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**Public Charge Update:
Review of DOS Implementation
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Webinar Agenda

- Current Status of Implementation
- Review of Foreign Affairs Manual (FAM) guidance on public charge inadmissibility and affidavits of support
- Review of DS-5540, Public Charge Questionnaire
- Client Counseling – Preparing Clients for Upcoming Visa Interviews



Headline News on Implementation of New Public Charge Rules

- DHS New Public Charge Rules: Apply to all applications filed on or after Feb. 24, 2020
- DOS New Public Charge Rules: Apply to all IV and NIV application adjudications on or after Feb. 24, 2020. Date of visa application irrelevant.



Legal Authority

- DHS Public Charge Regulations
8 CFR § 212.20
- DHS Policy Guidance
USCIS Policy Manual, Part G
- DOS Public Charge Regulations
8 CFR § 40.41
- DOS Foreign Affairs Manual provisions
9 FAM 302.8 – Public Charge
9 FAM 601.14 – Affidavit of Support



DOS FAM Guidance: Key Points

- Assessment of totality of circumstances based on (a) five statutory factors at time of visa application;
- (b) visa classification sought and length of anticipated stay;
- (c) affidavit of support when required
- Applicant with inadequate affidavit of support is ineligible under 212(a)(4)



Form DS-5540: Key Points

- Four-page form with questions re:
 - Applicant’s income, assets, liabilities
 - Applicant’s health insurance coverage
 - Household size
 - Applicant’s education and formal job training skills
- Only one form required when family applies together
- Only requests submission of latest tax return or transcript, proof of insurance if applicable



FAM on Initial Implementation

- (U) Informing Applicants of Required Documentation:**
- ...make every effort to inform applicants in advance of the visa interview of supporting documents that will help you resolve a public charge determination. This could include a request that applicants complete and upload the DS-5540 to the CEAC, or bring it with them to the interview. Posts may also request applicants bring with them to the interview supporting financial documents or other documentation post knows would be relevant.
 - ...you must provide applicants an opportunity to provide a completed DS-5540 before you refuse an application under INA 212(a)(4).



Impact of Implementation Without Notice and Preparation

- No prior DS-5540 and document submission →
- Longer visa interviews
 - Further backlog for visa appointments
 - No accountability for basis of visa refusals
 - More hardships for visa applicants with delayed adjudications
 - Probable growth in visa refusals



A Close Look at the FAM and DS-5540: Age

- 18-61 = **positive** factor
- Under 18 = **negative** if:
 - not accompanied by/following to join parent
 - not financially self-sufficient
- Over 61 = **negative** if age adversely affects:
 - ability to work
 - increases potential for healthcare-related costs
- DS-5540 only asks date of birth
- Possible documentation: health, employment, income, resources

A Close Look at the FAM and DS-5540: Household Size

- DS-5540: “expected” members of household in U.S.
- Whether positive vs. negative factor linked to income
- Household size measured differently for sponsor
- FAM: only count family members
 - “physically residing” in U.S. with applicant, AND
 - children if provides 50% of their support
 - spouse if provides 50% of support
 - dependents listed on tax return
 - parents if provide 50% of applicant’s support or list as dependent
 - siblings, half-siblings, stepsiblings if parent provides 50% of support

A Close Look at the FAM and DS-5540: Income

- Household income, assets \geq 125% FPG = **positive**
- Household income, assets $<$ 125% FPG = **negative**
- Household income, assets \geq 250% FPG = **heavily weighted positive**
- EAD, employed, income \geq 250% FPG = **heavily weighted positive**
- EAD, no job, no history, no prospects = **heavily weighted negative**

A Close Look at the FAM and DS-5540: Income

- DS-5540: current yearly compensation
- FAM: income after admission to the U.S.
- Current job? job offer?
- Other income regularly receive?
- Documentation: tax transcripts, proof of non-taxable income, wage receipts, employer's letter



