# NLWJC - Kagan
# DPC - Box 062 - Folder-008

# Welfare-Illegal Alien Provisions

WR - Illegal alien

| Benefit | Qualified Aliens | Non-Qualified Aliens |
|---|---|---|
| **Means Tested Benefits** (we interpret as mandatory programs -- SSI, Medicaid, TANF, food stamps) | Not eligible | Weren't eligible previously |
| **Federal Public Benefits** | Eligible for all except means-tested benefits | Not eligible -- issue before us (definition) |
| **Exceptions** (in statute):<br>- life and safety per AG order<br>- K-12 education<br>- emergency medical services<br>- disaster relief<br>- immunizations/ communicable diseases<br>- housing grandfathered | Eligible | Eligible |
| **All other**:<br>not a benefit "for which payments or assistance are provided to an eligibility unit" | Eligible | Eligible |

HHS - fed pub ben - only benefits from which you make application.

Argument - (B) is ambiguous; import Sec 432

"eligibility unit" can't import any state benefits.

Same def. as in state pub benefit.

- will be arguing here to unravel
- have to deny those we know unqualified
- states can impose own verification procedures for other benefits.

the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

# Subtitle A—Eligibility for Federal Benefits

SEC. 401. ALIENS WHO ARE NOT QUALIFIED ALIENS INELIGIBLE FOR FEDERAL PUBLIC BENEFITS.

(a) IN GENERAL.—Notwithstanding any other provision of law and except as provided in subsection (b), an alien who is not a qualified alien (as defined in section 431) is not eligible for any Federal public benefit (as defined in subsection (c)).

(b) EXCEPTIONS.—

(1) Subsection (a) shall not apply with respect to the following Federal public benefits:

(A) Medical assistance under title XIX of the Social Security Act (or any successor program to such title) for care and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of such Act) of the alien involved and are not related to an organ transplant procedure, if the alien involved otherwise meets the eligibility requirements for medical assistance under the State plan approved under such title (other than the requirement of the receipt of aid or assistance under title IV of such Act, supplemental security income benefits under title XVI of such Act, or a State supplementary payment).

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Public health assistance (not including any assistance under title XIX of the Social Security Act) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of commu-

nicable diseases whether or not such symptoms are caused by a communicable disease.

(D) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(E) Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development, any program under title V of the Housing Act of 1949, or any assistance under section 306C of the Consolidated Farm and Rural Development Act, to the extent that the alien is receiving such a benefit on the date of the enactment of this Act.

(2) Subsection (a) shall not apply to any benefit payable under title II of the Social Security Act to an alien who is lawfully present in the United States as determined by the Attorney General, to any benefit if nonpayment of such benefit would contravene an international agreement described in section 233 of the Social Security Act, to any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act, or to any benefit payable under title II of the Social Security Act to which entitlement is based on an application filed in or before the month in which this Act becomes law.

(c) FEDERAL PUBLIC BENEFIT DEFINED.—

(1) Except as provided in paragraph (2), for purposes of this title, the term "Federal public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

(2) Such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States; or

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State.

**SEC. 402. LIMITED ELIGIBILITY OF QUALIFIED ALIENS FOR CERTAIN FEDERAL PROGRAMS.**

(a) LIMITED ELIGIBILITY FOR SPECIFIED FEDERAL PROGRAMS.—

(1) IN GENERAL.—Notwithstanding any other provision of law and except as provided in paragraph (2), an alien who is a qualified alien (as defined in section 431) is not eligible for any specified Federal program (as defined in paragraph (3)).

(2) EXCEPTIONS.—

(A) TIME-LIMITED EXCEPTION FOR REFUGEES AND ASYLEES.—Paragraph (1) shall not apply to an alien until 5 years after the date—

SEC. 432. VERIFICATION OF ELIGIBILITY FOR FEDERAL PUBLIC BENEFITS.

(a) IN GENERAL.—Not later than 18 months after the date of the enactment of this Act, the Attorney General of the United States, after consultation with the Secretary of Health and Human Services, shall promulgate regulations requiring verification that a person applying for a Federal public benefit (as defined in section 401(c)), to which the limitation under section 401 applies, is a qualified alien and is eligible to receive such benefit. Such regulations shall, to the extent feasible, require that information requested and exchanged be similar in form and manner to information requested and exchanged under section 1137 of the Social Security Act.

(b) STATE COMPLIANCE.—Not later than 24 months after the date the regulations described in subsection (a) are adopted, a State that administers a program that provides a Federal public benefit shall have in effect a verification system that complies with the regulations.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out the purpose of this section.

SEC. 433. STATUTORY CONSTRUCTION.

(a) LIMITATION.—

(1) Nothing in this title may be construed as an entitlement or a determination of an individual's eligibility or fulfillment of the requisite requirements for any Federal, State, or local governmental program, assistance, or benefits. For purposes of this title, eligibility relates only to the general issue of eligibility or ineligibility on the basis of alienage.

(2) Nothing in this title may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under Plyler v. Doe (457 U.S. 202)(1982).

(b) NOT APPLICABLE TO FOREIGN ASSISTANCE.—This title does not apply to any Federal, State, or local govern-

CC Rob Weiner 019-0405

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A "Federal public benefit" includes "any grant, contract, loan, professional license, or commercial license" provided to individuals, and also includes "any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit" pursuant to an application.[1]

**The following HHS programs provide "Federal Public Benefits"[2]:**

Temporary Assistance for Needy Families (TANF)
Social Services Block Grant (SSBG)
Community Services Block Grant (CSBG)
Child Care
Foster Care
Adoption Assistance
Job Opportunities for Low Income Individuals (JOLI) Program
Low Income Home Energy Assistance Program (LIHEAP)
Residential Energy Assistance Challenge Option (REACH) Program
Medicare
Medicaid
State Child Health Insurance Program (CHIP)
Refugee Cash Assistance
Refugee Medical Assistance
Refugee Social Services Formula Program
Refugee Targeted Assistance Formula Program
Refugee Social Services Discretionary Program
Refugee Targeted Assistance Discretionary Program
Refugee Unaccompanied Minor Program (foster care part)
Refugee Preventive Health Services
Refugee Voluntary Agency Matching Grant Programs
Repatriation Program
Native Hawaiian Loan Program (ANA)
Adult Programs/Payments to the Territories
AHCPR Dissertation Grants

DETERMINED TO BE AN ADMINISTRATIVE MARKING Per E.O. 12958 as amended, Sec. 3.2 (c)
Initials: RL Date: 3/22/10

Some of the services funded through these programs are not considered to be "Federal public benefits" because they are not provided to an individual, family or household eligibility unit. For example, some states may use their SSBG and CSBG resources to fund drug prevention education programs in schools.

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[1] An application exists if, based on Federal statute or regulation, or as a matter of practice by the Federal agency administering the program: (1) the individual, household, or family seeking the benefit or service must meet minimum criteria in order to be eligible for such benefit; and (2) the benefit provider or program verifies that the individual, household, or family has met the eligibility criteria by either (a) inspecting documentation proffered by the individual, household, or family, or (b) by contacting a person or agency outside the program to verify the relevant information.

[2] In addition to the programs identified above, Some HHS programs would be interpreted as "federal public benefits" but are specifically exempted under the provisions of section 401(b). The Indian Health Service programs, and HIV Health Care Services under the Ryan White CARE Act, are exempted under section 401(b)(1)(C) related to pubic health assistance and section 401(b)(1)(D) related to services or assistance specified by the Attorney General.

