

## Vague Insurance Test May Spur Erratic Green Card Decisions

By **Suzanne Monyak**

Law360 (October 31, 2019, 8:46 PM EDT) -- President Donald Trump's recent proclamation requiring overseas green card applicants to show they can afford health insurance could lead to inconsistent decisions among consular officers entrusted with new responsibilities.

The **proclamation** — set to take effect Nov. 3 — will require people applying for green cards at consulates to show they will be able to get an approved health insurance plan within 30 days of arriving in the U.S., or else show they are wealthy enough to cover anticipated future medical costs.

But that latter part of the test imbues consular officers with expanded discretion to make decisions about an applicant's medical state, what amount of future medical costs are "reasonably foreseeable" and how much money in the bank an applicant should have to pay for those.

"It's like a Rorschach test. Every consular officer is different, and they're all going to interpret it differently," said David Strashnoy of Stone Grzegorek Gonzalez LLP, a former consular officer with the U.S. Department of State.

And with minimal public guidance about how the proclamation will be implemented, immigration attorneys have found themselves left in the dark as they prepare green card applicants for a test that they know little about.

"It's unfair to applicants because it's sort of hiding the ball on what's actually necessary," he said.

Trump handed down the proclamation in early October, justifying the ban as necessary to prevent immigrants from becoming a "burden" on the U.S. health care system. The proclamation lists a number of "approved" insurance plans, including Medicare, catastrophic plans, short-term and visitor plans, and unsubsidized health insurance purchased on state markets.

Advocates have been quick to point out that some of those plans, like Medicare, aren't even available to foreign citizens who haven't lived in the U.S., while others don't provide as comprehensive coverage as subsidized Affordable Care Act plans, doing little to advance the proclamation's stated goal to minimize uncompensated costs.

The proclamation will take its biggest toll on family-based immigration and diversity visas, as most foreign citizens entering on employment-based green cards would have access to employer-sponsored health insurance.

For example, a low-income American on a subsidized Affordable Care Act plan would be barred from sponsoring a foreign spouse for a green card based on that insurance. Foreign parents, whose American kids must be at least 21 years old to sponsor them for green cards, could also feel the brunt of the proclamation compared to younger applicants, if consular officers consider advanced age to be a factor that might lead to higher future medical costs.

The roll-out has also been "shoddy" and "last-minute," said Loren Locke of Ford Harrison LLP, a former consular officer, leaving immigration lawyers and applicants — some of whom may have had their interviews, the final step of the process, scheduled months in advance for next week — guessing at how to prepare.

As of Thursday afternoon, the State Department has yet to release any public guidance informing applicants preparing for their consular interviews what to bring to pass the test, with the department's website saying only that applicants "should be able to demonstrate to the satisfaction of the consular officer" that they will have an approved insurance plan on time or can otherwise cover anticipated medical costs. The website says that the officer may request additional documentation as needed.

The department's proposed form, released on the Federal Register on Tuesday, offers few details about what documents would suffice.

Attorneys have questioned if it would be enough for an applicant to simply list the insurance they intend to buy, with the intended start date, or if applicants will need to bring proof that they've already purchased insurance to live in the U.S. — a country they have not yet been approved to live in.

Locke predicted that the confusion will lead to inconsistent decisions across consulates, and even between officers at the same post, as to what amount of information will be enough.

And if the consular officer determines that the proof of insurance provided isn't sufficient, applicants must convince the officer that they could afford any "reasonably foreseeable medical costs," a nebulous standard that gives consular officers significantly more discretion than they currently have when evaluating a visa applicant's medical state.

Green card applicants applying at consulates are already required to undergo a medical exam conducted by a doctor, who then compiles a report known as an I-693, a 14-page form that requests information about an applicant's medical history to determine if they should be blocked from entering on public health grounds.

But in its current state, the form, while informative, is not designed for consular officers to make predictions about future medical conditions, on top of an economic analysis of what those conditions might cost, Locke said.

The report focuses on whether an applicant has what's known as Class A and Class B conditions, which include communicable diseases, not being vaccinated, drug addiction or

psychiatric disorders that would make a person a potential danger to themselves or others.

But Trump's proclamation asks consular officers to draw conclusions from that report about a person's likelihood of becoming sick or having a condition in remission return, and how much it would cost, requiring a knowledge of health care as well as medical billing in the U.S. — a process that is better known for its opacity.

"From pharmacy to pharmacy, from doctor to doctor, medical procedures vary vastly in price. So, how are we supposed to determine that?" asked Amy Peck, an immigration attorney with Jackson Lewis PC. "It's not as if we can call up Walgreens and say, 'What's your price?'"

Both Locke and Strashnoy said that consular officers are not qualified to make those assessments, which could lead to improper denials.

"Some consular officers may not be qualified, they may not have enough time to make a fully thought-out decision because their workload is very heavy," Strashnoy said. "So it creates a lot of pressure to do things relatively quickly. And when you do it relatively quickly, sometimes, you don't make the right decision."

And moreover, said Locke, this additional burden and time spent reviewing an applicant's medical records and anticipated costs will come at the expense of other factors an officer weighs during an interview, including evaluating whether a marriage is legitimate or whether an applicant could pose a national security threat.

"I hate to see any changes that distract the consular office from the primary duty of protecting the security of the United States," Locke said.

But attorneys told Law360 that they're not panicking yet, saying they are optimistic that the proclamation will be blocked by the courts, either before or shortly after the proclamation takes effect.

On Wednesday night, several legal and civil rights groups **filed a proposed class action** in Oregon federal court seeking to block the proclamation from taking effect. The suit claims that the proclamation is unconstitutional and accuses the administration of sidestepping administrative requirements when making major changes to the system.

Strashnoy said he thought this proclamation would not be as dire as the so-called public charge rule, which would penalize green card applicants found likely to become a "public charge" based on past usage of public benefits, age, English proficiency and other factors. The U.S. Department of Homeland Security's version of that rule **has been blocked** by several federal judges, while the State Department's form to carry their version out is **moving through** a monthslong review process.

He predicted that consular officers might table cases if the applicant isn't prepared with health insurance to give them time to buy a plan, rather than issuing straight denials.

Susan J. Cohen, head of Mintz Levin Cohn Ferris Glovsky and Popeo PC's immigration practice, said she would only recommend that a client buy insurance to fit the proclamation if their interview was "imminent."

"We're going to be taking more of a 'wait and see' attitude about what happens with this before requiring clients to take a very expensive step that may or may not make a difference for them," Cohen said.

Ellen Freeman, a Pittsburgh-based immigration lawyer, said she's taking a similar approach to avoid alarming clients before it's necessary. But even if the courts do step up and block the proclamation, she worried that the damage has already been done.

"It's to create chaos, uncertainty, make immigrants feel more vulnerable and hang them out as scapegoats and say they're draining our system. It's not for the actual change," she said.

A spokesperson for the U.S. Department of State would not respond to a list of questions about the proclamation's implementation, including whether consular officers had been given guidance about how to assess future medical costs, saying that the department does not comment "on matters under pending litigation."

--Editing by Emily Kokoll and Kelly Duncan.

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