



# The State Department's New FAM on Public Charge and Form DS-5540: Summary for Immigration Practitioners

The Department of State (DOS) announced that it will implement its final rule on [public charge](#) beginning on February 24, 2020. It recently published changes to the [Foreign Affairs Manual \(FAM\) on public charge](#) and the final version of [Form DS-5540](#), Public Charge Questionnaire. This new form will capture information regarding the immigrant visa applicant's household size and income, assets, liabilities, education, job skills, health, and receipt of public benefits.

The agency has announced that the new regulation and form will affect all applicants for an immigrant visa who are subject to public charge beginning on February 24, 2020, regardless of when the DS-260, Immigrant Visa Application, and accompanying documents were submitted and screened by the National Visa Center and forwarded to the consular post. The summary below describes how the agency is interpreting the new public charge rule and planning to implement it through the FAM and DS-5540. The summary will also contrast DOS interpretation with the comparable USCIS public charge rule, Policy Manual and Form I-944, Declaration of Self-Sufficiency. For more background information on the DHS public charge rule, see [The Public Charge Final Rule: FAQs for Immigration Practitioners](#) and [USCIS Policy Manual on Public Charge: Summary for Immigration Practitioners](#).

## 1. Overview and General Thoughts

The FAM and the DOS final public charge rule track in many ways the language in the USCIS Policy Manual and the DHS final rule. The DS-5540 and the I-944 also share a lot of similarities. For example, they both define the totality of the circumstances test in the same way; designate the same public benefit programs and the operative date for receipt of February 24, 2020; and classify the same heavily weighted positive and negative factors. But they also differ in some significant ways. For example, the positive and negative factors are not set forth as definitively in the FAM and the balancing process is much less detailed and systemized. The FAM contains far fewer formal designations of positive and negative factors than the USCIS Policy Manual.

Most importantly, the FAM states that "unless specified on Form DS-5540, applicants are not required to submit supporting documentation." The DS-5540 only asks the applicant to attach evidence of health insurance and tax transcripts, although the officer may request other supporting documentation at the interview. Therefore, practitioners may want to proactively prepare for such a request and have their clients bring documentation of financial resources, income and assets of all household members, job offers, educational degrees and certificates, job skills and work history, and statements from joint sponsors. The FAM and DS-5540 do not discuss the need to submit credit reports and scores, demonstrate a history of employment, or establish proficiency in English.

The State Department has chosen to implement this new form and rule change in the most expedient way possible. Rather than giving immigrant visa applicants time to prepare for the changes and apply the DS-5540 only to those who are filing the DS-260 after the effective date, the agency is applying it immediately. In response to public comments on the DS-5540, the agency writes: "once the DS-5540 is approved, 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." The FAM also contains the following instructions to consular posts:

Post will necessarily process some cases that were documentarily qualified by NVC or KCC prior to the effective date of the public charge rule or without the DS-5540. To help ensure a smooth transition, you should 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. 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 [sic] 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); however, you must provide applicants an opportunity to provide a completed DS-5540 before you refuse an application under INA 212(a)(4). Adequate time and effort spent prior to and during the initial interview can save work for the post and the applicant in this respect.

Based on this announcement, and until we receive further clarification, clients should be prepared for heightened public charge screening when they appear for consular interviews beginning on February 24, 2020. Clients already scheduled for an interview, including those scheduled in the future and whose DS-260 was submitted before February 24, 2020, should bring with them a completed DS-5540 together with supporting documents. Practitioners should also prepare a letter/statement summarizing the positive public charge factors and explaining why the applicant is not likely to become a public charge based on the new FAM guidance. This is particularly important given the FAM guidance on when consular officials should designate a refusal based on INA § 221(g)—insufficient documentation—or based on INA § 212(a)(4)—public charge inadmissibility. It states:

Applicants who [sic] 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); however, you must provide applicants an opportunity to provide a completed DS-5540 before you refuse an application under INA 212(a)(4).