**HHS Programs *not* defined as "Federal Public Benefits" due to proposed definition**

It should be noted that many of the programs which are not "Federal public benefits" due to our definition also do not provide benefits or services to "individuals, families or household eligibility units." For example, *Healthy Start* funding aids the development of community coalitions, service delivery infrastructure, training providers, perform outreach and education. Similarly, *State Developmental Disability Councils* promote advocacy and capacity building and *Adoption Opportunities* provides discretionary grants to fund the development of innovative programs to remove barriers to adoption placement.

**Administration for Children and Families**
Child Support Enforcement Program
Child Welfare Training
Adoption Opportunities
Abandoned Infants
Child Abuse State Grants
Child Abuse Discretionary Activities
Family Preservation and Support
Runaway/Homeless Youth
Transitional Living for Homeless Youth
Education & Prevention Grants to Reduce Sexual Abuse
Community Schools Youth Services & Supervision
Independent Living Program
State Developmental Disabilities Councils
ADD Protection and Advocacy
ADD Special Projects
ADD University Affiliated Projects
Administration for Native American Programs
Urban and Rural Economic Development
National Youth Sports Program
Community Food and Nutrition
Family Violence Prevention and Services

**Administration for Older Americans**
Older Americans Act Programs

**Center for Disease Control**
HIV/AIDS Prevention and Education
TB Prevention and Control
Prevention of Sexually Transmitted Diseases
Childhood Lead Poisoning
Preventative Health & Health Services Block Grant
National Breast and Cervical Cancer Early Detection Program

**HRSA**
Consolidated Health Center Programs
Black Lung Clinics programs
Native Hawaiian Health Care
Hansen's Disease Program
Title IV AIDS Demo Grants for Research

Special Projects of National Significance
Maternal and Child Health Service Block Grant
Healthy Start Initiative
National Vaccine Injury Compensation
Emergency Medical Services for Children
Rural Health Outreach Demo Grants

**National Institute of Health**
Research Grants and Contracts

**Office of Minority Health**
Centers of Excellence Bilingual & Bicultural Minority Prefaculty Fellowships
Minority Community Health Coalition Demonstration Grants
Cooperative Agreements and Contracts

**OPA**
Population Research and Voluntary Family Planning Programs (Title X)

**SAMHSA**
Substance Abuse Prevention and Treatment Block Grants
Projects for Assistance in transition from Homelessness (PATH)
Comprehensive Community Mental Health Services for Children
Block Grants for Community Mental Health Services
Protection & Advocacy for Mentally Ill Individuals
Consolidated Knowledge Development and Application Grants

**HHS Programs *not* defined as "Federal Public Benefits" due to exclusion from enumerated list of types of benefits in Section 401**
Head Start and Early Head Start (ACF) (this is a non-postsecondary education benefit)

**HHS Programs not defined as "Federal public benefits" due to statutory exemptions related to Public Health (Immunization) and Attorney General Programs**
Vaccines for Children (CDC)
Title IV HIV Health Care Services Program, Parts A & B (HRSA)
Indian Health Service Programs (IHS)

WR - Illegal alien

# INTERIM GUIDANCE ON VERIFICATION OF CITIZENSHIP, QUALIFIED ALIEN STATUS AND ELIGIBILITY UNDER TITLE IV OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

## INTRODUCTION

### A. Summary

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Act") provides that, with certain exceptions, only United States citizens, United States non-citizen nationals and "qualified aliens" (and sometimes only particular categories of qualified aliens) are eligible for federal, state and local public benefits. The Act, as amended by the Balanced Budget Act of 1997, requires the Attorney General, by November 3, 1997, to issue interim guidance on the verification of eligibility of aliens for federal public benefits. The Act also requires the Attorney General, by February 1998, to promulgate final regulations requiring verification that an applicant is a qualified alien eligible to receive federal public benefits under the Act. States have an additional twenty-four months to put into effect a verification system that complies with those regulations. Amendments to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 further require the Attorney General to establish fair and nondiscriminatory procedures for applicants to provide proof of citizenship. Benefit providers, however, are required to implement the Act, and hence to make determinations regarding citizenship, qualified alien status, and eligibility under Title IV of the Act, before the Attorney General's issuance of new regulations and the States' development of conforming verification systems.

This memorandum provides guidance on how to verify citizenship, immigration status and eligibility under Title IV of the Act during this interim period. This guidance adopts a four-step procedure: 1) Determine if your program provides a "federal public benefit" subject to the Act's verification requirements; 2) Determine whether the applicant is otherwise eligible for benefits under general program requirements; 3) Verify the applicant's status as a U.S. citizen, U.S. non-citizen national or qualified alien; and 4) Verify the applicant's eligibility for benefits under the Act. If at any step you determine that you are not required to verify (or further verify) immigration status, you should not go on to the following step(s). If you have any questions regarding verification of immigration status pursuant to this Guidance, contact the local office of the Immigration and Naturalization Service ("INS") serving your geographic area. A list of local INS offices is set forth in Attachment 1. Attachment 1 also includes a copy of INS Form G-845 and the Supplement thereto to be used to verify immigration status pursuant to this Guidance.

This Guidance applies only to federal public benefits, and does not directly address the citizenship and immigration requirements that Title IV of the Act imposes on the provision of state and local public benefits. To the extent that you are required to verify that an applicant is a U.S. citizen, U.S. non-citizen national or qualified alien when determining eligibility for a state or local program, however, the Attorney General will be promulgating regulations that set forth procedures by which state and local providers can verify alien eligibility for such benefits.

During the interim, we advise that you use this Guidance in consultation with state and local authorities.

B. Programs with Governmental Verification

Some federal programs (e.g., Medicaid) require federal, state and local governmental agencies, but not private providers, to verify citizenship and immigration status as part of program eligibility determinations. The private entities actually providing the benefits must abide by the verification determination made by the governmental agency; they engage in no independent verification. Nothing in this Guidance modifies such program requirements: providers of benefits under programs where verification is performed by a governmental agency are not required by this Guidance to verify that an applicant is a U.S. citizen, non-citizen national or qualified alien, and they should not engage in such verification. They should continue to provide benefits pursuant to program requirements based on the verification determinations made by the appropriate governmental agency.

C. Programs Currently Required to Use the SAVE System

Some federal programs (e.g., Medicaid, unemployment compensation, educational assistance under Title IV of the Higher Education Act of 1965, the multi-housing program and the Indian and public housing program) already require, absent a waiver, verification of the immigration status of noncitizens applying for benefits through the Systematic Alien Verification for Entitlements ("SAVE") system. SAVE is an intergovernmental information-sharing program that is available to benefit-granting agencies that need to determine an alien's immigration status. With one exception, nothing in the Act changes preexisting legal requirements regarding use of the SAVE system or relieves the administrators of statutorily mandated programs of their obligations to comply with the SAVE program (including the terms of any waiver of SAVE program requirements received from the appropriate federal agency); section 840 of the Act, however, did remove the requirement that a state agency use the SAVE system to verify eligibility for Food Stamps. You should note that SAVE does not provide all of the information that may now be necessary to determine an individual's eligibility under Title IV of the Act. You should use this Guidance to obtain or verify that new information.

