NLWJC - Kagan
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Welfare-Public Benefit Definition

WR - public benefit def

Diana Fortuna 07/14/98 12:20:48 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP

cc: Laura Emmett/WHO/EOP, Julie A. Fernandes/OPD/EOP, Andrea Kane/OPD/EOP

Subject: FYI: Heads up will go to Erskine on two welfare/immigration items

FYI, OIRA is now clearing two documents for the Federal Register, and will send one of their heads-up notes to Erskine about them. They'll be published around Monday. They are:

1. Definition of federal public benefit: Elena, Rob Weiner, and I worked with HHS on this. It is HHS's binding guidance as to which of its programs are federal public benefits. Under the welfare law, illegal immigrants are not eligible for federal public benefits. The guidance clarifies that about 30 HHS programs are off-limits to illegals, most of which are very small. The big ones are adoption assistance/foster care, CSBG, LIHEAP, Medicare, Medicaid, SSBG, CHIP, and TANF. The two most noteworthy decisions are that community health centers are not federal public benefits (major good news for immigrant advocates, who argued that shutting off these centers to illegals would be dangerous to the public health and to citizen children; Lamar Smith may react); and that child care funds are federal public benefits (bad news for the child care community, which will now have to verify children's status, as below).

2. INS Verification Rule: This proposed rule is required by welfare reform. It tells providers of federal public benefits how to make sure that they are providing benefits only to those who are eligible for them -- i.e., how to screen out illegal immigrants. This will be seen as a tougher interpretation than Item 1, so the immigrant groups may be unhappy. (That's why we decided to release these together.) It requires providers to look at documents for everyone, including citizens, which providers will see as a major burden, but the law is pretty clear on this point. "Charitable organizations" are off the hook, though, as are programs like food stamps that have existing rules on how to verify.

I'll try to write a short, coherent item on these for the weekly. We are not looking for press on these, needless to say. I'll tell HHS and INS to do a good rollout with the Hill and the groups.

WR-Public benefit def

Lisa M. Jones
07/16/98 11:40:08 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Heads-up Memo

The memo below was signed and sent to Erskine Bowles on Wednesday, July 15th.

MEMORANDUM FOR ERSKINE BOWLES

THROUGH: Jack Lew

FROM: Donald R. Arbuckle

SUBJECT: Heads up on HHS Notice Defining Federal Public Benefit and DOJ Proposed Rule on Verification of Eligibility for Public Benefits

HHS and DOJ are preparing to publish two documents in the *Federal Register* (an HHS notice and a DOJ proposed rule) that will provide the framework for implementing key provisions in the 1996 Welfare Reform Law, banning the receipt of Federal public benefits for non-qualified (largely illegal) aliens.

The HHS notice presents for the first time the Administration's interpretation of the definition of a Federal public benefit and provides a list of the HHS programs so defined. To date, programs have been operating without knowing whether they fall under the definition. In the notice, only those Federal programs that have an explicit eligibility determination process are defined as public benefit programs. This definition thus includes programs like Medicare, child care and the Child Health Insurance Program, but excludes public health clinics.

The DOJ proposed rule requires Federal public benefit programs to verify alien and citizenship status. The rule is mandatory for Federal Public Benefit programs, but is optional guidance for State and local programs. Charities are exempt. The law requires these programs to conduct matches with an INS database of eligible aliens to verify alien status. The rule would require applicants to provide written proof of their citizenship, unless the agency already has regulations in place governing citizenship verification. The rule also provides a temporary waiver for those programs where written verification would present a hardship, to allow programs time to comply with the new rule.

We believe that as a combined policy, the definition and the verification requirements

form a fairly middle ground position and should be generally well received. We cannot, however, rule out a surprise response, from Congress or the field.

cc: Maria Echaveste
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W2-public law def

§ 1611. 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) of this section, an alien who is not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit (as defined in subsection (c) of this section).