Given that there is little or no accountability regarding what an officer communicates to the applicant concerning the documentation he or she should submit in connection with the DS-5540, clients should come prepared to submit as much as possible. Practitioners should even have clients practice submitting the documentation during a mock interview, given that in many cases the officer will not specifically request it.

## **2. Age**

The standard is whether the applicant's age affects his or her "employability or may increase the potential for healthcare-related costs." Age is a positive factor if the applicant is between age 18 and 61. For applicants who are under the age of 18 and "neither accompanied by a parent or guardian nor following to join a parent or guardian," age is a negative factor. For applicants over 61, age is a negative factor if "the evidence reflects that the applicant's age adversely affects the applicant's ability to obtain or perform work, or may increase the potential for healthcare related costs that would be borne by the public." Therefore, the applicant should be prepared to show evidence of current or future employment, employment skills, income and resources, and good health.

## **3. Health**

All applicants will need to have submitted the results of the panel physician's health examination on Form DS-2054 or Form DS-7794. Findings of a Class A medical certification render the applicant inadmissible, while a Class B medical certification indicates the need to scrutinize the physician's report and prognosis. The test is whether the condition "is likely to require extensive medical care or institutionalization, or ... will interfere with the applicant's ability to provide and care for himself or herself, to attend school, or to work upon admission."

It is a negative factor if the medical condition is likely to affect the applicant's ability to maintain a job, receive Medicaid for long-term care or institutionalization, or incur medical expenses not covered by health insurance. It is a heavily weighted negative factor if the applicant: (1) has a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with his or her ability to provide for himself or herself, attend school, or work, (2) lacks health insurance, and (3) has neither the prospect of obtaining private health insurance for use in the United States, nor the financial resources to pay for reasonably foreseeable medical costs related to the medical condition.

Applicants with a medical condition should be prepared to evidence income and resources or medical insurance that will cover anticipated medical expenses. Although it is not included as possible evidence, the applicant should consider submitting a treating physician's report if it includes a more positive explanation of the medical condition or prognosis. A comparable statement from a current employer in the United States indicating that the medical condition does not interfere with the applicant's job performance would also be advisable. Unlike civil surgeons in the United States who can provide the adjustment applicant with a copy of the medical report, panel physicians do not provide applicants with a copy. There is also no equivalent positive factor if the applicant does not evidence any health condition.

## **4. Health Insurance**

The DS-5540 asks if the applicant is currently covered by health insurance in the United States and, if so, to attach evidence of it. If the applicant is not currently covered, the form asks if he or she will be covered within 30 days of admission. If so, the applicant is to identify the health insurance plan and indicate the date coverage will begin. This last question relates to the Presidential Proclamation mandating that most immigrant visa applicants either possess health insurance or express the ability to purchase it within 30 days of admission. That proclamation is currently enjoined, but the DS-5540 nevertheless asks this question.

It is a heavily weighted positive factor if the applicant has "private health insurance for use in the United States covering the period the applicant is expected to remain in the United States." But there is no equivalent negative factor if the applicant does not evidence having any health insurance.

Unlike the USCIS Policy Manual, the FAM does not distinguish between various forms of health insurance, such as that provided by an employer, that purchased within or outside the Health Marketplace, that which is subsidized or unsubsidized under the Affordable Care Act (ACA), Medicare, Medicaid (within the exceptions), the Child Health Insurance Program, or state-only subsidized health insurance. Nor does it define what is meant by "private" health insurance. Many immigrant visa applicants will not be eligible for health insurance in the United States due to their

immigration status; this is particularly true for those who have never resided in the United States. An exception would be those who have a parent or spouse who is employed in the United States and who can add the applicant to their employer-provided health plan. Consular officers are not instructed to look at the terms of coverage, premium, deductible, and the co-payment to determine if the insurance is adequate and complies with ACA standards.