D. Exemption for Nonprofit Charitable Organizations

Subject to such verification regulations as the Attorney General may subsequently adopt and the limitations set forth immediately below, a "nonprofit charitable organization" providing a federal, state or local public benefit covered by the Act is not required under Title IV of the Act to determine, verify, or otherwise require proof of an applicant's eligibility for such benefits based on the applicant's status as a U.S. citizen, U.S. non-citizen national or qualified alien. Thus, a nonprofit charitable organization is not required by the Act to seek an applicant's confirmation that he or she is a qualified alien, or to have a separate entity verify the applicant's status before providing benefits. To be eligible for this exemption, an organization must be both "nonprofit" and "charitable." For purposes of this Guidance, an organization is "nonprofit" if

it is organized and operated for purposes other than making gains or profits for the organization, its members or its shareholders, and is precluded from distributing any gains or profits to its members or shareholders. An organization is "charitable" if it is organized and operated for charitable purposes. The term "charitable" should be interpreted in its generally accepted legal sense as developed by judicial decisions. It includes organizations dedicated to relief of the poor and distressed or the underprivileged, as well as religiously-affiliated organizations and educational organizations. If you have any questions as to whether your organization is a nonprofit charitable organization exempt from the Act's verification requirements, you should contact the federal, state or local agency overseeing the program you administer to obtain guidance.

The exemption for nonprofit charitable organizations is limited to verification requirements imposed by Title IV of the Act and to those instances in which the nonprofit charitable organization itself would be required by Title IV to engage in verification. Certain programs, however, require federal, state and local agencies to verify citizenship and immigration status as part of program eligibility determinations, while benefits are provided, at least in part, by charitable organizations. Other programs currently require verification by the charitable organization itself. These independent requirements are not altered by the provision exempting nonprofit charitable organizations from the Act's verification requirements. If a non-exempt entity (e.g., a state agency) performs verification for benefits provided through a non-profit charitable organization, you must abide by those determinations. Similarly, if your program has procedures unrelated to Title IV of the Act that require verification by your charitable organization, or adopts such procedures in the future, you must comply with such procedures.

A nonprofit charitable organization that chooses not to verify cannot be penalized (e.g., through cancellation of its grant or denial of reimbursement for benefit expenditures) for providing federal public benefits to an individual who is not a U.S. citizen, U.S. non-citizen national or qualified alien, except when it does so either in violation of independent program verification requirements or in the face of a verification determination made by a non-exempt entity. However, if your organization chooses to verify, even though it is a nonprofit charitable organization that is not required to do so under the Act, you should comply with the procedures set forth in this Guidance and provide benefits only to those whom you verify to be U.S. citizens, U.S. non-citizen nationals or qualified aliens. Any verification request to INS by a nonprofit charitable organization must be accompanied by the written consent of the individual whose status is to be verified to the release of information about the individual to a nongovernmental entity. The consent must be notarized or executed under penalty of perjury. (INS Form G-639 may be used for this purpose.)

E. Nondiscrimination and Privacy Requirements

Various federal civil rights laws and regulations prohibit discrimination by governmental and private entities on the basis of race, color, national origin, gender, religion, age and disability. They include Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

("Title VI"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., the Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq., and the Fair Housing Act, 42 U.S.C. § 3601 et seq. These laws apply to entities' provision of any public benefits, including their implementation of the Act. In particular, Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity, whether operated by a public or private entity, that receives federal funds or other federal financial assistance. Thus, in operating or participating in a federally assisted program and implementing the requirements of the Act, including those set forth in this Guidance, a provider should not, on the basis of race, color or national origin, directly or indirectly differentiate among persons in the types of program services, aids or benefits it provides or the manner in which it provides them. For example, benefit providers should treat all similarly situated individuals in the same manner, and should not single out individuals who look or sound foreign for closer scrutiny or require them to provide additional documentation of citizenship or immigration status. The nondiscrimination requirements of Title VI and other applicable civil rights laws are discussed more fully in Attachment 2.

If you have questions regarding issues of discrimination that may arise with respect to benefit-granting procedures or the implementation of this Guidance, you should contact the civil rights office of the pertinent benefit-granting agency or the applicable office in the Civil Rights Division of the U.S. Department of Justice. Contact numbers in the U.S. Department of Justice, Civil Rights Division are set forth in Attachment 2.

When implementing the Act's verification requirements, you should be sensitive to privacy interests, and should use the citizenship and immigration status information received only for purposes of verifying the applicant's eligibility for benefits under the Act and, if you are a governmental entity, for sharing such information with the INS and other governmental entities as provided for by the Act. You should also review the Privacy Act (5 U.S.C. § 552a), state and local privacy laws, and your program's requirements to ensure that you comply with all applicable privacy requirements.

## VERIFICATION PROCEDURES

### STEP 1: DETERMINE IF YOUR PROGRAM PROVIDES A "FEDERAL PUBLIC BENEFIT" SUBJECT TO THE ACT'S VERIFICATION REQUIREMENTS

The Act's requirement that benefit recipients be U.S. citizens, U.S. non-citizen nationals or qualified aliens does not apply to all federally funded activity or programs; it applies only to non-exempted "federal public benefits". Therefore, benefit providers should first determine whether the particular program they are administering provides a "federal public benefit" for which the Act requires them to verify citizenship, nationality or immigration status. Preliminary guidance on which programs provide "federal public benefits" subject to the Act's verification requirements is set forth in Attachment 3. If the federal program does not provide a "federal public benefit" covered by the Act (e.g., the program is exempted by Attorney General Order No. 2049, 61 Fed. Reg. 45,985 (1996), regarding government-funded community programs,

services or assistance that are necessary for the protection of life or safety), the benefit provider is not required to, and should not attempt to, verify an applicant's status, unless otherwise required or authorized to do so by law, because all aliens, regardless of their immigration status, are eligible for such benefits.

If one program provides several public benefits, the Act's requirements apply only to those benefits that are non-exempted federal public benefits under the Act. A provider is not required to, and should not, verify the citizenship, nationality and immigration status of applicants for other benefits provided by the program that do not constitute federal public benefits.

## STEP 2: DETERMINE WHETHER APPLICANT IS ELIGIBLE FOR BENEFITS UNDER GENERAL PROGRAM REQUIREMENTS

Given the potential intrusiveness and possibly time-consuming nature of the citizenship and alien status verification inquiry, a provider should determine whether an applicant otherwise meets specific program requirements for benefit eligibility before initiating the verification process, unless determining program eligibility would be considerably more complex and time-consuming than verifying immigration status. This will reduce verification inquiries that prove unnecessary because the applicant is not otherwise eligible for the benefits requested. This Guidance does not address these other program eligibility requirements; a provider should refer to the statute, regulations and agency guidance (if any) governing its program for such requirements. (Note, however, that Title IV contains provisions requiring that, upon the effective date of the new affidavit of support, required under section 213A of the Act, when determining eligibility for federal means-tested public benefits and the amount of such benefits to which an alien is entitled, the income and resources of the alien be deemed to include those of any person executing an affidavit of support on behalf of the alien and that person's spouse, if applicable, with certain exceptions for indigent qualified aliens and aliens who (or whose children or parents) have been battered or subjected to extreme cruelty in the U.S. by a spouse, parent or member of the spouse or parent's family. See Exhibit B of Attachment 5.)

Determining program eligibility will normally include verifying that the applicant is who he or she claims to be. Although many of the documents and procedures relevant to determining citizenship or immigration status may also be relevant to identity verification, this Guidance is designed to provide assistance in determining the status of applicants whose identity has already been verified, and does not address appropriate identity verification procedures. It is your responsibility to assure yourself, pursuant to non-discriminatory procedures, of the identity of the applicant.

## STEP 3: VERIFY APPLICANT'S STATUS AS A U.S. CITIZEN, U.S. NON-CITIZEN NATIONAL OR QUALIFIED ALIEN

Because the process of verifying an individual's status as a U.S. citizen, U.S. non-citizen national or qualified alien raises significant issues involving privacy and anti-discrimination

protections, no verification of an applicant's status as a U.S. citizen, U.S. non-citizen national or qualified alien should be undertaken where benefits are not contingent on such status. In addition, if an alien is applying for benefits on behalf of another person, you may, under federal law, only verify the status of the person who will actually be receiving the benefits.

