for purposes of clarity to ask an applicant if he or she was on active duty at the time he or she was receiving public benefits, which is the relevant time period for the purposes of a consular officer's public charge assessment.

- Several commenters provided feedback on specific portions of the DS-5540. Questions relating to immigrant health insurance coverage (Question 4) is discussed above. The feedback for each part and/or question is discussed below:
 - *Question 3* – Have you ever been to the United States before? One commenter found this question redundant because it is on the DS-260, Immigrant Visa Electronic Application.
 - **Response:** The Department acknowledges that this question is also asked on the DS-260, Electronic Application for Immigrant Visa and Alien Registration and DS-160, Application for Nonimmigrant Visa. The Department took necessary steps in creation of the DS-5540 to collect information necessary to make a public charge determination. However, the burden for applicants to respond to this question is *de minimis* and will streamline the process for the Department by saving consular officers the time required to refer to the visa application and the DS-5540 while making public charge assessments.
 - *Question 5:* Several commenters stated that asking applicants to list the current jobs of household members is inappropriate and there is no statutory basis for requiring applicants to list this and believe it opens the door for arbitrary decision making. In contrast to these comments, several other commenters suggested that the financial information of derivatives should be considered as it may affect the assets, resources, and financial status of a household.
 - **Response:** The Department would like to clarify that only principal applicants are required to complete the DS-5540, but information pertaining to the current employment of household members contributes to the assessment of a visa applicant's financial status for public charge

determinations when household size and family status are taken into consideration.

- *Part 4:* One commenter expressed concern with the DS-5540's request for intending immigrants to report amounts in U.S. Dollars. This commenter believes the burden to convert foreign currency amounts to U.S. Dollars should rest with the Department.
 - **Response:** The Department must request information in a standardized format on the DS-5540, and this requires visa applicants to submit estimates of any amounts in U.S. Dollars. The burden on each individual visa applicant to provide a close estimate in U.S. Dollars is minimized through the availability of online conversion tools, and is less than the burden on the Department to collect information on 180 currencies and convert it for visa applicants across the globe.
- *Question 8A:* One commenter found this question about current salary overly broad, redundant, and believes it provides no useful guidance as to whether someone is more likely than not to become public charge once he or she enters the United States, because a visa applicant is already required to provide employment and income for employment-based cases. Another commenter stated that the request for salary is different than income and that this question fails to allow for reporting of hourly, weekly, or monthly income as well as income from self-employment.
 - **Response:** The Department is amending the language for this question to request a visa applicant's "yearly compensation" to avoid confusion, and to account for non-salaried income. The Department disagrees that the request for this information is redundant. The DS-5540 is not only filled out by employment-based immigrant visa applicants, but also family-based immigrant visa applicants, self-petitioning immigrant visa applicants, and some nonimmigrant visa applicants. The Department does not have another method for collecting this information from certain visa applicants and its inclusion here provides a streamlined method of gathering the necessary information for consular officers considering the totality of the circumstances in public charge determinations.
- *Question 8B:* "If you currently have a job awaiting your arrival in the United States, who is the employer and what is the annual salary in U.S. dollars?" One commenter found this question redundant and burdensome, stating that this information can be found in the petition and application for employment-based cases.
 - **Response:** The Department disagrees that the request for this information is redundant. The DS-5540 is not only filled out by employment-based immigrant visa applicants, but also family-based immigrant visa applicants and some nonimmigrant visa applicants. The Department does not have another method for collecting this information and applicants may not have another opportunity to provide this information. On the DS-260, the Department asks visa applicants to select his or her *present* primary occupation. While some visa applicants may continue to work for present employers upon immigration to the United States, many other visa

applicants may not. Additionally, while the DS-260 does ask visa applicants in which occupation he or she intends to work in the United States, it does not allow visa applicants to specify either the future employer's name and/or the annual salary in U.S. Dollars, unless the visa applicant selects "Other." Only visa applicants answering "Other" to this question are prompted to specify in which occupation they intend to work in the United States.

