



Health Insurance and Public Charge

Under new Department of Homeland Security (DHS) and Department of State (DOS) regulations, having health insurance is a positive factor in determining whether an adjustment of status or immigrant visa applicant is likely to become a public charge. Health insurance is viewed as directly related to an intending immigrant's assets, resources and financial status and whether he or she can cover the costs of reasonably foreseeable medical expenses. This resource reviews the types of health insurance that may be available to intending immigrants, how each type of insurance is viewed by DHS and DOS, and the types of documentation that must be submitted to show enrollment or future enrollment in a health insurance policy.

Overview of Agency Guidance Regarding Health Insurance

Both DHS and DOS view private insurance as a heavily weighted positive factor, however the term "private insurance" is not defined by either agency. USCIS views other "non-private" types of insurance as positive factors rather than heavily weighted positive factors, while DOS is silent on whether anything apart from private insurance carries positive weight. The weight that USCIS has assigned to insurance programs lacks internal consistency and the agency does not clarify its reasoning. Rather than attempt to explain the agency's classifications, they are simply provided below. USCIS assigns the following weight to these types of insurance policies:

Heavily weighted positive factor:

- Private health insurance provided by an employer;
- Private health insurance purchased outside the Health Insurance Marketplace and Affordable Care Act (ACA);
- Private insurance purchased through the ACA that is not subsidized;
- State-only subsidized health insurance, including state-based exchange;¹
- Foreign subsidized health insurance;² and
- Medicare.³

¹ It is unclear why state-subsidized health insurance would be a heavily weighted positive factor when ACA-subsidized insurance or Medicaid within the exceptions is only a positive factor.

² The agency does not explain what type of foreign subsidized health insurance would be acceptable or why it would be considered as a heavily weighted positive factor.

³ USCIS Policy Manual, Vol. 8, Part G, ch. 9(A)(4).

Positive factor:

- Medicaid for children under 21, pregnant women (including 60 days after delivery), or the disabled;⁴
- Child Health Insurance Program (CHIP);⁵ and
- Insurance purchased through the ACA that is subsidized.⁶

Volume 8, Part G, ch. 9 of the USCIS Policy Manual provides guidance on how USCIS implements the final public charge rule. The guidance notes that not all health insurance plans provide for adequate coverage and instructs officers to “generally consider whether a plan meets the requirements under the Affordable Care Act in limiting cost-sharing, including deductible, copayments, and out of pocket maximum amounts.”⁷ According to USCIS, a health insurance plan with a high deductible would carry less positive weight in the totality of the circumstances.

Under the Policy Manual guidance, plans that “only provide for vision and dental care; specific diseases or conditions; and discounts on medical services are generally not considered adequate coverage, and would likely carry little positive weight.”⁸ Other plans that are not considered “minimal essential coverage” under the ACA include discount plans, limited-benefit plans, critical illness plans, and accident supplements.⁹

The DOS guidance at 9 FAM 302.8 is less detailed and does not instruct officers to consider whether an insurance plan is ACA compliant. Form DS-5540, Public Charge Questionnaire, asks applicants who are consular processing to indicate whether they will have health insurance coverage within 30 days of entry into the United States. This question corresponds to the Presidential Proclamation Requiring Immigrants to Have Health Insurance,¹⁰ which is currently enjoined.¹¹

⁴ *Id.* This is listed as both a heavily weighted positive factor and a mere positive factor.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 26 CFR § 1.36B-2(5)(c); see *Minimum Essential Health Coverage*, www.healthcare.gov/fees/plans-that-count-as-coverage/

¹⁰ Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System (Oct. 4, 2019), www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/.

¹¹ Order denying government’s request for a stay pending appeal of the district court’s preliminary injunction, *Doe v. Trump*, No. 19-36020 (9th Cir. May 4, 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/04/19-36020.pdf>.

Employment-Based Health Insurance

Employment-based health insurance is considered a heavily weighted positive factor by both DHS and DOS. Employment-based insurance may be available regardless of immigration status. However, undocumented immigrants often work in industries where employment-based insurance is not offered or is unaffordable.¹² New employees who hope to purchase insurance through their employer often have to complete a probationary period before they may enroll in health insurance. This means that intending immigrants who have never lived in the United States may have difficulty obtaining insurance through a new employer within 30 days of their entry into the country. Those without access through their own employer may be eligible through a parent or spouse's employer, if they are included on the plan as a dependent.¹³ A child can remain a dependent on their parent's health insurance plan until the age of 26.