Except as set forth in this paragraph, if your program provides a non-exempted "federal public benefit," and thus is available only to U.S. citizens, U.S. non-citizen nationals and qualified aliens, you should verify an applicant's status as set forth below. If you are a private provider of a "federal public benefit" and your program requires verification by a federal, state or local governmental agency, but not by a private provider, you should not engage in any independent verification and should continue to comply with the verification determinations made by the appropriate governmental entity. If you are on the SAVE system, you should continue following the SAVE procedures and should use this Guidance only for matters not addressed under the SAVE program.

A. U.S. Citizen or Non-Citizen National

1. Ask for Declaration of Status. If you are required to verify an applicant's status as a U.S. citizen, U.S. non-citizen national or qualified alien, you should begin by asking the applicant to submit a written declaration, under penalty of perjury, that he or she is a citizen or non-citizen national of the U.S. (or that he or she is a qualified alien -- see Paragraph B.1. below).

Subject to certain exceptions and qualifications (particularly with respect to derivative citizenship), a United States citizen is:

- a person (other than the child of a foreign diplomat) born in one of the several States or in the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands who has not renounced or otherwise lost his or her citizenship;

- a person born outside of the United States to at least one U.S. citizen parent (sometimes referred to as a "derivative citizen"); or

- a naturalized U.S. citizen.

As a general matter, a United States non-citizen national is a person born in an outlying possession of the United States (American Samoa or Swain's Island) on or after the date the U.S. acquired the possession, or a person whose parents are U.S. non-citizen nationals (subject to certain residency requirements).

The law regarding U.S. citizenship and nationality is complex. These broad definitions are provided for general guidance only, and do not address all of the complexities involved in attaining or losing status as a U.S. citizen or non-citizen national. See 8 U.S.C. § 1401 et seq.

If you have any questions regarding whether an applicant is a U.S. citizen or non-citizen national, you should consult with the INS (in the case of a naturalized citizen) or the federal agency or department that oversees your program.

2. Verify Status. A number of programs have existing procedures for verifying that an applicant is a U.S. citizen or non-citizen national for purposes of program eligibility. You should continue to comply with any existing or future legal requirements for verifying citizenship and nationality that are imposed on your program, as well as with any applicable existing or future guidance provided by the agency or department overseeing your program. If a program has no requirements or guidance regarding verification, a benefit provider should refer to this Guidance.

The appropriate method of verifying an applicant's citizenship will depend upon the requirements and needs of the particular program, including, but not limited to, the nature of the benefits to be provided, the need for benefits to be provided on an expedited basis, the length of time during which benefits will be provided, the cost of providing the benefits, the length of time it will take to verify based on a particular method, and the cost of a particular method of verification. For example, a benefit provider could adopt a quick and simple verification procedure if it provides short-term benefits and the cost of extensive verification will outweigh the cost of the benefits or if verification will be time-consuming and the benefits are needed in the short term. On the other hand, if the benefit provider provides substantial, long-term benefits, it may be reasonable to require more extensive verification of citizenship.

Regardless, a benefit provider's decision as to the appropriate method must be made in a non-discriminatory fashion; for example, it cannot turn on the fact that the applicant looks or sounds foreign or has an ethnic surname. A benefit provider should adopt neutral procedures that apply equally to all applicants regardless of their appearance, ethnicity or accent. A benefit provider should not implement its procedures in a manner that discriminates against applicants whom it assumes to be foreign; nor should a benefit provider treat any applicant in a more beneficial manner based on assumptions as to the applicant's citizenship. (See Nondiscrimination Advisory in Attachment 2.)

To verify that an applicant is a U.S. citizen or non-citizen national, a benefit provider could do any one of the following:

(a) Ask the applicant to present a document demonstrating that he or she is a U.S. citizen or non-citizen national. Documents that can be used to make this demonstration are described in Attachment 4. (A benefit provider may also consult records of verified citizenship, if any, maintained by the agency overseeing its program.)

(i) If the document reasonably appears on its face to be genuine and to relate to the individual presenting it (or, if your program already has existing guidance or procedures mandating a higher standard of proof for acceptance of documentary evidence of status, the document satisfies that higher standard), the

provider should accept the document as conclusive evidence that the applicant is a U.S. citizen or non-citizen national, and should not verify status any further.

(ii) If the document presented does not on its face reasonably appear to be genuine (or to satisfy a higher applicable standard) or to relate to the individual presenting it, the benefit provider should contact the governmental entity that originally issued the document presented or that can confirm the applicant's status as a U.S. citizen or non-citizen national. (With regard to naturalized citizens and derivative citizens presenting certificates of citizenship, the INS is the appropriate governmental entity to contact for verification of such status. If the applicant presents a document relating to such status and that document does not on its face reasonably appear to be genuine or to relate to the applicant (or to satisfy a higher applicable standard), the provider may request verification of status by filing INS Form G-845 along with copies of the pertinent documents provided by the applicant with the local INS office. If an applicant has lost his or her original documents or never had an original document demonstrating naturalized or derivative citizenship, refer the applicant to the local INS office to obtain documentation of status.)

(b) Accept a written declaration, made under penalty of perjury and possibly subject to later verification of status, from one or more third parties indicating a reasonable basis for personal knowledge that the applicant is a U.S. citizen or non-citizen national.

(c) Accept the applicant's written declaration, made under penalty of perjury and possibly subject to later verification of status, that he or she is a U.S. citizen or non-citizen national.

The options described in subparagraphs (b) and (c) above present a greater potential for undetected false claims of being a United States citizen or non-citizen national, and therefore should be used with caution in appropriate circumstances. For example, before using these options, a provider might require the applicant to demonstrate why a document evidencing that he or she is a U.S. citizen or non-citizen national does not exist or cannot be readily obtained. Such a requirement must be imposed equally on all applicants, and cannot be applied in a discriminatory manner.

3. Action Pending Verification. If an applicant has satisfied the above requirements regarding submission of a sworn declaration and presentation of any other required evidence of status, you should refer to the legal requirements of your program and to any applicable guidance provided by the federal agency or department overseeing your program to determine if you should grant or withhold benefits during the period of time in which you are verifying the applicant's status. If your program has no such requirements or guidance and the applicant has submitted a written declaration, under penalty of perjury, that he or she is a U.S. citizen or non-citizen national, you should not delay, deny, reduce or terminate the applicant's

eligibility for benefits under the program on the basis of an applicant's citizenship or nationality during the period of time it takes to verify his or her status.

4. Take Action Based on Results of Verification. If you verify that the applicant is a U.S. citizen or non-citizen national, you are subject to no further verification requirements under Title IV of the Act and should grant the benefits requested if the applicant is otherwise eligible for them under the specific program's requirements. If you cannot verify that the applicant is a U.S. citizen or non-citizen national after exhausting the above-described methods (and the applicant is not a qualified alien -- see below), you should deny the benefits requested, and notify the applicant pursuant to your regular procedures of his or her rights under the applicable program to appeal the denial of benefits. If the INS was involved in the provider's attempt to verify naturalized or derivative citizenship, the INS will, upon request of the agency or department handling the appeal, conduct a thorough review of its initial verification response and will provide the agency or department with information in its possession necessary to resolve the appeal.

B. Qualified Alien

1. Ask for Declaration of Status. If an applicant is not a U.S. citizen or U.S. non-citizen national, you may grant the applicant non-exempted federal public benefits only if the applicant submits a written declaration, under penalty of perjury, that he or she has an immigration status that makes him or her a "qualified alien" and you verify that status as set forth below.