## **5. Family Status**

The DOS calculates household size similar to the way USCIS does it, although with some important differences. In neither case is the applicant's household size measured the same as it is for the sponsor completing the affidavit of support. The DS-5540 simply asks the applicant to list the name, age, relationship, current job, and U.S. citizenship of "expected" members of their household who will be residing in the United States. The FAM instructs consular officers that it is the applicant's household size "after admission" that is relevant. Therefore, applicants do not have to count a spouse or children residing with them abroad if they are not going to be "physically residing" with them after admission. They must still count children or others not physically residing with them in the United States if they provide at least 50 percent of their financial support or are listed as dependents on the applicant's most recent federal income tax return. They must also count any individual who provides at least 50 percent of the applicant's financial support or who lists the applicant as a dependent on his or her most recent federal income tax return. If the applicants are under 21 and unmarried, they also must count siblings, half siblings, or stepsiblings who will be residing with them or for whom the parent provides at least 50 percent of their financial support. But none of this is explained to the applicant completing the DS-5540 and there are no accompanying Instructions to the form.

## **6. Income**

It is a positive factor if the applicant's household's annual gross income or projected annual gross income in the United States is at least 125% of the Federal Poverty Guideline (FPG) based on the applicant's household size. If the applicant is on active duty, other than training in the U.S. Armed Forces, then the threshold is 100% of FPG. Unlike the I-944 and the U.S. Policy Manual, which look almost exclusively at income reported on the last tax return, the DS-5540 looks at "current yearly compensation." For applicants who have a job offer from an employer in the United States, it asks for the name of the employer and the anticipated annual compensation.

The FAM clarifies that it is income "that will continue to be received after admission to the United States plus any potential income based on expected employment" that counts. This will be a disadvantage to those applicants who have not been working in the United States and do not have any job offer, since the consulate will only consider an "income stream [that] will continue after the applicant immigrates to the United States." Thus, in most cases applicants will not be able to count the income from a current job in their home country. On the other hand, applicants who are currently employed here—even without employment authorization—and who have not filed federal taxes will be able to use this income to satisfy the 125% of FPG standard. It is total household income that counts, so this includes income from all family members who were included in the household size calculation, as well as "any additional income from individuals not included in the applicant's household who physically reside with the applicant and whose income will be relied upon." It also includes income "provided to the applicant by another person or source not included in the applicant's household on a continuing monthly or yearly basis for the most recent calendar year." The DS-5540 allows the applicant to list any income in addition to "yearly compensation" that will be received after arrival in the United States, such as rent, stock dividends, foreign pension, and child support. The applicant can also count assets and resources, defined below, in reaching the 125% level.

It is a heavily weighted positive factor if the applicant's household has income, assets, or resources of at least 250 percent of the FPG for the applicant's household size. This also includes "support from a sponsor," meaning that the income of the sponsor or joint sponsor can be included in this analysis. It is a heavily weighted positive factor if the applicant is authorized to work in the United States and is currently employed or is expected to be employed in the United States with an annual income of at least 250 percent of FPG for the applicant's household size.

It is a negative factor if an applicant currently lacks household income and assets at or above 125% of FPG, is unlikely to get a job where he or she will earn at least that amount, or lacks access to additional resources and financial support. It is a heavily weighted negative factor if the applicant is authorized to work, not a full-time student, but is unable to demonstrate current employment, recent job history or a reasonable prospect of future employment.

The DS-5540 asks the applicant to list whether he or she has filed a U.S. tax return for the last three years, and if so, state the gross income. If the applicant worked in the United States and did not file a return, he or she needs to explain why. There is no suggestion that the applicant in this situation should document current income with pay stubs, wage receipts, W-2, or an employer's letter, but the client may want to gather such documentation and have it ready to submit at the interview. Unfortunately, the DS-5540 does not ask any questions or provide any space to list household members' income. Applicants should come prepared with documentation evidencing total household income if there is income beyond that listed on their last tax return.