(b) Exceptions

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

(A) Medical assistance under title XIX of the Social Security Act [42 U.S.C.A § 1396 et seq.] (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 [42 U.S.C.A. § 1396b(v)(3)]) 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 [42 U.S.C.A § 601 et seq.], supplemental security income benefits under title XVI of such Act [42 U.S.C.A. § 1381 et seq.], 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 [42 U.S.C.A. § 1396 et seq.]) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable 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 [42 U.S.C.A. § 1471 et seq.], or any assistance under section 1926C of Title 7, to the extent that the alien is receiving such a benefit on August 22, 1996.

(2) Subsection (a) of this section shall not apply to any benefit payable under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] 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 [42 U.S.C.A. § 433], to any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act [42 U.S.C.A. § 402(t)], or to any benefit payable under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] to which entitlement is based on an application filed in or before the month in which this Act becomes law.

(3) Subsection (a) of this section shall not apply to any benefit payable under title XVIII of the Social Security Act (relating to the medicare program) [42 U.S.C.A. § 1395 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General and, with respect to benefits payable under part A of such title, who was authorized to be employed with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits.

(4) Subsection (a) of this section shall not apply to any benefit payable under the Railroad Retirement Act of 1974 [45 U.S.C.A. § 231 et seq.] or the Railroad Unemployment Insurance Act [45 U.S.C.A. § 351 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General or to an alien residing outside the United States.

(c) "Federal public benefit" defined

(1) Except as provided in paragraph (2), for purposes of this chapter 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, 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 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 to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99–239 [48 U.S.C.A. § 1901 note] or 99–658 [48 U.S.C.A. § 1931 note] (or a successor provision) is in effect; 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 [8 U.S.C.A. § 1101 et seq.] 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.

PRWORA Conference Report

The intent of the conferees is that title I, part A of the Elementary and Secondary Education Act would not be affected by section 401 because the benefit is not provided to an individual, household, or family eligibility unit.

WR-public benefit definition

GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

TO: Diana Fortuna

FROM: Chai Feldblum

DATE: March 6, 1998

RE: Definition of "Federal Public Benefit"

CC: Elena Kagan

Sharon Daly talked to Jack Smalligan at OMB about the federal public benefit issue last month. We prepared the attached analysis on the issue and just sent him an updated version (see attached memo).

Obviously, there are policy -- as well as legal -- implications to all this. I'd love to be able to come by with my Teaching Fellow and some students to talk to you about this, as well as our (still pending) issue about immigrants with disabilities and reasonable accomodations. I'll call you soon to see if we can set up a time.

By the way, I've already mentioned to Elena Kagan that I want to come by and talk about this. If she can join us, that would obviously be great.

Thanks for everything.

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M E M O

TO: Jack Smalligan

FROM: Sharon Daly
Deputy to the President for Social Policy

DATE: March 6, 1998

RE: Definition of "Federal Public Benefit"

Attached is a new version of an analysis of the federal public benefit issue prepared by our legislative lawyers at the Georgetown Federal Legislation Clinic. I faxed you the original version on February 6. The only difference is the addition of a new section on page 4 that sets forth an application of our suggested approach.

As I noted in my February 6 cover memo, we would like to meet with you to discuss this issue. Of course, if you agree with our analysis completely, we'd love to just see that reflected in your final guidance. But if you want to push my lawyers at Georgetown on some of the legal analysis (as I am sure you may wish to), I would greatly appreciate it if you would give us that opportunity.

David Rapallo from the Georgetown Federal Legislation Clinic will call your office to see if a meeting can be arranged. Thank you again for your attention to this matter.

GEORGETOWN UNIVERSITY LAW CENTER

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**Definition of "Federal Public Benefit"
Under the Personal Responsibility and
Work Opportunity Reconciliation Act of 1996**

Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (PRWORA), "not qualified" immigrants are generally ineligible for "federal public benefits." 8 U.S.C. § 1611. The categories of immigrants denied such benefits are defined precisely by statute, *see* 8 U.S.C. § 1641, but the category of benefits affected is defined only in general terms.

I. Statutory Definition

The statute defines "federal public benefit" as follows:

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

. . .

(B) 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 by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1).

II. Preliminary Regulatory Interpretation

In November, the Department of Justice (DOJ) addressed the definition of federal public benefit in a preliminary manner. *See* 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, 62 Fed. Reg. 61344, 61361-62 (1997) (Attachment 3).