A "qualified alien" is:

- an alien lawfully admitted for permanent residence under the Immigration and Nationality Act ("INA");
- an alien granted asylum under § 208 of the INA;
- a refugee admitted to the U.S. under § 207 of the INA;
- an alien paroled into the U.S. under § 212(d)(5) of the INA for at least one year;
- an alien whose deportation is being withheld under § 243(h) of the INA as in effect prior to April 1, 1997, or whose removal is being withheld under § 241(b)(3) of the INA;
- an alien granted conditional entry pursuant to § 203(a)(7) of the INA as in effect prior to April 1, 1980;
- an alien who is a Cuban or Haitian entrant as defined in section 501(e) of the Refugee Education Assistance Act of 1980; or

- an alien who (or whose child or parent) has been battered or subjected to extreme cruelty in the U.S. and otherwise satisfies the requirements of § 431(c) of the Act (see Exhibit B of Attachment 5).

2. Request Documentation of Immigration Status. Ask the applicant to provide documentation evidencing his or her status as a qualified alien. The documents that will demonstrate that an applicant is a "qualified alien" are described in Attachment 5. Note that, if the applicant is applying for federal means-tested public benefits covered by the Act, or possibly a program funded by a Social Services Block Grant, the applicant may well have to present additional documentation demonstrating eligibility under the Act -- see Step 4 below -- and you will also want to ask the applicant to provide any such additional documentation demonstrating eligibility.

3. If Supported by Documents, Conclude that the Applicant is a Qualified Alien. If the documentation reasonably appears on its face to be genuine (or, if your program already has existing guidance or procedures mandating a higher standard of proof for acceptance of documentary evidence of immigration status, the document satisfies that higher standard) and to relate to the individual presenting it, you should accept the documentation as conclusive evidence that the applicant is a qualified alien, you should not further verify immigration status with the INS (unless you are a SAVE user, in which case you should proceed to verify status according to SAVE procedures), and you should proceed to determine if the applicant satisfies the Act's other eligibility requirements for the particular benefits discussed in Step 4 below (addressing SSI, Food Stamps, TANF, Medicaid, programs funded by a Social Services Block Grant, and federal means-tested public benefits).

4. If, Based on the Documents Presented, You Are Considering Concluding that the Applicant Is Not a Qualified Alien, Take the Following Steps.

(a) Verify Status. If, based on your review of the documents presented, you are considering determining that an applicant is not a qualified alien and thus is not eligible for the benefits requested based on his or her immigration status -- e.g., because the document does not on its face reasonably appear to be genuine (or to satisfy a higher applicable standard) or to relate to the person presenting it -- you should check with the INS to verify the information presented as set forth below. (You do not need to check with the INS if the applicant presents a document that is valid and demonstrates lawful immigration status but that simply does not qualify him or her for status as a qualified alien: e.g., INS Form I-94 showing admission as a nonimmigrant visitor.) **Do not determine that an applicant is not a qualified alien, and do not conclusively deny benefits on that basis, without first verifying the applicant's status with the INS as follows:**

If you are connected to the INS SAVE system, check the applicant's immigration status using the standard procedures for use of the SAVE system, including both the electronic mechanism and, if necessary (e.g., if information regarding the pertinent immigration status cannot be confirmed through the electronic SAVE database), the procedures for secondary

verification. If you are not connected to the SAVE system and the applicant presents documents relating to such status, request verification of immigration status by filing INS Form G-845 and Supplement along with copies of the pertinent immigration documents provided by the applicant with the local INS office. In either instance, the INS will conduct a thorough review of its records to determine if the applicant is a qualified alien. If the applicant presents expired documents or is unable to present any documentation evidencing his or her immigration status, refer the applicant to the local INS office to obtain documentation of status. In unusual cases involving applicants who are hospitalized or medically disabled, or who can otherwise show good cause for their inability to present documentation, and for whom securing such documentation would constitute an undue hardship, if the applicant can provide an alien registration number, you may file INS Form G-845 and Supplement, along with the alien registration number and a copy of any expired INS document presented, with the local INS office to verify status. As with any documentation of immigration status, you should confirm that the status information you receive back from INS pertains to the applicant whose identity you have verified.

(b) Action Pending Verification. You should refer to the legal requirements of your program and to any applicable guidance provided by the federal agency or department overseeing your program, if any, to determine whether you should grant or withhold benefits during the period of time in which you are verifying the applicant's immigration status. If your program has no such requirements or guidance and the applicant has submitted a written declaration, under penalty of perjury, that he or she is a qualified alien, you should not delay, deny, reduce or terminate the applicant's eligibility for benefits under the program on the basis of an applicant's immigration status during the period of time it takes to verify his or her immigration status. If you are to grant benefits pending verification, you should first determine if the applicant satisfies the Act's other eligibility requirements (if any) for the benefits requested as set forth in Step 4 below.

(c) Take Action Based on Response to Verification Inquiry.

If the INS notifies you that the applicant has an immigration status that makes him or her a qualified alien within the meaning of the Act, you should accept the INS verification and proceed to determine whether the applicant satisfies the Act's other eligibility requirements (if any) for the benefits requested as set forth in Step 4 below.

If the INS notifies you that it cannot verify that the applicant has an immigration status that makes him or her a qualified alien within the meaning of the Act, you should deny benefits and notify the applicant pursuant to your program's regular procedures of his or her rights under the applicable program to appeal the denial of benefits. Upon request of the agency or department handling the appeal, the INS will conduct a thorough review of its initial verification response and will provide the agency or department with information in its possession necessary to resolve the appeal.

## STEP 4: VERIFY ELIGIBILITY UNDER THE ACT

Title IV of the Act provides that all qualified aliens are eligible for some federal public benefits, while it imposes additional eligibility requirements for receipt of other benefits. If the qualified alien is applying for a benefit for which all qualified aliens are eligible, you should not engage in any further verification of immigration status. If he or she is applying for a program for which the Act imposes additional eligibility requirements, however, you should determine whether the applicant satisfies those requirements.

### A. Federal Public Benefits With No Further Immigration Eligibility Requirements for Qualified Aliens

Except as set forth below, all qualified aliens are eligible for all federal public benefits. If the qualified alien is applying for a federal public benefit for which all qualified aliens are eligible, you should not engage in any further verification of immigration status.

With some exceptions, individuals receiving SSI as of August 22, 1996, continue to be eligible for such benefits until the Commissioner of Social Security, prior to September 30, 1998, redetermines their eligibility; if, as a result of that redetermination, an individual is found to be ineligible for SSI, the individual can nevertheless continue receiving benefits until September 30, 1998.

In the absence of a State's decision to restrict eligibility for programs funded by a Social Services Block Grant, all qualified aliens are eligible for Social Services Block Grant programs. In the absence of a State's decision to restrict eligibility for TANF and Medicaid, the Act does not restrict the availability of these benefits to qualified aliens who entered the United States prior to August 22, 1996, and who were continuously present in the United States until attaining qualified alien status; however, because the Department of Health and Human Services has determined that TANF and Medicaid are federal means-tested public benefits, see 62 Fed. Reg. 45,256 (August 26, 1997), aliens who entered the United States on or after August 22, 1996, are ineligible for those programs for five years from the date that they attain qualified alien status (see discussion of federal means-tested public benefits in Paragraph B below and Attachment 7). You should determine whether your State is continuing to provide TANF, Medicaid, and programs funded by a Social Services Block Grant to all qualified aliens:

- If the State is continuing to provide programs funded by a Social Services Block Grant to all qualified aliens, you should not engage in any further verification of immigration status;

- If the State is continuing to provide TANF and Medicaid to all qualified aliens, you should refer to Paragraph B below and Attachment 7 for further guidance on additional eligibility requirements; and

- If the State has restricted qualified aliens' eligibility for TANF and Medicaid, you

should determine whether the applicant is eligible for such benefits as set forth in Paragraph B below.

