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December 20, 2019

Visa Services  
Bureau of Consular Affairs  
Department of State  
600 19<sup>th</sup> Street NW  
Washington, DC 20006

Re: Proposed Information Collection: Public Charge Questionnaire (DS-5540) - Docket No. DOS-2019 0037

To Whom It May Concern:

The District of Columbia Health Benefit Exchange Authority (HBX) appreciates your consideration of our comments on the above-cited proposed Information Collection, which is a new proposed Form DS-5540 to implement the State Department's revised interpretation of the Public Charge statute<sup>1</sup> as well as the Presidential Proclamation ("Proclamation") requiring immigrants to have certain types of health coverage within 30 days of entry to the United States<sup>2</sup>.

By way of background, HBX is a private-public partnership established by the District of Columbia (District) to develop and operate the District's on-line health insurance marketplace, DC Health Link (DCHealthLink.com). We cover approximately 100,000 people -- District residents and people who work for District small businesses. DC Health Link fosters competition and transparency in the private health insurance market, enabling individuals and small businesses to compare health insurance prices and benefits and to purchase affordable, quality health insurance. Since we've opened for business, we have cut the uninsured rate by 50% and now nearly 97% of District residents have health coverage.

We strongly oppose the proposed Information Collection and request it be withdrawn in its entirety. The new interpretation of the Public Charge statute is bad public policy and has been determined by several different federal courts to likely violate federal law and the U.S. Constitution.<sup>3</sup> We have detailed

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<sup>1</sup> U.S. Department of State. Interim Final Rule. "Inadmissibility on Public Charge Grounds," 84 Federal Register 54996 (Oct. 11, 2019).

<sup>2</sup> Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, No. 9945, Oct. 4, 2019. <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/>.

<sup>3</sup> See e.g. *New York v. United States Dep't of Homeland Sec.*, No. 19 CIV. 7777 (GBD), 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *Casa De Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook Cty., Illinois v. McAleenan*, No. 19 C 6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).



our concerns with the Administration’s new interpretation of the Public Charge statute in the following comments: December 10, 2018 comments to DHS’s Notice of Proposed Rulemaking<sup>4</sup>, November 12, 2019 comments to your Department’s Public Charge Interim Final Rule<sup>5</sup>, and October 31, 2019 comments regarding your Department’s emergency Information Collection associated with the Presidential Proclamation (“Proclamation”)<sup>6</sup>. (See Attachments).

In short, implementing this new interpretation of the Public Charge Rule will endanger public health and harm the nation’s healthcare systems and insurance markets. Additionally, multiple federal courts have found it unlikely to have a legal basis and have placed nationwide injunctions preventing DHS from implementing it.<sup>7</sup> Another federal court has placed a nationwide injunction preventing implementation of the Proclamation by your Department.<sup>8</sup> As such, the State Department should withdraw the proposed Form DS-5540.

However, should you move forward to implement a bad public policy that federal courts have determined likely to be unlawful, our comments below highlight the serious deficiencies with the proposed Form DS-5540, beyond the issues with the underlying policy.

### **General Comments**

Public Charge determinations impact immigrant families and their livelihoods. Given the significant consequences of any misunderstandings, forms related to an immigrant’s ability to enter the United States must be clear and unambiguous.

Form DS-5540 repeatedly contains compound sentences in questions or explanations, making it difficult to understand. As proposed, the Form scores 16.0 on the Flesch-Kincaid Grade Level scale – a level not acceptable for most Americans and even less acceptable for people for whom English is a second language. The Department should work with experts on readability and revise the form to an eighth-grade reading level.<sup>9</sup> In addition, prior to implementation, the Department should provide guidance materials, such as frequently asked questions, to accompany the form.

### **Comments on Question 4A, 5, and 11**

#### **Question 4A**

Question 4A inappropriately asks an applicant to specify the health insurance plan and coverage date if an applicant has affirmatively answered beforehand that they will have health insurance within 30 days of their entry into the United States. This question does not reflect how health insurance is currently obtained. Generally, pre-requisites to obtaining health insurance coverage includes qualifying legal

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<sup>4</sup> U.S. Department of Homeland Security. Notice of Proposed Rulemaking. “Inadmissibility on Public Charge Grounds,” 83 Federal Register 51114 (Oct. 10, 2018).

<sup>5</sup> U.S. Department of State. Interim Final Rule. “Inadmissibility on Public Charge Grounds,” 84 Federal Register 54996 (Oct. 11, 2019).