- *Question 9:* One commenter found this question overly broad and burdensome, stating that evaluating assets often requires getting appraisals. This commenter believes consular officers will have to play a role determining asset values, which may add to current backlogs. This comment suggests eliminating this question and adding supplement pages to the Form I-864 where the system allows for any additional information concerning the visa applicant, including assets, to be included.
 - **Response:** The Department acknowledges the increased burden for visa applicants in evaluating assets. While the Form I-864, Affidavit of Support, requires the petitioner/sponsor to provide information on his or her assets to determine financial status, collecting asset information from visa applicants on the DS-5540 is also necessary to properly assess the financial status of a visa applicant/beneficiary. Allowing visa applicants to provide information on assets in open-ended supplemental pages of the I-864 instead of on the DS-5540 would create inconsistencies in the types of information visa applicants provide. Asking for this information on the DS-5540 creates a standardized method of collecting this information that the Department can more efficiently and effectively digest. The Department believes this would not only decrease the Department's time burden for processing and reviewing a visa applicant's financial information, but potentially save visa applicants time because visa applicants can provide specific asset information requested on the DS-5540, rather than potentially provide the incorrect information on an open-ended supplemental page on the I-864. The Department also clarifies that the I-864, Affidavit of Support, is a DHS form and focused on the assets and financial status of the petitioner/sponsor, not the visa applicant/beneficiary. Further, not all visa applicants, including diversity visa applicants, are required to submit an I-864 and thus the DS-5540 is the only form that may be available to consular officers to assess some visa applicants' financial status. While consular officers do assess the Form I-864 as authorized under INA § 213A, 8 U.S.C. § 1183a, the Department cannot amend another agency's form.
- *Question 10:* One commenter found this question overly broad, non-probative, and burdensome. The comment suggests that the Department clarify and define with specificity what constitutes a "liability" and/or "debt." This comment notes that visa applicants may have mortgages and/or revolving credit debt which is often an indicator of credit worthiness and a positive indicator – and the request to list liabilities seems akin to a credit check for a mortgage or loan application, which is not relevant for public charge determination. The comment suggests the

elimination of this question and addition of supplemental pages to the Form I-864 where the system allows for any additional information concerning the visa applicant to be included.

- **Response:** INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B) requires that, in order to consider a visa applicant's ineligibility under the public charge ground, a consular officer must take into account a number of factors, including the visa applicant's assets, resources, and financial status. Per the Department's interim final rule, *Visas: Ineligibility Based on Public Charge Grounds* (84 FR 54996), consideration of liabilities is part of the calculation of assets for the purpose of evaluating a public charge ineligibility. Information regarding a visa applicant's outstanding liabilities and/or debts is relevant to these factors. An assessment of debts and liabilities act as one indicator of a visa applicant's financial status. The Department believes it is useful information in determining whether visa applicants are able to support themselves, and understands that debts and/or liabilities can indicate credit worthiness. Other than an absent or insufficient affidavit of support, where required, however, a consular officer will not find a visa applicant ineligible based on any single factor without consideration of all of the other factors and the totality of their effect on a visa applicant's likelihood of becoming a public charge at any time in the future. Allowing visa applicants to provide information on assets in open-ended supplemental pages of the I-864 instead of on the DS-5540 would create inconsistencies in the types of information visa applicants provide. Asking for this information on the DS-5540 creates a standardized method of collecting this information that the Department can more efficiently and effectively digest. The Department believes this would not only decrease the Department's time burden for processing and reviewing a visa applicant's financial information, but potentially save visa applicants time because visa applicants can provide specific asset information requested on the DS-5540, rather than potentially provide the incorrect information on an open-ended supplemental page on the I-864. The Department also clarifies that the I-864, Affidavit of Support, is a DHS form and focused on the assets and financial status of the petitioner/sponsor, not the visa applicant/beneficiary. Further, not all visa applicants, including diversity visa applicants, are required to submit an I-864 and thus the DS-5540 is the only form that may be available to consular officers to assess some visa applicants' financial status. While consular officers do consider information on the Form I-864 as authorized under INA § 213A, 8 U.S.C. § 1183a, the Department cannot amend another agency's form.
- *Question 11:* One commenter suggests rephrasing this question to: "Has the applicant requested or received public benefits..." because the interim final rule states that the focus of receipt of public benefits would be on the visa applicant only. Another commenter found the definition of "public benefit" unclear, and