B. Federal Benefits With Additional Eligibility Requirements for Qualified Aliens

SSI, Food Stamps, TANF, Medicaid, and Programs Funded by a Social Services Block Grant: The Act provides that only certain excepted categories of aliens are eligible for SSI and Food Stamps. A State may, however, choose to issue Food Stamp benefits to individuals that are otherwise ineligible for such benefits under sections 402 or 403 of the Act, provided that the State reimburses the federal government for the costs of such benefits and complies with certain administrative requirements. In addition, if a State has exercised its right to limit qualified aliens' eligibility for TANF, Medicaid, and programs funded by a Social Services Block Grant, certain excepted categories of aliens remain eligible for such programs. The excepted categories of aliens that remain eligible for SSI are somewhat broader than the excepted categories for Food Stamps, Medicaid, TANF and programs funded by a Social Services Block Grant. Consult Attachment 6 for a more specific description of these excepted categories and the documentation that will demonstrate that an alien falls within such an exception and thus remains eligible for these programs.

Federal Means-Tested Public Benefits. With certain exceptions discussed in greater detail in Attachment 7, qualified aliens are ineligible to receive federal means-tested public benefits for five years from the date that they attain qualified alien status. However, aliens who entered the United States prior to August 22, 1996, and who were continuously present in the United States until attaining qualified alien status are not subject to this restriction. In addition, exceptions are made for refugees, asylees, aliens whose deportation or removal has been withheld, Cuban/Haitian entrants, certain Amerasian immigrants, and aliens who are veterans honorably discharged or on non-training active duty and their families. This restriction, moreover, does not apply after the expiration of the five-year period. If a qualified alien is applying for such a benefit, you should determine, in accordance with Attachment 7, whether he or she arrived in the United States prior to August 22, 1996, whether he or she falls within one of the enumerated exceptions, or whether he or she has been a qualified alien for at least five years.

WR - illegal alien provisions

Record Type: Record

To: Elena Kagan/OPD/EOP, Jose Cerda III/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP, Laura Emmett/WHO/EOP
Subject: I really do need folks' reaction to the attached

This is NOT the same issue as the means tested benefit issue that you've read about lately in the paper; this one has yet to be resolved. And I need to hear something in the next few days.

The pressure comes from the fact that the Balanced Budget Act set a deadline of November 3 for DOJ to issue interim verification guidance on the immmigration provisions of welfare reform *(one week from today,* and people feel it would look very foolish to leave this out.
---------- Forwarded by Diana Fortuna/OPD/EOP on 10/27/97 10:05 AM ----------

Record Type: .Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Jose Cerda III/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: Immigrant benefit definition that I need DPC views on

Elena, I need your call on this issue in the next day or two, if at all possible.

HHS would like to release ASAP its interpretation of what the welfare law means when it says that "non-qualified aliens" are not eligible for "federal public benefits." It has taken them forever to get to this point, but now they are ready. The pressure to get this out is that DOJ wants to issue its "interim verification guidelines" on how to interpret all the welfare law's benefit restrictions for immigrants. HHS is not the only agency affected by this, but it is the primary one, so other agencies are looking to HHS to take the lead. There has been no movement to have DOJ do a common definition.

I think what HHS wants to do makes sense, but it does keep certain benefits open for **illegal** immigrants, so I need to flag that for you. OMB has signed off on it.

Welfare Law
The question arises because the welfare reform bill states that "an alien who is not a qualified alien [for example, an illegal immigrant] is not eligible for any Federal public benefit . . . ." The law defines "public benefit" to mean (among other things):

> "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household or family eligibility units by an agency of the United States or by appropriated funds of the United States."

The law specifies exceptions to this ineligibility for emergency Medicaid services, immunizations,

treatment of communicable diseases and some other items.

HHS' Interpretation Minimizes Administrative and Health Burden of the Term
HHS' representatives said that they set about interpreting this language to minimize the administrative burden on the programs and the public health impact of the law.

They said that the term "public benefit" as used in the law is ambiguous and requires interpretation. They get some help interpreting the term from Section 432, which requires the Attorney General to "promulgate regulations requiring verification that a person applying for a Federal public benefit... is a qualified alien and is eligible to receive such benefit." This implies that a "benefit" is something that requires an "application." And an application requires provision of information for the purpose of determining eligibility.

Therefore, to minimize administrative burden, HHS thinks that no program that currently does not verify eligibility should begin doing so. So programs that have no eligibility requirements, or which do not verify eligibility as a matter of course, are not "public benefits" for the purposes of welfare reform.

HHS Programs That **Aren't** Public Benefits By This Definition
Under this definition, Community Health Centers, the maternal/child health block grant, substance abuse grants, Administration on Aging, HUD homeless shelter assistance and some other aging programs would not be "public benefits" and would be available to non-qualified aliens.

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Other programs would clearly be "public benefits" under this definition, and denied to non-qualified aliens: TANF, Medicaid and Medicare, Indian Health Service programs,LIHEAP and Ryan White, among others.

It does not appear that Labor or DoEd programs would be affected by this definition. Housing is partially grandfathered by the law.

WP-illegal alien provisions

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP
Subject: Federal public benefit definition

You asked where we are on the HHS public benefit definition, after Kevin Thurm called you about it. We are having a conference call with HHS tomorrow morning to go over it thoroughly and so we'll have a recommendation after that.

(Attached is an email that describes the issue more fully, in case you're interested.)

---------- Forwarded by Diana Fortuna/OPD/EOP on 10/29/97 06:49 PM ----------

Record Type: Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Jose Cerda III/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP

cc: Laura Emmett/WHO/EOP
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WP-illegal alien provisions

Diana Fortuna 04/09/97 09:38:47 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Stephen C. Warnath/OPD/EOP, Nancy A. Min/OMB/EOP

cc:

Subject: Definition of federal public benefits

As we get closer to issuing this interim verification guidance from DOJ, there are still 2 outstanding definitions of the welfare law we need to finish up. One, means tested benefits, is about to get issued. The other is "federal public benefits." Federal public benefits are denied to illegals, so this is an illegals issue.

In a nutshell, HHS has proposed a definition that draws the line at programs that require some establishment of eligibility. All the lawyers (HHS, DOJ, OMB) seem to think this is fine legally. From a practical standpoint, the major program that this definition would affect is community health centers, and maybe some similar discretionary health programs. Illegals WOULD be eligible for these programs.

There don't seem to be any other major impacts (although HHS hasn't shared their paper with us yet). Education is specifically OK because the law exempts them. Housing would appear to be off-limits to illegals because there is an eligibility determination.

This comes down to a policy call. I hear Ken is probably fine with this proposal. It would be good to decide this before the interim verification guidance goes out in the next 2 weeks or so, because if this is missing from it HHS will get a lot of questions. Reactions?

WR - illegal aliens
provisions

Stephen C. Warnath 03/26/97 09:51:23 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Diana Fortuna/OPD/EOP

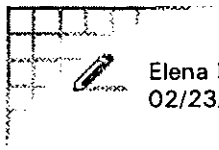
cc:

Subject: benefits and undocumented immigrants

There is apparently an L.A. Times article today that indicates that Governor Wilson's position on providing certain health-related benefits to undocumented immigrants is changing -- basically a necessary move from political rhetoric to the real world. He is also calling for State agencies to report on their verification procedures. I have not seen the article yet, but we need to follow the State's verification process closely.