Private Health Insurance Purchased Outside the Exchange

Both USCIS and DOS view private health insurance purchased outside the exchange as a heavily weighted positive factor. Individuals may purchase private health insurance coverage directly from an insurance provider regardless of immigration status. Proof of lawful immigration status is not required for enrollment. However, the high cost of these plans may make this option inaccessible to many.¹⁴

Note that insurance coverage can only be purchased for someone who resides in the United States, and an insurance provider may be unwilling to guarantee a date of coverage before the insurance plan is purchased. Those who reside abroad and will consular process could obtain an online quote from an insurance provider to help demonstrate their ability to obtain coverage within 30 days of their entry. To compare available plans and obtain a quote directly from an insurance provider, one would visit the provider's website and enter information regarding the zip code of the city where the applicant intends to reside, his or her age, whether the coverage will include other family members, and the applicant's household income.

¹² Samantha Artiga & Maria Diaz, Kaiser Family Foundation, *Health Coverage and Care of Undocumented Immigrants*, (July 15, 2019), www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants/.

¹³ U.S. Department of Labor, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Businesses and Families*, www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/young-adult-and-aca.

¹⁴ *Id.*

Private Health Insurance Purchased Within the Exchange

Both DHS and DOS view private insurance purchased within the exchange without subsidy as a heavily weighted positive factor. If the insurance was subsidized, meaning the purchaser will receive premium tax credits or benefit from another cost saving plan, it is viewed as merely a positive factor.

The federal and state health insurance exchanges, also referred to as marketplaces, are platforms that allow individuals to compare numerous health insurance plans and purchase coverage from a private insurer. To be eligible to purchase insurance through the exchange, an individual must reside in the United States and be considered “lawfully present” for purposes of the ACA.¹⁵ Applicants for adjustment of status are considered lawfully present and may purchase insurance through the marketplace as long as they have a pending Form I-485. Those who are applying for an immigrant visa abroad would not be eligible to access the exchange until they are admitted as lawful permanent residents (LPRs) and are residing in the United States.

Some noncitizens are eligible to use the health insurance exchanges prior to becoming an LPR or filing for adjustment of status. This includes recipients and applicants (with work authorization) for Temporary Protected Status (TPS) and Deferred Enforced Departure (DED), as well as those who have been paroled into the United States. Other types of immigration status are considered lawfully present for purposes of the ACA. They are not subject, however, to the public charge ground of inadmissibility. For example, asylees, refugees, Violence Against Women Act (VAWA) self-petitioners, T and U nonimmigrants, and those granted Special Immigrant Juvenile Status (SIJS) may access the exchange and are not subject to public charge inadmissibility. Deferred Action for Childhood Arrivals (DACA) recipients are not eligible to access the exchange. Applicants for enrollment in insurance through the ACA marketplace may be asked for a Social Security Number (SSN) for income verification purposes, although an SSN is not specifically required to submit the application.¹⁶ However, proof of a lawfully present immigration status is required. For more information on who is considered “lawfully present,” see the National Immigration Law Center’s (NILC) “Lawfully Present” Individuals Under the Affordable Care Act.¹⁷

Under the ACA, subsidies are available to reduce monthly premiums and out of pocket costs. One type of subsidy, the premium tax credit, reduces monthly payments for insurance plans purchased through the marketplace. Lawfully present noncitizens are eligible for a premium tax credit if their household income is under 400 percent of the Federal Poverty Guidelines (FPG) and they meet other

¹⁵ 42 USC § 18032(f)(1)(A)(ii); 45 CFR § 155.2; see generally, National Immigration Law Center, “Lawfully Present” Individuals Under the Affordable Care Act (July 2016), www.nilc.org/wp-content/uploads/2015/10/lawfully-present-imm-categories-ACA-2016-07.pdf.

¹⁶ 45 CFR § 155.305(f)(6); National Immigration Law Center, *Frequently Asked Questions: The Affordable Care Act and Mixed Status Families* (Dec. 2014), www.nilc.org/issues/health-care/aca-mixedstatusfams/.

