

October 31, 2019

The Honorable Mike Pompeo
Secretary of State
U.S. Department of State
600 19th Street NW
Washington, DC 20006

Re: Visas: Ineligibility Based on Public Charge Grounds [DOS–2019–0035 and/or RIN: 1400–AE87] and 60-Day Notice of Proposed Information Collection: Public Charge Questionnaire “Docket Number: DOS–2019–0037” and Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage “Docket Number: DOS–2019–0039”

Dear Secretary Pompeo:

On behalf of the physician and medical student members of the American Medical Association (AMA), I am writing to provide comments to the U.S. Department of State (DoS) in response to the Interim Final Rule on “Visas: Ineligibility Based on Public Charge Grounds” (interim final rule), the 60-Day Notice of Proposed Information Collection: Public Charge Questionnaire, and the Notice of Information Collection regarding immigrant health insurance coverage. We are deeply concerned about the interim rule’s negative impact on individuals and families who are seeking visas to enter the U.S to access health care services. The AMA strongly opposes any proposed rule, regulation, or policy that would deter immigrants/nonimmigrants seeking visas and/or their dependents from utilizing non-cash public benefits such as, but not limited to, Medicaid, Supplemental Nutrition Assistance Program (SNAP), and housing assistance. Impeding access to non-cash public benefits for these individuals and families could undermine population health in general, and thus we strongly urge the DoS to rescind the interim final rule. With regards to the public charge questionnaire, we believe that the proposed collection of information is not necessary for the proper function of the DoS and will have a negative impact on the health and well-being of individuals and families who are seeking visas. The AMA also opposes the collection of information on health insurance status as proposed in the emergency submission comment as well as the underlying Presidential Proclamation that is the basis for the collection of information.

VISAS: INELIGIBILITY BASED ON PUBLIC CHARGE GROUNDS

Public Charge Definition

The AMA strongly opposes the change in the definition of public charge. In previous guidance issued by the DoS and in effect since May 1999, the federal government defined public charge for purposes of admission/adjustment as “an alien who is likely to become primarily dependent on the U.S. government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.” The interim final rule substantially broadens the definition of public charge as an alien who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period. It is our understanding that this definition

would mean, for instance, that receipt of two benefits in one month counts as two months' worth of benefits.

The interim final rule is more than a technical change to U.S. immigration/visa policy, it is a dramatic shift. When coupled with an additional list of heavily weighted positive/negative factors immigration officials may consider in determining visa ineligibility, we believe the proposed change in the definition of public charge will further exacerbate the negative impacts on population health resulting from the U.S. Department of Homeland Security's (DHS) final rule on Inadmissibility on Public Charge Grounds.¹

Public Benefit Definition

The DoS seeks to align its public benefit definition with the definition in the DHS final rule to include for the first-time non-emergency Medicaid, SNAP, and public housing and rental assistance programs. It is our understanding that the DoS in its interim final rule proposes to allow consular officers to deny visa applications to applicants if the officer determines that the applicant "could become at any time a public charge" under the expanded definition. We believe these proposed changes will negatively impact population health.

Consideration of Additional Negative Factors and the Totality of the Circumstances Test

It is our understanding that under the DoS interim final rule, consular officers will use a "more likely than not" standard and take into account the totality of a foreign national's circumstances at the time of a visa application when considering the likelihood of the individual's becoming a public charge. At a minimum, the factors would include the alien's: age; health; family status; assets, resources, and financial status; and education and skills.

- *Age:* A consular officer will consider 18 to 62 years of age as a positive factor; under age 18 and over age 62 will be considered a negative factor.
- *Health:* A consular officer will consider whether the individual has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with his/her ability to work/attend school as a negative. The new provision adds that consular officers will consider the report of a medical examination performed by the panel physician where such examination is required, including any medical conditions noted by the panel physician.
- *Assets, Resources, and Financial Status:* A consular officer will consider in evaluating whether the individual's assets, resources, and financial status make him/her likely to become a public charge. The officer will review whether the individual has applied for, been certified to receive or approved to receive, or received, one or more public benefits on or after October 15, 2019, or whether the alien has disenrolled or requested to be disenrolled from such benefits; whether the alien has received an immigration benefit fee waiver from DHS on or after the interim final rule's