I spoke with Lisa Brown yesterday and she says that the process is on track for getting the A.G. interim verification guidelines signed by the A.G. and out at the end of next week.

thanks



Elena Kagan
02/23/97 02:21:32 PM

Record Type: Record

To: Stephen C. Warnath/OPD/EOP, Diana Fortuna/OPD/EOP

cc: Bruce N. Reed/OPD/EOP
Subject: medicaid case

I read the brief that counsel's office sent over. It looks pretty clear to me that the brief is right in saying that the welfare law forbids illegal aliens from receiving medicaid coverage for non-emergency pre-natal care. So I'd tell DOJ to go ahead and file. Does anyone disagree?

IMA:CSK:ec
cv6_464.mem

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - X

LYDIA LEWIS, et al.,

Plaintiffs,

- against -

WILLIAM GRINKER, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - - X

THE CITY OF NEW YORK and the NEW YORK HEALTH AND HOSPITALS CORPORATION,

Plaintiffs-Intervenors,

- against -

DONNA E. SHALALA, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - - X

DETERMINED TO BE AN ADMINISTRATIVE MARKING Per E.O. 12958 as amended, Sec. 3.2 (c)
Initials: Ply Date: 3/22/10

Civil Action
No. CV 79-1740

(Sifton, J.)

~~CONFIDENTIAL~~

DRAFT

MEMORANDUM OF LAW IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS DISMISSING THE COMPLAINT AGAINST HER IN ITS ENTIRETY, INCLUDING AN ORDER DISSOLVING THE INJUNCTION PREVIOUSLY ENTERED AGAINST HER

ZACHARY W. CARTER
United States Attorney
Eastern District of New York
Attorney for Federal Defendant
One Pierrepont Plaza, 14th Floor
Brooklyn, NY 11201

CHARLES S. KLEINBERG
Assistant U.S. Attorney
(Of Counsel)

## PRELIMINARY STATEMENT

On March 14, 1991, this Court entered an order permanently enjoining the Secretary of Health and Human Services from denying Medicaid coverage for non-emergency prenatal care to undocumented aliens. Lewis v. Grinker, 794 F. Supp. 1193 (E.D.N.Y. 1991), aff'd, 965 F.2d 1206 (2d Cir.), reh'g denied, 965 F.2d 1221 (2d Cir. 1992).[1] The injunction was upheld by the Court of Appeals for this Circuit in Lewis v. Grinker, 965 F.2d 1206 (2d Cir.), reh'g denied, 965 F.2d 1221 (2d Cir. 1992). In its decision, the Appeals Court held that statutory language then at issue in the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), Pub L. No. 99-509, 100 Stat. 2050 (1986), which expressly limited Medicaid coverage for undocumented aliens to emergency services, should not be read as applying to non-emergency prenatal care in the absence of some indication in the legislative history that Congress envisioned and intended that result. Id. at 1214-24. However, in the subsequent enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act"), Pub. L. 104-193, 110 Stat. 2105 (1996), Congress has now provided that missing evidence of its specific intent on this issue, both in the form of clear statutory language and express legislative history. Because the current injunction is now inconsistent with the existing law, it should be vacated, and plaintiffs' complaint should be dismissed.

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[1] The injunction was entered on plaintiffs' motion for partial summary judgment. See Fed. R. Civ. P. 54(b).

## ARGUMENT

I. THE WELFARE REFORM ACT EVIDENCES A SPECIFIC CONGRESSIONAL INTENT TO DENY MEDICAID COVERAGE FOR NON-EMERGENCY PRENATAL CARE TO UNDOCUMENTED ALIENS.

"In the usual case, where the language of [a] statute is clear, that is the end of the inquiry," Lewis, 965 F.2d at 1215, and "the sole function of the court is to enforce [the statute] according to its terms." United States v. Ron Pair Enterprises, 489 U.S. 235, 240 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). Section 401 of the recently enacted Welfare Reform Act plainly provides, in pertinent part, that "an alien who is not a qualified alien[2] . . . is not eligible for any [Medicaid] benefit," 8 U.S.C. § 1611(a), except "for the treatment of an emergency medical condition." 8 U.S.C. § 1611(a)(1)(A). On its face, the language in § 401 Act plainly forbids undocumented aliens from receiving Medicaid coverage for non-emergency prenatal care.

That the broad prohibition on non-emergency Medicaid coverage in the Welfare Reform Act was meant to encompass prenatal care as well as other forms of medical treatment is

[2] Section 431 of the Welfare Reform Act, as amended, defines a "qualified alien" as one who has been admitted as a permanent resident, or who has been granted asylum, or who has been admitted as a refugee, or who has been paroled into the United States for a period of one year, or whose deportation is being withheld, or who has been granted conditional entry, or who is a battered alien. 8 U.S.C. §§ 1641(b)(1)-(6), (c)(1). By definition, an undocumented alien pregnant woman does not belong to any of these seven specifically enumerated categories of documented aliens, and thus an undocumented alien pregnant woman is not a "qualified alien" under Section 401 of the Welfare Reform Act.

conclusively established by the legislative history. In the Conference Committee Report accompanying the legislation, Congress made clear that the exception for emergency conditions was intended to be "very narrow," and it expressly stated that "[t]he conferees do not intend that emergency medical services include pre-natal or delivery care assistance that is not strictly of an emergency nature." H. Conf. Rep. No. 725, 104th Cong., 2d Sess. 380 (1996), reprinted in 1996 U.S.C.A.A.N. 2649, 2768 (emphasis added). This explanation leaves no room for doubt that the drafters specifically considered the impact of the statute on pregnant women and made a deliberate policy choice to deny Medicaid coverage for non-emergency prenatal care to undocumented aliens.

That conclusion is further supported by the fact that in the course of considering subsequent amendments to the Welfare Reform Act during the same session, Congress rejected previously proposed language that would have expressly mandated Medicaid coverage for non-emergency prenatal care for undocumented aliens. In § 501 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-1772-73 (1996), Congress amended § 431 of the Welfare Reform Act to allow Medicaid coverage for undocumented aliens who are battered aliens, 8 U.S.C. § 1641(c)(1), but did not include language passed by the Senate in a predecessor version of the immigration legislation that would have guaranteed Medicaid coverage to undocumented aliens for "prenatal and postpartum

service," as well as emergency services. 142 Cong. Rec. S4730, S4749 (May 6, 1996); see also S. Rep. No. 249, 104th Cong., 2d Sess. ---- (1996), reprinted in 1996 WL 180026 (Apr. 10, 1996). By deleting the prenatal care exception from the version of the legislation that was ultimately approved, "Congress thus has rejected the very concept which [plaintiffs] seek[] to have the Court judicially legislate." J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 563 (1981).[3]

The conclusion that Congress, in passing § 401 of the Welfare Reform Act, intended to preclude Medicaid funding for non-emergency prenatal care for undocumented aliens also is completely consistent with the reasoning of the Court of Appeals in Lewis. In that decision, the Court addressed the intended meaning of language then in effect under OBRA '86, which prohibited all Medicaid assistance "to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law" ["PRUCOL"], 42 U.S.C. § 1396a, unless it was for "the treatment of an emergency medical condition," 42 U.S.C. § 1396b(v)(2), "including emergency labor and delivery." 42 U.S.C. §

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[3] See INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded for other language.") (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)) (italics in original); United States v. Ten Cartons, More or Less, of an Article, 72 F.3d 285, 287 (2d Cir. 1995) ("We are reluctant to give a statute a meaning that Congress considered and rejected.").

1396b(v)(3). Although the Court found that "the plain language of the statute appears to require denying prenatal care to non-PRUCOL women," it declined to ascribe that specific intent to Congress because "we are convinced that Congress did not realize this result would follow from the blanket alienage restriction of OBRA '86 and that had Congress foreseen this problem, it would not have enacted the statute as written." 965 F.2d at 1215.