## **7. Assets and Resources**

If the applicant's household gross income is below 125% of FPG, then it is a positive factor if the total value of the household assets and resources is at least five times the shortfall (three times if the applicant is a spouse or child over 18 of a U.S. citizen). The assets that can be considered include checking and savings account statements covering 12 months prior to filing the visa application and non-cash assets and resources that can be converted into cash within 12 months. Examples of the latter include: the net cash value of real estate holdings minus the sum of all loans secured by a mortgage, trust deed, or other lien; annuities; retirement and educational accounts; certificates of deposit; and insurance. The DS-5540 includes a drop-down menu that includes each of these items, as well as a space for the applicant to indicate the asset's location and value. It asks for assets "available to" the applicant, which presumably would include all assets belonging to the "expected members" of the household listed in Part 3.

For applicants who are listing bank deposits as an asset, the FAM encourages officers to ask for "a letter signed by a senior officer of the bank over the officer's title, showing: (i) the date the account was opened; (ii) the number and amount of deposits and withdrawals during the last 12 months; (iii) the present balance; and (iv) how the money, if in a foreign bank in foreign currency, is to be transferred to the United States." In contrast, the USCIS Policy Manual simply asks for 12 months of bank statements, which would seem to accomplish the same thing without involving a senior bank officer.

## **8. Credit report and score**

The State Department is not requiring applicants to submit credit report, credit score, statement of no report, or proof of payment of bills.

## **9. Liabilities**

The FAM instructs officers to consider "any financial liabilities of the applicant," but it does not elaborate. The DS-5540 asks the applicant to list his or her liabilities and/or debts, and includes a drop-down menu for mortgages, car loans, credit card debt, education-related loans, personal loans, and "other." There is no designation of debt being a negative factor or the absence of debt being a positive factor.

## **10. Fee Waivers**

The FAM also instructs officers to "consider whether the applicant has received an immigration benefit fee waiver from USCIS on or after February 24, 2020, unless the fee waiver was applied for or granted as part of an application for an immigration benefit to which the public charge inadmissibility does not apply." It will be very rare for immigrant visa applicants to have ever applied for such a fee waiver. There is no designation of receipt of a fee waiver being a negative factor or its absence being a positive factor.

## 11. Public Benefits

DOS and USCIS both define “public charge” and “public benefit” in almost the same way. The eight designated programs in the FAM are Supplemental Security Income (SSI); Temporary Assistance to Needy Families (TANF); state general relief or general assistance; Medicaid other than for emergencies, for those under 21, for pregnant women, for services to the disabled and for education-related; Supplemental Nutrition and Assistance Program (SNAP, formerly food stamps); Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and public housing.

Receipt of any of these programs beginning on February 24, 2020 will be considered, although the officer can also consider receipt of benefits before that date for institutionalization for long-term care, as well as “cash assistance for income maintenance.” That term is defined as including SSI, TANF (but not including supplemental cash benefits or any non-cash benefits provided under TANF), and state and local general assistance. The FAM contains the same exclusions as the USCIS for receipt of benefits by members of the U.S. Armed Forces, by children who will derive citizenship, and by individuals present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. The FAM also specifies that health services for immunizations and for testing and treatment of communicable diseases are excluded from the definition of public benefit.

It is a heavily weighted negative factor if the applicant has received, been certified, or been approved to receive one or more of the designated public benefit programs beginning on or after February 24, 2020, or for more than 12 months in the aggregate within a 36-month period immediately preceding adjudication of the visa application.

The DS-5540 asks if the applicant has received one of these benefit programs, the date the benefit was granted, the date it ended or expires, and the reason for requesting or receiving the benefit. This last question, presumably, allows the applicant to state any special circumstances and explain why he or she needed the benefit for a temporary period. The form also asks if the applicant is “likely to request or receive any of the public benefits described in Question 11 in the future in the United States from any Federal, state, local, or tribal government entity.” The answer to this should always be a definitive “no.”

Like the USCIS Policy Manual, the FAM considers the receipt of these benefits, as well as the application for, approval of, or certification to receive them. It considers whether the applicant has disenrolled or requested to be disenrolled from these benefits. It also permits the consideration of evidence from a federal, state, local, or tribal agency indicating that the applicant does not qualify or would not qualify for a particular public benefit due to income, prospective immigration status or length of stay.