¹ On Oct. 11, 2019, judges before the U.S. District Courts for the Southern District of New York, Northern District of California, Eastern District of Washington, Northern District of Illinois, and District of Maryland ordered that DHS cannot implement and enforce the final rule on the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act. The court orders also postpone the effective date of the final rule until there is final resolution in the cases. Most of the injunctions are nationwide and prevent USCIS from implementing the rule anywhere in the United States. <https://www.uscis.gov/greencard/public-charge>.

effective date; and whether the applicant has private health insurance or other financial resources sufficient to pay for reasonably foreseeable medical costs.

- *Prospective Visa Classification:* The interim final rule adds consideration of the individual's prospective visa classification. Specifically, the DoS states in its interim final rule that "the visa classification, including the purpose and duration of travel, are relevant to assessing the likelihood that an alien 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." The DoS goes on to provide the following example, "An applicant with a serious chronic health condition seeking medical treatment in the United States on a tourist visa would be expected to establish that he or she has the means and intent to pay for all reasonably foreseeable treatment. By demonstrating the ability to cover the medical expenses anticipated on a short-term trip to the United States, the applicant can demonstrate that even though health presents as a negative factor, the applicant has financial resources that make it unlikely the applicant would avail himself or herself of one or more public benefits."

The AMA strongly opposes the expansion of health-related factors that consular officers, with no substantial health care training, must consider in determining visa eligibility. The interim final rule places consular officers in the precarious position of making a visa determination based on a forward-looking, more expansive public charge test; even if a person is not currently or has not previously used a public benefit (which may be the case in visa applicants applying overseas), this means that an officer must subjectively assess the likelihood of future use by the individual on a case-by-case basis. Many families are considered mixed-status families, meaning the family includes members with different immigration statuses and/or visas and it is our firm belief that this expanded public charge test will continue to foster and increase toxic stress, confusion, and fear within families that could be torn apart due to the subjective determination of consular officials. According to one survey conducted prior to the DHS final rule, one in seven adults in immigrant families reported avoiding public benefit programs for fear of risking future green card status, and more than one in five adults in low-income immigrant families reported this fear.² We believe the DoS interim final rule, like the DHS final rule, will continue to have a chilling effect on immigrant families and be utilized to deter these individuals and families from applying for visas.

New Requirements for Nonimmigrants and the Impact on J-1 and H-1B Visa Physicians

It is our understanding that nonimmigrants applying for a visa will also be subject to the new public charge standard under the interim final rule. As part of the application process, nonimmigrants, such as physicians on J-1 and H-1B visas, will need to demonstrate they are not using or receiving, nor are likely to use or receive, public benefits such as the medical and nutritional services described in the interim final rule. Additionally, it is our understanding that physicians on J-1 and H-1B visas would also be subject to the new expanded "Totality of the Circumstances Test" factors which would include English language proficiency and negative health factors such as being diagnosed with a medical condition that requires extensive medical treatment. As a result, the AMA's International Medical Graduate (IMG) members would be directly impacted by the interim final rule. In 2016, 897,783 physicians were practicing in the U.S., 206,030 (23 percent) of whom did not graduate from a U.S. or Canadian medical school. Also, in 2016, 30,000 IMG residents were in U.S.-based residency training programs. Additionally, 36 percent of all practicing internists (i.e., primary care) were IMGs, (i.e., foreign-trained physicians) in 2016.

² <https://www.urban.org/research/publication/one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018>.

Once accepted into a residency program via the match process, physicians who are foreign nationals must obtain a visa that permits participation in U.S. medical training. Foreign-born medical school graduates commonly apply for a J-1 visa through the U.S. Exchange Visitor Program, which allows the Educational Commission for Foreign Medical Graduates (ECFMG) to sponsor visas for physicians participating in clinical training programs. However, the amount of time clinical trainees can stay in the U.S. through the ECFMG is limited generally to seven years, which is the time typically required to complete a residency program and a subsequent fellowship for sub-specialty training. After completing their residency, J-1 visa holders must generally return to their home countries for two years before they can return to the U.S., often on an H-1B (temporary highly skilled nonimmigrant) or L-1 (intracompany transferee) visa. International residency or fellowship graduates who are willing to work in medically underserved areas or with underserved patients for three years can apply for a waiver of the two-year residency requirement. There are several federal agencies that sponsor international physicians for these types of waivers, including the Department of Veterans Affairs. The interim final rule has the potential to negatively impact the VA's ability to obtain physicians to provide timely, quality care to our nation's veterans.