suggested that exceptions should be listed in a standalone sentence; this commenter also suggested that the DS-5540 should specifically identify all public programs that are considered “public benefits” under public charge analysis and have boxes to check if a visa applicant received any of the benefits listed; agency name, specific date, and reason for benefit is unnecessary and unlikely to be available to the applicant. Several commenters also suggested that this question should be amended to allow any visa applicant who indicated receipt of a public benefit to also indicate that they received such benefit during a period when they were exempt from public charge, had a waiver, were serving in the Armed Forces, or were a spouse or child of someone serving in the Armed Forces.

- **Response:** The Department does not believe it would be practical to try to provide an exhaustive list of all public benefits provided by the federal government, all state governments, and other local, territorial, or tribal governments. However, asking the question broadly, understanding the visa applicant might not know if a benefit received would be a relevant factor, allows for the consular officer to make the public charge determination based on the totality of relevant circumstances. Also, past receipt of a public benefit alone is not determinative and is only one factor of many for a consular officer to consider. The Department also amended the DS-5540 for purposes of clarity to ask a visa applicant if he or she was exempt from public charge at the time he or she was receiving public benefits, which is relevant for the purposes of a consular officer’s public charge assessment. The Department also clarifies that while only the principal applicant is required to complete the DS-5540, the DS-5540 is intended to collect information on the principal applicant and his or her derivatives.
- *Part 5:* One commenter suggests omitting this section for employment-based cases, because the information is already provided in various phases of the immigrant and nonimmigrant visa processes. Many commenters expressed concern that visa applicants are asked if they have any occupational skills, because it only seems to recognize certifications and licenses, which they find inconsistent with the totality of circumstances test of the Interim Final Rule.
 - **Response:** The DS-5540 is not only filled out by employment-based immigrant visa applicants, but also family-based immigrant visa applicants and some nonimmigrant visa applicants. Because the form is not currently automated, the Department does not have a method to solicit targeted information based on visa classification. Maintaining multiple versions of the form that differ based on visa classification would likely lead to confusion. The current proposal provides a streamlined method of gathering the necessary information for consular officers considering the totality of the circumstances in public charge determinations.

When considering a visa applicant's education and skills, consular officers will consider both positive and negative factors associated with whether the visa applicant has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being likely to become a public charge. In assessing whether the visa applicant's

level of education and skills makes the visa applicant likely to become a public charge, the consular officer must consider, among other factors, the visa applicant's history of employment, educational level (high school diploma, or its equivalent, or a higher educational degree), any occupational skills, certifications, or licenses, and proficiency in English or proficiency in other languages in addition to English. Education is one of the mandatory factors consular officers must consider when making public charge determinations under INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). The Department agrees that skills gained through employment are considered positive factors even if certifications or licenses are not available, and the Department is not requiring any minimum level of education, skill level, certifications, or licenses to overcome a public charge inadmissibility determination. Employment history will also be considered under the totality of the circumstances assessment, in addition to a range of evidence as to education and skills, and the Department encourages visa applicants to bring forward any consideration a visa applicant believes is relevant to the determination of whether she or he has sufficient education or skills to not become a public charge at any time in the future.