The interim guidance provides a general framework for determining whether a particular program provides a federal public benefit. The guidance demonstrates this framework by

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including several examples of programs and assistance that are and are not federal public benefits. We largely agree with the interpretation set forth in DOJ's interim guidance, but we propose some additional clarifications.

III. DOJ's Analysis and Our Proposed Clarifications

DOJ's interim guidance divides part B of the definition of federal public benefit into three components. In order to qualify as a federal public benefit, the benefit must:

(A) fall into one of the expressly enumerated categories (retirement, welfare, health, etc.) or be similar to one of these enumerated categories;
(B) be provided by a federal agency or with federal funds; and
(C) be provided to an individual, household, or family eligibility unit.

We agree this is the proper way to analyze the applicability of the definition of "federal public benefit" to any particular program.

A. *Expressly Enumerated Categories*

According to the statute and the interim guidance, a benefit must fall under one of the categories listed in the statute, or be similar to one of the categories listed (similar to retirement, similar to welfare, similar to health, etc.), in order to qualify as a federal public benefit.

DOJ's interim guidance correctly notes, for example, that unemployment benefits fall within the listed categories, and hence would be considered a federal public benefit. The guidance also correctly notes that police services, fire protection, and crime victim counseling are not federal public benefits because they are not similar to any of the listed categories.

B. *Federal Agency or Federal Funds*

According to the statute and the interim guidance, a benefit must be provided by a federal agency or with federal funds in order to qualify as a federal public benefit.

For example, DOJ's interim guidance states that a local agency or community organization that receives a grant from a federal agency, and subsequently provides benefits with such funds, is considered to be providing a federal public benefit, assuming other conditions of the "federal public benefit" definition are met. We agree with this analysis and example.

C. *Individual, Household, or Family Eligibility Unit*

1. General Intent of Congress Recognized in Interim Guidance

According to the statute and the interim guidance, a benefit must be provided to an

"individual, household, or family eligibility unit" to qualify as a federal public benefit.

The statutory limitation (to an "individual, household, or family eligibility unit") is intended to exclude *community-based benefits* from the definition of federal public benefits. The aid some individuals may ultimately receive from such programs is not the kind of aid Congress intended to bar to not qualified immigrants.

DOJ's interim guidance reflects this understanding. For example, the guidance states that "generally available" services, such as fire and ambulance services, are not federal public benefits. The focus of these programs is on entire communities, not individuals, households, or families, and they are given to whomever may need them.

Similarly, DOJ's interim guidance states that any program that builds or renovates libraries or parks does not provide a federal public benefit. That an individual may profit by walking through the park, or taking a book out of the library, does not change the central fact that the benefit, very clearly, is aimed at the community in which the library or park is located.

2. Recommendation that DOJ Clarify Congressional Intent By Discussing Conference Report

DOJ could clarify its discussion of this component of the test by recognizing that Congress expressly addressed the meaning of the limitation "provided to an individual, household, or family eligibility unit" in the conference report accompanying the PRWORA.

The conference report includes the following statement:

> *The intent of the conferees is that title I, part A of the Elementary and Secondary Education Act would not be affected by [the bar on receipt of federal public benefits] because the benefit is not provided to an individual, household, or family eligibility unit.*

H.R. CONF. REP. NO. 104-725, at 380 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2768.

DOJ should include this statement in its final guidance. Moreover, DOJ should explain that federal public benefits do not include benefits provided by programs that are structured in a manner similar to title I, part A of the Elementary and Secondary Education Act (ESEA).

Title I, part A of the ESEA provides federal grants to school districts that, in turn, fund individual schools. The amount of money each school district receives is based on the number of children from poor families in that school district as a whole; the amount of money each school subsequently receives from the district is based on the number of children from poor families eligible to attend that school. *See* 20 U.S.C. §§ 6313, 6333.

If 50% or more of the children eligible to attend a school are from poor families, the

school may choose to use its ESEA funds to operate a "schoolwide" program designed "to upgrade the entire educational program in [the] school." 20 U.S.C. § 6314(a)(1). The ESEA money, in these cases, essentially goes into the school's general fund. The school need not identify the particular children who are eligible for the services paid for with the ESEA funds. 20 U.S.C. § 6314(a)(3)(A).