Whether the physician trains in the U.S. in J-1 status and then obtains a waiver of the two-year home residency requirement, or performs research, teaches or provides direct patient care to U.S. citizens in H-1B status, the path to lawful permanent resident status following the completion of training is not guaranteed due to extreme backlogs in the federal government's processing of these applications. Thus, IMGs do not need any additional obstacles put in their path as they seek to become permanent U.S. citizens and continue to provide care to our most vulnerable residents in rural and underserved parts of our nation. Nearly 21 million people live in areas of the U.S. where foreign-trained doctors account for at least half of all doctors. As such, the impact of the interim final rule on this physician cohort could significantly undermine current efforts to address the worsening physician shortage, and directly impact patient populations across the U.S. considered medically underserved.³ The U.S. is facing a serious shortage of physicians, largely due to the growth and aging of the population and the impending retirements of older physicians. According to recent data, the U.S. could see a shortage of up to 120,000 physicians by 2030, impacting patient care across the nation.⁴

Impact on Population Health

The U.S. Centers for Disease Control and Prevention (CDC) defines population health as providing “an opportunity for health care systems, agencies and organizations to work together in order to improve the health outcomes of the communities they serve.”⁵ We all have an important role to play in population health. According to the CDC there are numerous advantages to developing policies that improve population health such as: a reduction in mortality, a reduction in medical costs, and a reduction in life expectancy inequity. Linking individuals and families to needed medical and social supports is a core public health function that can add both health and economic value.⁶ We believe that neither health costs nor public health concerns are driving these drastic changes in public charge policy by the Administration and we strongly urge the rescission of the interim final rule by the DoS.

³ https://www.americanimmigrationcouncil.org/sites/default/files/research/foreign-trained_doctors_are_critical_to_serving_many_us_communities.pdf.

⁴ https://aamc-black.global.ssl.fastly.net/production/media/filer_public/85/d7/85d7b689-f417-4ef0-97fb-ecc129836829/aamc_2018_workforce_projections_update_april_11_2018.pdf.

⁵ <https://www.cdc.gov/pophealthtraining/whatis.html>.

⁶ https://works.bepress.com/glen_mays/307/.

60-Day Notice of Proposed Information Collection: Public Charge Questionnaire and Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage

On October 24, 2019, the DoS published a request for public comment on the form DS-5540 or the public charge questionnaire. The DoS concedes in the notice that the questionnaire is more expansive than in the past. Almost two decades ago, the federal government clarified that the use of services such as health coverage or nutrition assistance would not be considered in the public charge determination. Only the receipt of cash assistance for monthly income maintenance or government-funded long-term care could be considered. Additionally, any negative factor could be outweighed by positive factors—most importantly the sponsor’s Affidavit of Support—in determining whether the individual was likely to rely on cash assistance or long-term care in the future. However, the DoS proposes to use the DS-5540 “to collect more detailed information on an applicant’s ability to support himself or herself. Consular officers will use the information to assess whether the applicant is likely to become a public charge, based on the totality of the circumstances.” The DoS’ proposal seems to emphasize that the Affidavit of Support is a positive factor in the totality of the circumstances test but is not sufficient on its own to protect an individual from being determined likely to become a public charge. This is a dramatic shift in the intent and use of the public charge questionnaire. As a result, the AMA believes that the proposed information collection is not necessary for the proper function of the DoS and will have a negative impact on the health and well-being of individuals and families who are seeking visas.