A Close Look at the FAM and DS-5540: Assets and Liabilities

- If annual gross household income < 125%, consider assets
- Five times shortfall in income
- Three times if USC spouse or child age 18-21
- Same assets as DHS: cash, stocks, bonds, real estate
- DS-5540: drop-down menu for asset, location, value
- DS-5540: drop-down menu for liabilities
- Documentation: 12 mos. bank statements, portfolio, real estate value



A Close Look at the FAM and DS-5540: Receipt of Public Benefits

- Receipt of SSI, TANF, state GA before 2/24/20
- Receipt of nine designated programs after 2/23/20
- Receipt of any of nine for > 12 mos. w/in 36-month period = **heavily weighted negative** factor
- Only applicant's receipt, not other family members
- DS-5540: list request for or receipt of any benefit after 2/23/20
- Likely to receive in the future in the U.S.?
- Documentation: Not eligible for public benefits



A Close Look at the FAM and DS-5540: Health

- Health condition → inability to work, go to school, care for self?
- Class A certification
- Class B certification
- Physician’s report and prognosis indicate:
 - hinders ability to maintain employment = **negative**
 - likelihood will result in future medical expenses = **negative**
 - likelihood will result in institutionalization = **negative**
- Health insurance, ability to cover medical costs = **positive**
- Possible documentation: health insurance, resources, own dr.’s report



A Close Look at the FAM and DS-5540: Health Insurance

- DS-5540: do you have health insurance coverage in U.S.?
- Covered w/in 30 days of entry?
- Private health insurance = **heavily weighted positive**
- Medical condition, no health insurance, no resources = **heavily weighted negative**
- No distinction between types of health insurance
- Documentation: health insurance policy, proof of future enrollment



A Close Look at the FAM and DS-5540: Education and Skills

- Adequate education and skills to obtain/maintain job
- FAM: job history, skills, language proficiency, job offers
- DS-5540: graduated high school, occupational skills?
- DS-5540: list certifications and licenses
- DS-5540: nothing about English language proficiency
- I-130, DS-260: applicant’s employment history
- Documentation: proof of skills, diplomas, school enrollment, job offers



A Closer Look at the FAM: Affidavit of Support

- Applicant who fails to submit a required, sufficient I-864 is inadmissible
- One factor in the totality of the circumstances analysis, not outcome determinative
- Properly filed, facially sufficient, non-fraudulent I-864 is a **positive factor**
 - if officer believes that the sponsor is likely to provide the required amount of financial support, if needed
- **Negative factor** if the sponsor has failed to reimburse a government entity that provided a previously sponsored immigrant a means-tested benefit

I-864W Eliminated

- **Form I-864W Eliminated:** A Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support, is no longer required of any visa applicants. The Form I-864W was previously required of the following categories of applicants: those who will acquire citizenship upon admission to the United States; applicants who can demonstrate 40 qualifying quarters of SSA coverage; self-petitioning widows or widowers, or the abused spouse, parent, or child of a U.S. citizen, the abused spouse or child of an abused spouse or child of a U.S. citizen or lawful permanent resident who have an approved Form I-360. Instead of requiring the applicant to submit a Form I-864W, you should enter a case note indicating that the applicant is not required to submit an affidavit of support. Applicants exempt from the affidavit of support requirement due to 40 qualifying quarters of coverage under the Act must submit an earnings and benefits statement from the SSA.

Review: Positive Factors

- Age 18-62
- **Total income > 250%**
- **EAD, income > 250%**
- Income > 125%
- **Private health insurance**
- Resources to cover medical costs
- Not benefits eligible

Review: Negative Factors

- Age < 18 or > 61
- Health condition affects job, school, care for self
- Health condition and no insurance, resources
- Total income < 125%
- Receipt of 9 benefit programs after 2/23/20 for > 12 mos. w/in 36-mth period
- EAD, no job, no job history, no prospects
- Prior inadmissible on public charge



Visa Refusal: 221(g) vs. 212(a)(4)

- **221(g): More information needed to decide the case.** Applicant has one-year period to submit additional documents or information.
- **212(a)(4): Finding of inadmissibility for public charge.** Can seek to overcome with new information and documents BUT inadmissibility finding triggers revocation of provisional waiver approval