<sup>6</sup> U.S. Department of State. Interim Final Rule. “Inadmissibility on Public Charge Grounds,” 84 Federal Register 58199 (Oct. 30, 2019).

<sup>7</sup> *Supra n. 3.*

<sup>8</sup> *Doe v. Trump*, No. 3:19-CV-1743-SI, 2019 WL 6324560, (D. Or. Nov. 26, 2019)

<sup>9</sup> Eighth grade reading level is a standard for health literacy, Nielsen-Bohlman L, Panzer AM, Kindig DA. Health Literacy: A Prescription to End Confusion. Washington, DC: Institute of Medicine, National Academies Press; 2004

status (a visa) and meeting residency in a particular state or starting a job with health insurance as a benefit. For example, to enroll in individual coverage through an exchange requires that the customer be a citizen, national, or lawfully present at the time they seek coverage.<sup>10</sup> So, a person that is on an active visa at the time of application, and it is “reasonably expected” that their visa will be renewed, meets the requirement. However, a person without a visa completing Form DS-5540 may not meet the “reasonably expected” to be approved for a visa requirement. Additionally, both in and outside exchanges for individual market coverage, a person may only purchase coverage in the service area where they live. Additionally, for job-based coverage, starting the job is a pre-requisite and there still may be a waiting period after the job’s start date. Immigrants may not know definitively what type of coverage they will have or the specific effective date until they enter the United States.

HBX recommends this question be eliminated as the Form already requests attestation to whether the applicant will be covered within 30 days of entry into the United States, which is the requirement under the Proclamation.

#### Question 5

The table included in this question inappropriately asks applicants to list the “current job” of their household members. There is no statutory basis for requiring applicants to list the type of employment their household members have. The information needed for the Public Charge test, in relation to income and assets, is requested in Part 4. Requiring applicants to list job types of their household members is not necessary and opens the door for arbitrary decision making.

#### Question 11

The first sentence is a definition of “public benefit.” While it is helpful to have a definition, as drafted it is one sentence, seven lines long and uses 138 words. It scores 17.0 on the Flesch-Kincaid Grade Level and 14.1 Flesch Reading Ease. The definition sentence is almost incomprehensible. But even if an applicant understands it, the definition is ambiguous. It references technical and programmatic terms like “cash assistance.” It is not clear whether all state, local and tribal programs including ones that are outside the scope of “cash assistance” for Public Charge purposes are included in the definition. Consequently, it is not clear what type of assistance an applicant must list and provide details for. Also, the exception to what types of Medicaid benefits must be included is buried within the lengthy sentence. The exception should be a stand-alone sentence with bullets to make clear what types of Medicaid are excluded from the definition of public benefit.

The Form should specifically identify all public programs that are considered “public benefits” under the Public Charge analysis and have boxes to check if an applicant received any of the benefits listed. The request for agency name, specific date including month, day, and year as well as reason for the benefit is unnecessary detail, is unlikely to be available (e.g. day or exact name of agency), and is not necessary. The request for such details creates a barrier and will discourage people from applying for a visa.

Finally, any applicant who indicates they received a public benefit should also be able to indicate that they received such benefit during a period when they were exempt from the public charge, had a waiver, were serving in the Armed Forces, or were a spouse or child of someone serving in the Armed

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<sup>10</sup> 45 C.F.R. §155.305(a)(1).

Forces.<sup>11</sup> In each of these instances, the benefits they received are excluded from the public charge analysis.<sup>12</sup> Therefore, question 11 should include a request for this information.

### **Conclusion**

HBX strongly opposes the Department's reinterpretation of the Public Charge statute as well as the Proclamation related to visa applicants. Because Form DS-5540's sole purpose is to implement that change, we ask that it be withdrawn in its entirety. Alternatively, if the Department chooses to ignore federal courts that have stopped implementation of the underlying policy and proceeds with Form DC-5540, at a minimum, the Department should make the Form clear, unambiguous, and at a reading level not higher than 8<sup>th</sup> grade. We specifically ask the Department to incorporate the suggested modifications outlined in this letter.

Sincerely,



Mila Kofman  
Executive Director  
DC Health Benefit Exchange Authority

### **ATTACHMENTS:**

- HBX December 10, 2018 comments to DHS Public Charge Notice of Proposed Rulemaking
- HBX October 31, 2019 comments to State Department emergency Information Collection associated with the Proclamation.
- HBX November 12, 2019 comments to State Department Public Charge Interim Final Rule

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<sup>11</sup> 22 C.F.R. §40.41(c)(2) & (3)

<sup>12</sup> *Id.*