- One commenter expressed concerns regarding the impact of the DS-5540 on F, J-1, and H-1B visa applicants who are physicians. More specifically, the commenter noted that “an applicant for a student visa F and/or an individual seeking to change their status from F to H-1B would fall under DoS’ sweeping new proposal for the visa eligibility determination under the public charge grounds and by extension the revised DoS public charge questionnaire. This means that children of H-1B visa holders, who may have turned age 21 or aged out and no longer fall under the H-4 classification, may now be included in the DoS interim final rule and required to complete the public charge questionnaire.” This commenter suggested that the Department consider the implications on the ability of these individuals to study and use their skills in the United States. Other commenters expressed concerns for visa applicants applying under the O and P visa classifications, stating that it will significantly increase the difficulty of the already rigorous visa process for O-1B, O-2, and P visas, negatively impact small and independent artists from countries with developing economies, and make the United States a less viable place to for international artists to perform or develop careers.
 - **Response:** INA § 212(a)(4), 8 U.S.C. § 1182(a)(4), mandates that consular officers assess whether a visa applicant is likely to become a public charge at any time in the future, unless the visa classification is exempt from the ground of inadmissibility. Applicants for student visas under INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F), or INA § 101(a)(15)(M), 8 U.S.C. § 1101(a)(15)(M), will not routinely be required to fill out the DS-5540, because among other things, they must demonstrate possession of sufficient funds to meet his or her financial needs to qualify for a student visa. If a visa applicant fails to meet the criteria for a student visa, he or she is ineligible under INA § 214(b), 8 U.S.C. § 1884(b). However, consular officers could ask some or all questions on the DS-5540 from

student visa applicants if necessary to determine whether that individual is more likely than not to become a public charge.

The Department's interim final rule, *Visas: Ineligibility Based on Public Charge Grounds* (84 FR 54996), explains that consular officers will consider the visa classification sought (noting that in many cases visa applicants may not be eligible for public benefits in the United States). In this respect, the visa classification, including the purpose and duration of travel, and, as mentioned by this commenter, support provided by family, are all relevant to assessing the likelihood that a visa applicant would avail himself or herself of public benefits. For example, a consular officer's public charge analysis of a visa applicant for a B-1 nonimmigrant visa, who plans to attend a week-long business meeting, would differ from a longer term nonimmigrant visa applicant, such as an H-1B nonimmigrant specialty worker, who would reside and work in the United States for years at a time, and would differ even more from an immigrant visa applicant who intends to reside permanently in the United States and may not have pre-arranged employment. In this respect, the visa classification, including the purpose and duration of travel, are relevant to assessing the likelihood that a visa applicant would avail himself or herself of public benefits, and therefore consular officers must evaluate these factors on a case-by-case basis. That is not to say that a B-1 nonimmigrant visa applicant is subject to a lower standard than an H-1B visa nonimmigrant or an immigrant visa applicant under the statute or this interim final rule, but the immigration status sought by the visa applicant will be highly relevant context for the consular officer's totality of the circumstances determination.

- Several commenters believe the implementation of the DS-5540 will have a chilling effect on enrollment for public benefits and will lead to visa issuance based solely on wealth. Specifically, one commenter provided information that the Kaiser Family Foundation reported in October 2019 that nearly half the community health centers in the United States report that many noncitizen patients declined to enroll in Medicaid in the past year and nearly one-third of these centers say that some patients dropped or decided not to renew such coverage.
 - **Response:** The Department cannot speculate on the effect the implementation of the DS-5540 will have on enrollment for public benefits. The Department disagrees that implementation of the DS-5540 will lead to visa issuance based solely on wealth. While consular officers do consider a visa applicant's assets, resources, and financial status when making public charge determinations, this is only one of several factors in the totality of the circumstances under INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B). Consular officers also consider factors including age; health; family status; education and skills; among others, as part of the totality of the visa applicant's circumstances.
- One comment suggests that the DS-5540 should not apply retroactively or to visa applicants who already applied and submitted evidence as part of a visa application.