If a school chooses not to operate a schoolwide program, or if less than 50% of the children in its attendance area are not from poor families, the school must use the ESEA funds for a "targeted assistance" program. *See* 20 U.S.C. § 6315(a). Under such a program, the school must determine which individual children are eligible for services. *See* 20 U.S.C. § 6315(b). These children must be "identified by the school as failing, or most at risk of failing, to meet . . . student performance standards." *Id.* The "targeted assistance" money may be used to provide services only to these children. 20 U.S.C. § 6315(a).

The critical structural element of title I, part A of the ESEA is that funds from the program are not necessarily spent on services for children who have been individually identified as eligible. Rather, program funds are provided to a larger community -- a school in this case -- in which all members of the school benefit. Of course, individual children ultimately receive some specific, educational benefits from the program funds. *See, e.g.*, 20 U.S.C. § 6315. Congress did not prohibit programs in which individuals will ultimately benefit from services, if the aim and structure of the program as a whole is to focus on a larger community. For that reason, services paid for with ESEA funds are not -- in Congress' judgment -- "provided to an individual, household, or family eligibility unit."

3. Application of New Approach

The final DOJ regulations and guidance should set forth a description of the type of programs that are not considered to be federal public benefits because they are designed to meet general community needs. These programs should not be considered federal public benefits even if the benefits are ultimately provided to specific individuals within the community who are in need.

DOJ should also include an example, in addition to the ESEA, of the kind of program that is not considered a federal public benefit under the "individual, household, or family eligibility unit" prong of the definition. Community health centers would be appropriate. In order to reach populations with the greatest need for health care, community health centers are open to "all residents of the area served by the center." 42 U.S.C. § 254b(a)(1); *see also* 42 C.F.R. § 51c.102(c)(1) ("'community health center' . . . means an entity which . . . provides for all residents of its catchment area"). Since community health centers are structured to serve communities, like ESEA programs, the centers do not provide federal public benefits to individuals.

Considering this approach in light of the nonprofit charitable organizations exemption, 8

U.S.C. § 1642(d), it is clear that our analysis is consistent with congressional intent. The exemption allows nonprofits to refrain from verifying the immigration status of applicants for federal public benefits. *See id.* Community health centers are typically operated by nonprofit charitable organizations. Excluding these centers from the definition of federal public benefits, therefore, would lead to the same outcome as the verification exemption -- immigration status does not matter. The same holds true for many other programs that, analyzed properly under the "individual, household, or family eligibility" prong, do not provide federal public benefits. Viewing the federal public benefits definition and the nonprofit exemption consistently, so that they lead to the same outcome, best effectuates congressional intent.

IV. Conclusion

DOJ's regulatory definition of "federal public benefit" should be clarified by adding a discussion of the limitation provided by the phrase "individual, household, or family eligibility unit," as indicated in the conference report on the PRWORA.

WR - public benefit definition

Not for Distribution

Interpretation of the Term "Federal Public Benefit" Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

Summary

As is made clear by the Conference Report to the Welfare Reform statute and the DOJ verification guidance, Congress did not intend that every benefit or service receiving federal resources be considered a "federal public benefit." The Department of Health and Human Services has proposed interpreting "federal public benefit" to include only those benefits for which payments or assistance are provided to an individual, household or family eligibility unit, pursuant to an application. Programs that do not make "eligibility" determinations would not be subject to the verification requirements. This approach provides the strongest public health protection, reduces the confusion that providers and immigrant communities will face, and minimizes administrative burden on and increased costs to providers. Although our proposed interpretation may be considered narrow, it denies nearly 95% of DHHS resources to non-qualified immigrants.

ISSUE

What is a "federal public benefit" under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and which Administration programs will be required to verify the citizenship or immigration status of every applicant in order to deny non-qualified aliens "federal public benefits"?

BACKGROUND

Section 401 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, provides that an alien who is not a qualified alien is not eligible, with certain specified exceptions, for any "federal public benefit." PRWORA defines "federal public benefit" as follows:

> (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.