¹⁷ National Immigration Law Center, “Lawfully Present” Individuals Under the Affordable Care Act (July 2016), www.nilc.org/wp-content/uploads/2015/10/lawfully-present-imm-categories-ACA-2016-07.pdf.

requirements.¹⁸ The taxpayer or at least one family member must be lawfully present and must not have access to affordable coverage through other sources, such as an employer or Medicaid.¹⁹ When calculating eligibility for subsidies, family members who are not lawfully present are excluded from the household size.²⁰ According to USCIS guidance, insurance purchased with a subsidy is a positive factor, but not a heavily weighted positive factor.

Applicants can view and compare available plans through their state's healthcare exchange or, if the state does not have its own exchange, through the Federal exchange, www.healthcare.gov. Cost and availability of plans will vary depending on the applicant's zip code, age, household income, and whether coverage is being purchased for other household members. Without entering specific information, it is possible to view estimates for full-priced plans. For example, a 35-year-old living in the Houston area can expect to pay \$246 for individual coverage with the lowest monthly premium without subsidy. Note that plans with the lowest premiums often have higher out-of-pocket costs.

Example: Sandra is a 50-year-old woman living in Oakland, CA, and seeking individual health insurance. She is undocumented but has applied for adjustment of status and is now eligible to buy insurance through the ACA marketplace. She lives with her U.S. citizen spouse and son, who are covered through Medicaid, and a daughter who is undocumented. Their household income is \$70,000 for a household of three, since the undocumented daughter is not counted in the household size. Sandra expects medium use of doctor's visits and prescriptions.²¹ For 2020, Covered California offers a health insurance plan for an estimated monthly premium of \$283.23 after subsidies. If the other facts remain the same but Sandra's household income is \$50,000, the plan with the lowest estimated monthly premium costs \$82.48 after subsidies. If Sandra's household income is \$50,000 for a household of three but she lives in Los Angeles, the plan with the lowest estimated premium costs \$178.49, after subsidies.

Anyone who purchased insurance through the exchange should receive Form 1095-A for tax filing purposes. Those who purchased insurance with a premium tax credit should have filed Form 8962 with the IRS when filing their tax return. Undocumented immigrants who do not have an adjustment application pending are not eligible to buy marketplace health coverage, nor are they eligible for premium tax credits. However, they may apply for coverage on behalf of lawfully present family members and may claim the tax credit or subsidy for an eligible family member.²²

¹⁸ 45 C.F.R. § 155.305(f)(2).

¹⁹ *Id.*; 26 C.F.R. § 1.36B-2(b)(5); Kaiser Family Foundation, *Explaining Health care Reform: Questions About Insurance Subsidies* (Jan. 16, 2020), www.kff.org/health-reform/issue-brief/explaining-health-care-reform-questions-about-health/.

²⁰ 26 C.F.R. § 1.36B-3(l)(1)

²¹ Covered California describes medium health service use as "4-5 doctor visits, lab tests and one or more small treatments done in a doctor's office: often the care is for an ongoing health problem." Medium prescription drug use is described as "1-2 prescriptions each month for a health problem."

²² 26 CFR § 1.36B-2(b)(4).

Public Health Insurance that is Not Considered a “Public Benefit”

The USCIS Policy Manual lists Medicare, Medicaid for children under 21 and pregnant women (and women for up to 60 days after giving birth); CHIP, and state-only subsidized health care as “private health insurance,” though these programs are provided through federal and state funding.²³

Elsewhere in the Policy Manual, these same programs are listed as merely positive factors. Despite internal inconsistencies in the guidance, it is clear that these programs are not considered a public benefit for purposes of a public charge inadmissibility determination. USCIS considers these types of insurance as positive factors, not heavily weighted positive factors.

The definition of an immigrant who is “qualified” to receive federal benefits is a subset of the broader “lawfully present” definition that is used for purposes of ACA eligibility. Most applicants for permanent residency, including those who are undocumented and many who have lawful status, are not considered “qualified” under 8 USC § 1641 and will be unable to access the federal programs that are considered a “public benefit” under the final DHS rule. However, some states provide healthcare access to children and pregnant women through Medicaid, CHIP and/or state-only subsidized programs. See NILC’s [resources](#) for a more detailed review of federal and state programs and eligibility for immigrants.