The FAM clarifies that the officer may not consider “any other forms of public assistance the applicant or the applicant's family has received.” This is an important change from the prior FAM language, which allowed the consular officer to consider whether the applicant or a family member in the applicant’s household is currently or has received “public assistance of any type” from state, federal, or local sources.

## 12. Education and Skills

The FAM states the general principle that the officer “must consider both positive and negative factors associated with whether the applicant has adequate education and skills to either obtain or maintain employment with an income sufficient to avoid becoming a public charge.” But it does not classify or define specific factors as either positive or negative. Included in the analysis are the applicant's history of employment, educational level (high school diploma or its equivalent or a higher educational degree), any occupational skills, certifications or licenses, language proficiency, the applicant's employment plans, and tentative job offers.

The DS-5540 asks if the applicant has graduated from high school or has a GED and if the applicant has earned any other educational degrees. It asks if the applicant has any occupational skills, but it limits the applicant to listing

only certifications and licenses, the date they were obtained, who issued them, the license number, and the date of expiration or renewal. If the applicant has a particular job skill—such as mechanic, plumber, electrician, welder—but lacks a formal license or certification, he or she should still answer “yes” to question #16 and be prepared to explain this to the consular officer. He or she might also submit a statement from an employer confirming this skill and how it is applied on the job.

The FAM does not require or contemplate the officer’s testing of English language proficiency. No question on the DS-5540 asks about this. Applicants, nevertheless, should consider attending the interview prepared to provide diplomas or degrees, certification of English language school enrollment or course completion, or evidence of current enrollment in high school or post-secondary school.

The DS-5540 does not ask any questions about employment history, although they are asked on the DS-260 and Form I-130, Petition for Alien Relative. The FAM states that being the primary care provider for a child or other household member is a positive factor and can mitigate the absence of income “particularly if the caregiving responsibility will end when the alien travels to the United States.” That is at variance with the USCIS Policy Manual, which considers being a primary caretaker within the United States a positive factor.

### **13. Affidavit of Support**

A properly filed, non-fraudulent, and sufficient Form I-864 is a positive factor, but just one “among many, and is not outcome determinative in the totality of the circumstances analysis.” It is a negative factor if the sponsor has failed to reimburse a government entity that provided a previously sponsored immigrant a federal means-tested benefit, after proper notification to the sponsor that such reimbursement is due. But it is unclear how the consulate would have ready access to that information due to a lack of centralization of this data. The Form I-864, Affidavit of Support Under 213A of the INA, does not ask for this information.

There is no language in the FAM that gives any weight to whether a joint sponsor is related to the intending immigrant, is residing with the applicant, or has submitted I-864s for previous applicants. Nor does the FAM or I-864 ask about the sponsor’s prior receipt of public benefits, bankruptcy, or receipt of a fee waiver.

Nevertheless, applicants should prepare for heightened scrutiny of the affidavit of support and consider submitting a statement from a joint sponsor acknowledging the obligation to support the applicant and explaining the reason for taking on this financial obligation.

### **14. Nonimmigrant or Immigrant Visa Classification**

Immigrant visa applicants, as opposed to nonimmigrant visa applicants, will be subject to a higher public charge scrutiny, but that is not considered a negative factor, as it is with adjustment of status applicants.

### **15. Public Charge Bond**

While applicants for adjustment of status can overcome a public charge inadmissibility finding by posting a public charge bond, immigrant visa applicants will be offered this option only “in rare cases” and only after the consular officer has consulted with the Visa Office or a higher authority. The FAM warns officers that a public charge bond should be used “sparingly.” Given this language, it is unlikely that many immigrant visa applicants who are refused based on public charge will be able to take advantage of this option.

### **16. Fiancé(e) Applicants**

The FAM reminds consular officials that K visa applicants are not required to submit an I-864 as part of the application process, even though they are subject to the public charge ground of inadmissibility. Officers may, however, ask the applicant to complete a DS-5540. If granted the K visa, the person will be required to submit an I-864 at the adjustment of status stage, assuming he or she marries the U.S. citizen petitioner within 90 days of admission.