PRWORA further requires that providers of "federal public benefits," unless otherwise exempted, verify the citizenship or immigration status of all individuals applying for "federal public benefits" for purposes of establishing eligibility and denying benefits to non-qualified aliens.[1]

PRWORA does not identify the specific benefits that should be treated as "federal public benefits," and the definition in section 401, standing alone, does not provide sufficient guidance for benefit providers to make consistent determinations.[2] Congress did not intend to define every benefit or service provided with Federal dollars as a "federal public benefit." For example, HHS funds health promotion activities. To treat these as federal public benefits could have the result of requiring verification of everyone who viewed health promotion materials on a city bus billboard or pamphlets offered at a health fair. Therefore a criteria or standard must be used to differentiate among all federally funded services.

As DOJ pointed out in its 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, 62 Fed. Reg. 61,344 (1997) ("Interim Guidance"), the responsibility of interpreting the definition will fall on the federal agencies overseeing the programs. Our objective is to structure a legally permissible interpretation that also accomplishes the Department's goals of protecting the public health and minimizing the administrative burden on our programs and providers.[3]

ANALYSIS

Whether a particular benefit falls within part (a) of the definition (i.e., "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") is fairly straightforward and does not require any elaboration by the Department. Essentially, these "benefits" involve agreements or arrangements between federal programs and individuals, such as a research grant, student loan, or a patent license. For example, the Native Hawaiian Loan Program and the Repatriation Program, both administered by ACF, are "federal public benefits" because, as loan programs, they meet the

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[1] Section 432 of PRWORA provides as follows:

> 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.

[2] Since the enactment of PRWORA in August, 1996, HHS programs have been inundated with requests from providers, including state and local governments, public and private organizations, and other benefit providers and grantees to clarify, among other things, the scope of the term "federal public benefit."

[3] The need for the Department to issue guidance on a matter such as this is bolstered by the statute itself which expressly directs the agencies that administer programs to "post information and provide general notification to the public and to program recipients of the changes regarding eligibility for any such program. . ." PRWORA § 404(a).

statutory definition's criteria under (a).[4]

If a benefit does not fall within (a), it must be determined whether the benefit is a "federal public benefit" under (b). To qualify as a "federal public benefit" under (b), a benefit must satisfy two conditions. First, the benefit must be one of those enumerated in PRWORA section 401(c)(1)(B), that is, a "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit," or be a "similar benefit." Second, a program's benefits or assistance must be provided to an "individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United States."

Condition 1

A "federal public benefit" under (b) is "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, or unemployment benefit, or any similar benefit." We assume that this list encompasses, with certain exceptions, virtually all benefits provided by HHS programs. To the extent questions arise as to whether a particular HHS program, such as Head Start, should fall outside the list, the Department would make a case-by-case determination.

Condition 2

Assuming the first condition is met, we must then consider whether the benefit is "provided to an individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United States." The phrase "eligibility unit" in conjunction with the word "applying" in Section 432[5] suggests that a "federal public benefit" under (b) is a benefit provided to an individual, household, or family pursuant to an application for that benefit.

What, for purposes of this interpretation, is an "application"? The dictionary defines "application" as "a *request*, as for aid, employment, or admission" and "the form or document for such a *request*."[6] (Emphasis added). The word "request" in this definition suggests two things: first, that there is the possibility of a denial based on the applicant's failure to meet certain eligibility criteria; and two, that the provider has a process in place to assess or verify whether the eligibility criteria are satisfied.

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[4] This interpretation of (a) is consistent with DOJ's interpretation in its Interim Guidance.

[5] Section 432 directs the Attorney General, after consultation with the Secretary of Health and Human Services, to "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." (Emphasis added).

[6] *Webster's II New Riverside University Dictionary 119* (1988).