FAM on Visa Refusal: 221(g) vs. 212(a)(4)

- Ideally, you should be in a position to assess whether applicants are ineligible for visas under INA 212(a)(4) at the end of the initial visa interview, assuming that the applicant has made reasonable efforts to submit the evidence originally requested
- Applicants who you determine are more likely than not to become a public charge at any time after admission even after the presentation of additional evidence, should be refused under INA 212(a)(4) instead of INA 221(g)



DOS Guidance = USCIS Guidance? Not Exactly

- DHS Guidance differs on:
 - Household definition
 - Credit report requirement
 - Treatment of primary caretaker status
 - More designated positive and negative factors
 - More required documentation to accompany applicant form

FAM Guidance and DS-5540

Public Charge Assessment Factor	FAM	DS-5540
Household Income (in addition to applicant)	Yes	No Question
Household Assets (in addition to applicant)	Yes	No Question
Proof of Ineligibility for Public Benefits	Yes	No Question
Future Employment generally	Yes	No Question except for actual job offer
Primary Caregiver	Yes	No Question
Employment Skills generally	Yes	Question only re certificates
Language Proficiency	Yes	No Question

DOS and Public Charge Bonds

- Should be used sparingly
- In rare cases where bond is being considered, officer must consult with Visa Office or a higher authority
- Filing of a bond would not serve any purpose if the needs of the applicant would easily overcome the value of the bond

Public Charge and Nonimmigrants

- Subject to less scrutiny than immigrants
 - Determination that applicant qualifies for NIV is generally sufficient, absent evidence of a public charge concern
- Prior public charge inadmissibility is a **heavily weighted negative** factor
- Officer may request specific financial evidence, DS-5540, or surety bond
- K applicants may be asked to complete a DS-5540
 - If visa is granted, must submit I-864 at adjustment stage



Getting Practical: How Can I Assist My Client Who Has an Upcoming Consular Interview?

Your client Emma, in Buenos Aires, is the parent of USC Eduardo, and she has her IV consular interview scheduled for next Monday. Emma is 61 years old and recently retired from her part-time job working at a library. She does not have a pension. Her health is good but she has no plans to work in the United States. She plans to live with her son and his wife Emma, and take care of her two-year-old grandson while his parents work. Eduardo makes \$50,000 per year, and his wife will be looking for a teaching job after Emma immigrates. Emma has not been contacted by the consulate to bring any new documents or information.



Getting Practical: How Can I Assist My Client Who Has an Upcoming Consular Interview?

Your client Graciela is the spouse of USC Arturo and she is traveling to CDJ in three weeks for her consular interview. She has a provisional waiver approval and doesn't want to postpone her interview because she's been waiting so long for her appointment. She is a homemaker caring for her two children, ages 3 and 6. Arturo makes \$40,000/year and they do not have a joint sponsor. Before her children were born, Graciela worked at a factory with a fake EAD.



Looking Ahead: Counseling My Clients Who Won't Have a Consular Interview for Months

Lupe, from El Salvador, has TPS and will likely have a current priority date in the F-2B category within the next few months. Her petitioner father is married with two minor children and makes \$40,000/year, just over the FPG for a household of 5. Lupe has been steadily employed for the past five years as a teachers' aide and makes \$35,000 year. She has three minor USC children and she is in good health. She also receives sporadic child support from the father of her children. She does not have health insurance but the children are covered by a state-funded health program?

Best Practices

- For upcoming consular interviews, be proactive
- Submit DS-5540, supporting documents, cover letter
- Consider doing mock interview and have client practice answering public charge questions and submitting new documents to consular officer
- Counsel clients with I-601A approvals about enhanced risks re public charge inadmissibility
- Visit CLINIC's public charge resources page: <https://cliniclegal.org/issues/public-charge>

Advocacy

- Join our public charge listserv by emailing advocacy@cliniclegal.org
- If you are a CLINIC affiliate and have questions that are not answered by the regulation or guidance and need clarification from USCIS, send them to advocacy@cliniclegal.org
- NOTE: Non-affiliates can send questions to CLINIC through the public charge listserv



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