Application to the Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System (Presidential Proclamation)

Under the DoS’ notice for the public charge questionnaire, a consular officer may request any immigrant visa applicant not subject to the public charge determination to be subject instead to the Presidential Proclamation to ensure the applicant will be covered by approved health insurance within 30 days of entry into the U.S. or that they have financial resources to pay for reasonably foreseeable medical costs. Under the Presidential Proclamation, approved health insurance would include employer-sponsored and other private coverage, including unsubsidized coverage through the Affordable Care Act (ACA) marketplaces, short-term plans, traveler plans, or catastrophic plans. Subsidized marketplace coverage and Medicaid coverage for adults would not be considered approved coverage. The Presidential Proclamation claims that suspension is necessary to protect the health care system and taxpayers from uncompensated care costs. We disagree. As outlined in our [letter](#) to the President, we believe the Presidential Proclamation will cause confusion and have a chilling effect by discouraging non-citizens, especially pregnant women and children, from applying for certain public benefits even if they are eligible. In addition, we believe the Presidential Proclamation will increase the usage of short-term limited duration insurance plans resulting in consumers purchasing inadequate, skimpy coverage, exempt from the consumer protection provisions and benefit standards of the ACA.⁷

It is our understanding that under the Presidential Proclamation, the Secretary of State is authorized to establish standards and procedures for governing the determinations of approved health insurance. On October 30, 2019, the DoS issued a “Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage.” The DoS gave the public approximately 48-hours to comment on the collection of information included in the emergency notice regarding the Presidential Proclamation. The AMA believes the information collection request does not rise to the level of an emergency and

⁷ <https://searchf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2019-10-22-Letter-to-Trump-re-Presidential-Proclamation.pdf>

therefore does not require an abbreviated comment period. According to the DoS the Presidential Proclamation does not suspend or limit the entry of applicants if they do not have coverage but possess financial resources to pay for reasonably foreseeable medical expenses. Reasonably foreseeable medical expenses are those expenses related to existing medical conditions, relating to health issues existing at the time of visa adjudication. The emergency submission comment does not appear to fully explain how a consular officer would effectively evaluate reasonably foreseeable medical expenses related to an applicant's existing medical condition. The AMA firmly opposes the collection of information on health insurance status as proposed in this emergency submission comment. As detailed in our October 22, 2019 letter to the President of the United States, the AMA opposes the underlying Presidential Proclamation and we also strongly oppose its application in any circumstance by the DoS.

Data and Privacy Concerns

A potentially serious unintended consequence of both the interim final rule and the public charge questionnaire is its impact on patient data. As a result of the proposed changes to the public charge, physicians may feel compelled not to include data about any public benefit immigrant families are receiving—though information about such benefits are part of the social determinants of health assessment seen as key to care coordination. To complicate the matter further, immigration authorities may seize electronic health records as part of their investigations, which raises several questions about both the accuracy and security of patient data and privacy of health information. Of concern, there may be potential violations to the Health Insurance Portability and Accountability Act of 1996 depending on how the federal government seeks to track insurance coverage and an individual's medical condition. Therefore, we remain deeply concerned about the impact the interim final rule and potentially the questionnaire will have on patient data and privacy.

Impact on Certain Nonimmigrants

We strongly urge the DoS to consider another unintended impact of this change in policy on the children of H-1B visa holders. It is our understanding that an applicant for a student visa F and/or an individual seeking to change their status from an F to a H-1B would fall under the 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. The DoS should consider the implications of the interim final rule on the ability of these individuals to study and share their skills/talents in the U.S. workforce.

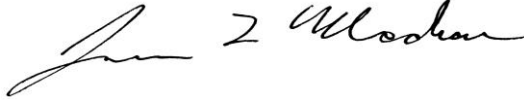
Conclusion

The AMA believes every individual, regardless of immigration status, deserves timely, accessible, quality health care, nutrition, and housing. The policy changes in the interim final rule have the potential to worsen population health in general. We urge the Administration to rethink these proposed policy changes, rescind the interim final rule, the public charge questionnaire and the collection of immigrant health insurance information under the Presidential Proclamation and instead work with the AMA and other health care professionals to develop policies that ensure the health of children and families is protected throughout the immigration process.

The Honorable Mike Pompeo
October 31, 2019
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If you have any questions, please contact Margaret Garikes, Vice President for Federal Affairs, at margaret.garikes@ama-assn.org, or by calling 202-789-7409.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim L Madara". The signature is written in a cursive style with a large initial "J" and a distinct "L" before the name "Madara".

James L. Madara, MD