That an application must have an eligibility verification process in order to satisfy the definition of "federal public benefit" is a logical condition given the context of the statutory definition and its relationship to the verification requirement in section 432. Moreover, it appropriately considers how benefits are actually provided to individuals in the field and it achieves our policy objective of minimizing the administrative burden inherent in verifying that the applicant is a qualified immigrant or citizen. Providers that already administer an eligibility verification process will not be unduly burdened by the added requirement of verifying the applicant's alienage status. This distinction is particularly important at HHS where virtually all benefits target a particular group (e.g., elderly) or focus on a particular problem (e.g., HIV/AIDS), and, therefore, in the case of these benefits, membership in the group or having the problem could constitute an eligibility criteria. We know, however, that many programs do not require their benefit providers to engage in a process to determine whether the requisite eligibility criteria are met. Such benefits would not require an "application" and, therefore, would not be a "federal public benefit."

In light of this reasoning we have composed the following definition:

> 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 must meet minimum criteria in order to be eligible for such benefit; and
>
> (2) the benefit provider or program *determines* 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.[7]

Under this approach, "as a matter of practice by the federal agency administering the program" would be determined by the express words of a statute, regulation, or federal program guidance or the equivalent. Thus, to constitute an "application", in the absence of a statute or regulation, federal guidance or a similar issuance applicable to all providers must establish eligibility determination procedures.

DISCUSSION

Alternative readings of "federal public benefit" create hardship not only for immigrants, but also for all other users of public benefits, and providers of those services. The statutory exemptions alone will not prevent harm to the public health–for all residents, not only immigrants. Alternative readings create undue administrative burden for providers. Finally, a definition that encompasses

[7] Therefore, programs that rely on self-attestation by an applicant that he or she meets the relevant eligibility criteria do not meet this second condition.

the broad range of all programs would be confusing for providers and clients alike and difficult to administer. We have already received several letters from providers and other organizations, including the National Conference of State Legislatures (NCSL), the National Association of Counties (NaCo), and the National Council of La Raza, expressing concern about the ambiguity of the term and urging us to construct a definition that will minimize administrative burden.

Beyond the Communicable Disease Exception--Protecting Public Health

The communicable disease exemption (Section 401(b)(1)(C)) alone will not sufficiently protect public health since many people do not realize that their symptoms are caused by a communicable disease until they are diagnosed in a medical visit. As a result of access restrictions, many immigrants may have undiagnosed but serious communicable diseases but will not seek medical attention, increasing the risk to *all communities*.

This is a vulnerable population: children (mostly US citizens) of immigrant parents have almost twice the rate of poverty and are twice as likely to be uninsured as children of US born citizens. As is noted by the Children's Aid Society in a recent letter, imposing verification requirements tends to result in eligible individuals being denied benefits by confused and fearful providers, who may discriminate against immigrants as a group. An apparent decline in use of health and other services is affecting all immigrants, including citizen children and qualified aliens. Most "immigrant" families include a mix of citizens, "qualified" and "nonqualified" immigrants. Increasingly, immigrants fear possible consequences of accessing care for themselves or their children and therefore are less likely to seek care. Requiring immigration documents in order to receive services may exacerbate this chilling effect.

The proposed definition would diminish the factors which may be contributing to this decrease in utilization of health services while an overly "broad" definition would increase the factors. The proposed definition maintains access to preventive and basic health services. Other approaches that would reduce access will increase the pressure on emergency services and may lead to more costly and long term medical conditions.

Proposed Definition Would Protect Many Important Health Programs That are Threatened Under a Broader Definition.

Most disease prevention activities are outside the communicable disease exemption and are provided by non-exempt public sector providers, but these services would remain accessible with the proposed definition. Under the proposed definition, services to prevent chronic (i.e. diabetes) and environmental disease, breast and cervical cancer, lead poisoning, injury control, occupational safety and health could still be provided. These services would not be protected by the exemptions.

Access to family planning, maternal and child health, and services for the elderly in all clinics, in all neighborhoods and communities, will continue. Access would vary clinic to clinic if we rely

solely on the exemption for nonprofit charitable organizations (Section 432(d)); non-profit clinics may not have the capacity to serve all the immigrants formerly served by local health departments. While most Community Health Centers would meet the nonprofit exemption, clients would not necessarily seek treatment based on the tax status of the providers.

The proposed definition will result in consistently applied verification requirements, thus mitigating confusion among providers and immigrant families.