Six states and the District of Columbia use state-only funds to provide Medicaid coverage to income-eligible children and pregnant women regardless of immigration status.²⁴ Per the USCIS guidance, “a state medical insurance program, funded exclusively by the state, is not included in the definition of public benefit. For example, if Medi-Cal services are provided by a state only authority at no expense to the federal government, then it is not considered a public benefit for purposes of a public charge inadmissibility determination.” Adjustment applicants are not required to list receipt of a state-only funded health insurance program on Form I-944. Some state programs may use the same name as the federal Medicaid program, so practitioners should check to confirm whether the benefit received includes any federal funding. However, if Medicaid is listed on the Form I-944 as a received public benefit, it is the applicant’s burden to provide information and documentation that the health insurance is state funded only. USCIS will assume that any Medicaid identified on the Form I-944 is federally funded Medicaid.

Example: Romel is undocumented and resides in California. He will apply to adjust status once his priority date is current in the F-2B category. Romel receives state-only funded, non-emergency Medi-Cal. If he continues to receive Medi-Cal coverage when he applies for adjustment of status, he should indicate on Form I-944, question 15, that he currently has health insurance. For question 16, he can indicate that he has never received federally funded Medicaid.

²³ USCIS, Policy Manual, Vol. 8, Part G, ch. 9(A)(4).

²⁴ Artiga & Diaz, *supra*.

Foreign Health Insurance

The USCIS Policy Manual instructs officers to consider foreign health insurance, or health insurance subsidized by a foreign government, a heavily weighted positive factor. The FAM guidance does not specifically refer to foreign health insurance, but includes any private health insurance for use in the United States as a heavily weighted positive factor. For DOS, the coverage must be available for the duration of residency in the United States to be considered as a heavily weighted positive factor.

Health insurance provided by foreign governments can vary, and may not cover health care costs incurred in the United States, since providers here may not accept such coverage.²⁵ The USCIS and DOS guidance does not indicate whether officers should consider this in their analysis. Note that travel insurance or short-term policies may not carry much weight since they are not ACA compliant nor do they provide coverage for the duration of residency in the United States.

Enrolling in Health Insurance

Individuals can purchase health insurance, directly from insurance carriers or through the exchanges, during the open enrollment period each year. After open enrollment ends, individuals may only purchase insurance during a special enrollment period if they have a qualifying life event such as a marriage, the birth of a child, moving to a new state, or moving to the United States. Applying for adjustment of status or gaining a new immigration status that makes one eligible for the ACA marketplace is also a special qualifying event. Anyone seeking coverage during a special enrollment period must provide proof of his or her qualifying life event. The marketplace also provides special enrollment periods for complex issues that may have prevented the individual from previously enrolling. Those issues include, but are not limited to, unexpected hospitalization, natural disaster, and being determined ineligible for Medicaid or CHIP. More information is available at www.healthcare.gov.

Documenting Insurance Coverage

DHS Guidance:

The USCIS Policy Manual Vol. 8 Part G and the Form I-944 Instructions address the documents that must be submitted to establish health insurance coverage.

²⁵ Centers for Medicare & Medicaid Services, *Foreign Insurance Coverage Fast Facts for Assistants*, marketplace.cms.gov/technical-assistance-resources/foreign-insurance-coverage.pdf.

For each health care coverage policy, a copy of each policy page showing:

- The terms and type of coverage and persons covered; and
- Annual amount of deductible or annual premium of the health insurance including documentation of the amount of deductible or premium; or
- Letter on the company letterhead or other evidence from the health insurance; or
- Most recent Form 1098-B, Health Coverage (provided by the insurance provider); Form 1095-C, Employer Provided Health Insurance Offer and Coverage (provided by an employer and only demonstrates that an employer offered insurance) with evidence of renewal of coverage for the current year.

A summary of benefits statement should show the type of coverage, persons covered, and the annual deductible or premium amount. This can be requested from the insurance provider. A health insurance card without evidence of the effective and expiration dates is insufficient proof.

Form I-944 Instructions and the USCIS Policy Manual direct noncitizens who do not have health insurance but will soon be enrolled to provide a “letter or other evidence [that] must include the terms, the type of coverage, that the alien is the person covered, and the date when the coverage begins.” Such a letter might come from the insurance provider, an employer, or future employer describing eligibility for enrollment, when enrollment can begin, and information about the plan.