Response: There will be a period of transition during which immigrant visa cases that have already been scheduled for an interview without a DS-5540 may be adjudicated without requiring the immigrant visa applicant to complete the DS-5540. Consular officers may ask visa applicants orally or in writing (i.e., using the form) any or all of the questions from Form DS-5540 necessary for the consular officer to make the public charge determination. Similarly, consular officers may ask nonimmigrant visa applicants orally or in writing (i.e., using the form) any or all of the questions from Form DS-5540 necessary for the consular officer to make the public charge determination on a case-by-case basis.

- Many commenters expressed concern that the DS-5540 will extract additional costs from people who can least afford them and that the information collected is not reflective of many visa applicants' "true economic value."
 - **Response:** While the Department acknowledges that the implementation of the DS-5540 will increase the time and cost burden for certain visa applicants, INA § 212(a)(4), 8 U.S.C. § 1182(a)(4), requires consular officers to find ineligible any visa applicant who, in the opinion of the consular officer at the time of application for a visa, is likely to become a public charge at any time in the future. INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B), further provides that officers must take into account the totality of the visa applicant's circumstances at the time of visa application, including, at a minimum: (a) age, (b) health, (c) family status, (d) assets, resources, financial status, (e) education and skills, and (f) an affidavit of support when required. The DS-5540 implements 22 C.F.R. 40.41, which adheres to the statutory requirement as provided in INA § 212(a)(4), 8 U.S.C. § 1182(a)(4), and is consistent with congressional intent on the national policy relating to welfare and immigration in 8 U.S.C. § 1601.
- Several commenters found that the DS-5540 may confuse visa applicants, highlighting that 38 states have alternative names for the Medicaid program and that individuals participating in such programs may be more familiar with the alternative name than with Medicaid. These commenters are concerned that this may cause visa applicants to inadvertently incorrectly fill out the DS-5540.
 - **Response:** The Department reiterates that if a state medical insurance program is funded exclusively by the state, it is not included in the definition of a public benefit under 22 CFR 40.41(c), and will not be considered as a public benefit in the public charge ineligibility determination. In part because of the complexity of this issue, the Department has reassessed and increased the time burden estimate associated with completing this information collection.
- Several commenters stated that requiring extensive financial records puts certain populations, particularly victims of domestic abuse, at risk. Specifically, one commenter noted that "[i]n abusive families, often the abuser maintains control over the family finances," and that "abusers often prevent survivors from accessing important

information and documents like health insurance or experience great difficulty in attempting to acquire the information.”

- **Response:** Consular officers will consider the totality of the circumstances in public charge determinations, including the specific circumstances of visa applicants who may be unable to obtain financial records.
- Some commenters expressed concerns about data privacy surrounding the Department’s collection of health records. These commenters stated that the collection and use of health information may violate the Health Insurance Portability and Accountability Act (“HIPAA”) depending on how the Department seeks to track insurance coverage and applicants’ medical conditions.
 - **Response:** The Department disagrees that this information collection raises privacy concerns violating HIPAA. The Department is required to take visa applicants’ health into consideration not only as part of a public charge assessment under INA § 212(a)(4)(B)(i)(II), 8 U.S.C. § 1182(a)(4)(B)(i)(II), but also under the health-related ground of ineligibility under INA § 212(a)(1), 8 U.S.C. § 1182(a)(1). The Department is generally not a covered entity bound by HIPAA.¹ The Department already collects and considers medical records submitted with visa applications, and to the extent that new medical information is collected, the data is protected consistent with the System of Records Notice (“SORN”) and INA § 222(f), 8 U.S.C. § 1202(f), visa record confidentiality requirements. In accordance with INA § 222(f), 8 U.S.C. § 1202(f), information obtained from visa applicants in the visa application process, including health information, is considered confidential and is to be used only for the limited purposes articulated in the statute.

9. Are payments or gifts given to the respondents?

No payment or gift is provided to respondents.