The Court based this conclusion on evidence in the legislative history that (a) "Congress neglected to consider the implications of OBRA '86 for qualified pregnant women," id. at 1216, and (b) prenatal care was such a cost-efficient health-care practice that a congressional choice to deny Medicaid coverage for routine prenatal care to undocumented aliens would "undermine[] the clearly expressed Congressional purpose" of OBRA '86 "of curbing expenditures." Id. at 1219. Under those "rare and exceptional circumstances," id. at 1221 (citation omitted), the Court concluded that it was permissible to construe OBRA '86 in a manner that was "contrary to the plain language of the statute," because to do otherwise "would fly in the face of the legislative history." Id.

To read § 401 of the Welfare Reform Act as precluding prenatal Medicaid coverage for undocumented aliens, however, would not fly in the face of the legislative history but rather would be completely consistent with it. As shown above, the Conference Committee explicitly considered the impact that the statute's broad language would have on pregnant women and

expressly indicated that a strict prohibition on Medicaid funding for non-emergency prenatal care for undocumented aliens was the result both envisioned and intended by Congress. H. Conf. Rep. No. 725 at 380, reprinted in 1996 U.S.C.A.A.N. at 2768. Furthermore, Congress considered alternate statutory language that would have guaranteed prenatal Medicaid coverage for undocumented aliens and chose not to include it in subsequent amendments to the Welfare Reform Act passed during the same session. Unlike the situation in Lewis, there can be no question here that Congress was aware of the specific effect of the language it chose on the availability of routine prenatal care for undocumented aliens.[4] The reasoning of Lewis therefore compels the conclusion that the broad prohibition on Medicaid coverage for non-emergency services for undocumented aliens should be read to include the prenatal services that otherwise unarguably fall within the ambit of its plain language.

As this case is currently framed, it can no longer plausibly be characterized as presenting one of those "extremely rare instance[s]" where the faithful application of plain statutory language can be excused on the ground that it produces "an

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[4] Section 400 of the Welfare Reform Act also makes clear that at least two of the specific purposes of the Act were to restrict the availability of Medicaid and other federally funded benefits "in order to ensure that aliens be self-reliant," 8 U.S.C. 1601(5), and "to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). These restrictive purposes stand in sharp contrast to the purpose of "expand[ing] access to prenatal care," which the Court of Appeals imputed to Congress in construing the meaning of OBRA '86. Lewis, 765 F.2d at 1219.

unexpected result," Lewis 965 F.2d at 1219, "demonstrably at odds with the intentions of the drafters." Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)) (emphasis added). This case now presents an instance where carefully crafted statutory language produces a result -- a prohibition on Medicaid funding for non-emergency prenatal care for undocumented aliens -- which was fully expected by the drafters and is unarguably consistent with their plainly expressed intentions. Whatever misgivings one may have about the wisdom of that choice as a matter of public policy, see Lewis, 965 F.2d at 1219, 1223, there can be no question that the choice was actually made by Congress, and this Court has no alternative but to "give effect to the unambiguously expressed intent of Congress." Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1401 (1996) (quoting Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984)).

## II. THE ENACTMENT OF THE WELFARE REFORM ACT REQUIRES THIS COURT TO VACATE THE EXISTING INJUNCTION.

Because the injunction that was previously entered by this Court and the legal theory on which it was based are no longer tenable in light of recent changes in the underlying statutory law, the injunction must be vacated. It has long been settled that where the statutory basis for an injunction is later undermined by substantive amendment or repeal, the injunction must be dissolved because "parties have no power to require of a court continuing enforcement of rights the statute no longer gives." System Federation No. 91 v. Wright, 364 U.S. 642, 652

(1961) (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430-32 (1855)). Thus, in System Federation, the Supreme Court held that it was an abuse of discretion for a district court to fail to vacate an injunction enforcing certain rights under the Railway Labor Act, 45 U.S.C. §§ 151, et seq., after those rights were eliminated by later amendments. Id. at 648-52. To continue the injunction under those circumstances, the Court stated, "would be to render protection in no way authorized by the needs of safeguarding statutory rights." Id. at 648.

In Class v. Norton, 507 F.2d 1058 (2d Cir. 1974), the Court of Appeals for this Circuit applied that principle in the specific context of a regulation involving welfare benefits. In that case, a district court entered an injunction enforcing a regulation which required that the processing of welfare applications be completed within 30 days. The regulation was later amended in a manner that undercut the authority for the injunctive order. Relying on System Federation, the Court held that it was error for the district court not to modify the injunction so as to make it consistent with the amended regulation. Id. at 1061-62.

In this case, the recently enacted Welfare Reform Act removes whatever arguable doubt previously might have existed as to whether undocumented aliens are eligible for Medicaid for non-emergency prenatal care. Since the permanent injunction issued by the Court is inconsistent with both the clear language and

legislative history of this now-controlling provision, the Court is required to dissolve its injunction mandating Medicaid coverage for non-emergency prenatal care for undocumented aliens.

III. THE ENTIRE COMPLAINT SHOULD BE DISMISSED.

In addition to dissolving the injunction, the Court also should enter final judgment in federal defendant's favor. Since plaintiffs have previously stipulated to the dismissal of all claims other than those concerning non-emergency prenatal care,[5] dissolution of the existing injunction would dispose of the entire case. Inasmuch as the injunction with respect to prenatal coverage was originally entered on motion for partial summary judgment and this Court has not directed entry of final judgment with respect to any of plaintiffs' claims, see Fed. R. Civ. P. 54(b), the proper course now would be for the Court to dispose of the entire case by issuing an order entering final judgment in favor of the federal defendant. See J. Moore, Federal Practice ¶ 60.26[4] at 256 (2d ed. 1995). Because the Welfare Reform Act precludes plaintiffs from receiving the only relief which they still seek, federal defendant is entitled to judgment on the pleadings.[6]

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[5] See Stipulation dated November 13, 1996 ("all claims related to the application and implementation of ... 'PRUCOL' under federal law are hereby dismissed with prejudice"); Transcript of November 7, 1996 at 3-4 (admission by plaintiffs that, except for the order on prenatal care, "we do not believe that [there are] any remaining issues [in this case]").

[6] In the alternative, however, if the existing injunctive order were construed as having the effect of already entering a form of final judgment in favor of plaintiffs (it did not), (continued...)

## CONCLUSION

For the reasons stated, this Court's order dated March 14, 1991 should be vacated and judgment on the pleadings should be entered in favor of the federal defendant.

Dated: Brooklyn, New York
January , 1997

Respectfully submitted,

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[6](...continued)
relief from the judgment would still be required under Fed. R. Civ. P. 60(b)(5). Federal Practice ¶ 66.26 at 259-60; see, e.g., System Federation, 364 U.S. at 649-50; Class, 507 F.2d at 1061-62.

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DOJ -- The Department of Justice wants to file a brief in the next few days arguing that New York State should be permitted to cut off Medicaid-funded prenatal care for illegal aliens, in a case dating back to the late 1980's. The Bush Administration argued in court that illegal aliens were not entitled to Medicaid coverage for prenatal care. In 1991 a district court enjoined HHS and the state from cutting off benefits because congressional intent was unclear. However, the new welfare law appears to make it very clear that illegal aliens are not entitled to Medicaid-funded prenatal care, and DOJ would like to file a motion dismissing the complaint against the government. It appears that this would be the first action by the Clinton Admistration on this issue.

DOJ + NY Medicaid
prenatal care for aliens

Warnath.