Applicants should also include documentation that may outweigh any negative factors related to a medical condition, including but not limited to information provided by a civil surgeon or a panel physician after a medical examination or an attestation from a treating physician regarding the prognosis of any medical condition and whether it impacts the ability of the applicant to provide and care for himself or herself, to attend school, or to work.

Example: Carla is preparing to apply for adjustment of status. She has a history of heart disease and wants to be added to her spouse’s employment-based insurance. Open enrollment has ended for this year, but once she files for adjustment her receipt notice will serve as proof that she is eligible for special enrollment. At her adjustment interview she can amend her I-944 to indicate that she now has health insurance. Her proof of insurance will include a summary of benefits statement provided by her insurer. The statement confirms her enrollment in the plan, the date when her coverage must be renewed, and the annual premium. She will also include a letter from her doctor explaining that her condition is being treated, is under control, and should not interfere with her ability to work or to care for herself. Her employer will write a letter explaining that she performs well at work and has excellent attendance.

DOS Guidance:

Applicants who reside in the United States but will travel abroad to consular process may already have health insurance or be able to obtain health insurance before they depart. Unlike the USCIS

guidance, the FAM does not describe specific types of supporting documentation that should be included to prove current or future health insurance coverage. Those who are insured should include a summary of benefits and coverage or other evidence described above.

The DS-5540, Public Charge Questionnaire, instructs applicants who indicate that they will have health insurance in the United States within 30 days of entry to identify the specific health coverage plan and the date coverage will begin. Those who reside abroad will be unable to enroll in insurance before they immigrate. To enroll in a plan through the ACA marketplace, an employer, or an insurance provider, the person seeking coverage must reside in the United States and purchase the coverage during an open enrollment or special enrollment period. However, it is possible to obtain a quote for an insurance plan online and then complete enrollment within 30 days of arrival. As described above, the process for obtaining a quote does not include questions regarding immigration status. Applicants must provide, however, a U.S. zip code where they intend to reside.

Example: U.S. citizen Megan filed an I-130 for her spouse Harry, who resides in the United Kingdom. Megan purchased health insurance through the exchange. She will not be able to add Harry to her plan, however, until after he immigrates and resides in the United States. For his consular interview, Harry will bring proof of Megan's insurance, a printout from the exchange describing the plan he intends to enroll in and the estimated monthly premium, and a print out from the exchange showing that lawful permanent residents are eligible to purchase insurance through the exchange.

What if Megan has health insurance through her employer? Can she add Harry to her insurance prior to his consular interview? No, he won't be able to enroll in health insurance until he resides in the United States. For his consular interview, Harry will bring proof of Megan's insurance and a letter from her employer that states he can be added to Megan's insurance plan as soon as he has immigrated. He will also bring proof of the cost of the monthly premium for Megan and Harry.

Practice Tips

1. **Help clients understand their health insurance options.** Changes to the public charge rules have created a chilling effect among many immigrants who are concerned that use of state subsidized benefits or the health insurance exchanges will be considered a negative factor. State-only funded health programs and health insurance through the federal or state exchanges are positive factors in the public charge analysis.
2. **Filing for adjustment of status can improve an undocumented person's access to health insurance.** First, applicants for adjustment of status are considered lawfully present for purposes of the ACA. If your client is applying for adjustment, he or she may purchase health insurance from the marketplace and include the I-485 receipt notice as proof of eligibility. Second, applying for adjustment of status makes one eligible to receive an employment authorization document, which in turn may improve a person's ability to obtain employment

that provides health insurance. Changes in circumstances – such as new health insurance coverage – and any other additions and corrections to the I-944 can be reported at the time of the adjustment interview.

3. **Intending immigrants who have not resided in the United States will likely be unable to obtain health insurance until they have immigrated. Help clients demonstrate that they will be able to purchase insurance once they have immigrated.** Strategies might include:
 - 1) obtaining a quote for a plan from the exchange, an employer, or directly from an insurance provider, and submitting that along with proof that the applicant can afford the premiums; and
 - 2) preparing a letter and supporting evidence to show that lawful permanent residents are eligible to purchase insurance in the exchange. Subsidized insurance purchased within the exchange is a positive factor.