10. Describe assurances of privacy/confidentiality

In accordance with INA § 222(f), 8 U.S.C. § 1202(f), information obtained from visa applicants in the nonimmigrant or immigrant visa application process is considered confidential and is to be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that, in the discretion of the Secretary of State, it may be made available to a court or provided to a foreign government if the relevant requirements stated in INA § 222(f), 8 U.S.C. § 1202(f), are satisfied.

11. Are any questions of a sensitive nature asked?

The Department does collect some questions of a sensitive nature regarding family status; assets, resources, and financial status; and health-related information. These questions are necessary in order to determine the likelihood that a visa applicant will be ineligible for a visa under INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). In accordance with INA § 222(f), 8 U.S.C. § 1202(f), information obtained from visa applicants in the nonimmigrant or immigrant visa application process is considered confidential and is to be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of

the United States, except that, in the discretion of the Secretary of State, it may be made available to a court or provided to a foreign government if the relevant requirements stated in INA § 222(f), 8 U.S.C. § 1202(f), are satisfied.

12. Describe the hour time burden and the hour cost burden on the respondent needed to complete this collection

The Department estimates that 397,814 individuals per year will be asked to submit this information. The average burden per response is estimated to be 4 hours and 30 minutes (4.5 hours) per principal visa applicant. The Department adjusted the time burden estimate from 60 minutes to 4.5 hours to more accurately account for the time required for familiarization and reviewing instructions, gathering information and necessary documentation, completing the questionnaire, preparing statements, attaching any additional documentation, and submission of the questionnaire. The Department also adjusted the number of respondents to correspond with the number of FY2019 immigrant visa principal applicants, excluding those individuals not subject to public charge (visa: AM, SU, SI, SQ, SL, IB, IB1, IB2, and IB3, IW; non-visa: YY, ZZ, CP1, and HP1).

Therefore, the Department estimates that the annual hour burden to visa applicants posed by the additional questions is 1,790,163 hours (397,814 visa applicants x 4.5 hours). The wage hour cost burden for this collection is \$65,288,676 based on the calculation of \$24.98² (average hourly wage)³ x 1,790,163 hours x 1.46 (average hourly wage rate multiplier) = \$65,288,676.

13. Describe the monetary burden to respondents (out of pocket costs) needed to complete this collection.

In addition to the cost associated with the time burden for completing the DS-5540, the Department believes this information collection may result in a monetary burden to some respondents. Visa applicants completing the DS-5540 may incur expenses related to familiarization and preparation of the form; legal services; and obtaining property, health, family status, financial, and education-related records. While the Department recognizes these costs, it cannot provide an estimate for the average cost of these activities given price variation across the globe. There is no filing fee associated with the DS-5540.

14. Describe the cost incurred by the Federal Government to complete this collection.

There are additional costs to the federal government as a result of the additional pre-processing and review of DS-5540 responses at the National Visa Center (“NVC”) and Kentucky Consular Center (“KCC”). While the cost analysis is not final, the Department expects future costs of approximately \$5 million dollars annually. Future efficiency gains and technology changes will likely decrease these costs. The Department will account for these costs, in addition to the time required for consular officers to review DS-5540 responses, in burden estimates for the next renewals of the immigrant and nonimmigrant visa applications forms (Form DS-230, Application for Immigrant Visa and Alien Registration, Form DS-260, Electronic Application for Immigrant Visa and Alien Registration, Form DS-156, Nonimmigrant Visa Application, and Form DS-160, Online Nonimmigrant Visa Application).

15. Explain any changes/adjustments to this collection since the previous submission.

There are no changes and adjustments to this collection from the previous submission that OMB approved on March 9, 2020.

16. Specify if the data gathered by this collection will be published.

The information gathered by this collection will not be published.

17. Explain the reasons for seeking approval to not display the OMB expiration date.

The Department will display the expiration date for OMB approval on the information collection.

18. Explain any exceptions to the OMB certification statement below.

The Department is not requesting any exceptions to the certification statement requirements.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection does not employ statistical methods.