Minimizes costly burden on providers of complex verification procedures

Our proposed definition would affect a smaller number of providers, thus minimizing the impact of anticipated problems. Imposing confusing new verification requirements on providers will require redesigning public health and social service programs and may seriously hinder them from fulfilling their missions to serve and be accessible to underserved populations. Imposing verification requirements on providers that previously had no eligibility processes will require new staff or using finite resources to train current staff, to understand these complex new immigration rules and process requirements. These increased administrative costs borne by grantees will reduce the resources spent on the vital services they provide to all of their clients.

Again, the NCSL, NACo and others have expressed concern about the burdens imposed on state and local governments by a broad definition. Finally, the proposed definition alleviates the continuing concern by non-profit providers about their potential liability for providing benefits to non-qualified patients despite the non-profit exemption.

We Cannot Rely on Exemptions to Maintain Safety Net Programs

By including several exemptions to the verification requirements, Congress clearly intended to safeguard access to public health and safety net programs. However, the three statutory exemptions alone, for communicable diseases, charitable non-profit organizations, and the Attorney General designation of services that protect life and safety and are not contingent on income, do not adequately safeguard the public health safety net if they are not applied within the proposed framework.

The exemption for communicable diseases has limited applicability. Immigrants will not seek care if they do not know they are infectious. Clinics could only offer limited preventive health care to children; immunizations, but not testing and treatment for congenital or non-communicable chronic diseases like asthma.

The exemption for charitable non-profits will cover only a portion of providers and will confuse immigrant clients and providers in their communities. Benefit providers may believe they are in a risky legal position and may choose to verify anyway.

Our programs would be subject to widely varying administrative burdens and client requirements. For example, 60% of Administration on Aging, Maternal and Child Health and Title X Family Planning programs are administered by public agencies and would not be exempt from verification requirements through the non-profit exemption.

A broad interpretation may increase pressure on the Attorney General to use her authority to exempt programs necessary to protect life and safety. The current criteria may not be explicit enough for providers to be confident of their status and they may request specific interpretation.

WR-public benefit definition

Federal Public Benefit -- Briefing Paper

Purpose of Meeting: To get an update on HHS on this issue. They will present new arguments that they believe support their original draft definition. In addition, we want to ask them about some new arguments presented to us by immigration advocates in a meeting last week.

Attending the Meeting:

- From HHS: Kevin Thurm, Peggy Hamburg (new ASPE Assistant Secretary), Anna Durand and Andy Hyman from HHS general counsel; Dennis Hayashi from HHS Civil Rights office
- From OMB: Barbara Chow and staffers; possibly Josh Gotbaum; and Steve Aitken from OMB general counsel
- WH Counsel: Rob Weiner
- DOJ OLC: Randy Moss

What the Law Says: Under welfare reform, "an alien who is not a qualified alien is not eligible for any Federal public benefit." Most non-qualified aliens are illegal immigrants.

Federal public benefits are defined as:

> "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."

Exemptions to this policy are given for emergency Medicaid; emergency disaster relief; certain public health assistance; and programs specified by the Attorney General that meet three criteria (provide in-kind assistance, do not condition assistance on income, and are necessary for the protection of life and safety). Non-profit groups are exempt from verifying eligibility for federal public benefits.

Effect on Agencies Other than HHS: Most agencies have been able to readily identify the programs that should be considered Federal public benefits. For Education, the "postsecondary education" limitation in the legislation provides guidance that excludes all elementary and secondary education programs (and Head Start) from the restrictions. For HUD, legislative language specific to its programs causes public housing and Section 8 assisted housing to be considered public benefits but most homeless shelters would be included in the Attorney General's exemption list. For USDA, school lunch, WIC, and related programs are exempt. For DOL, the legislative language specifically includes unemployment benefits and it is expected that job training services will also be considered Federal public benefits.

HHS Programs: HHS has a draft definition of Federal public benefits that would exclude a number of programs from the restrictions, including Community Health Centers (CHCs), Maternal and Child Health, substance abuse grants, Administration on Aging programs, and others. Programs that would be considered Federal public benefits include TANF, Medicaid, Medicare, LIHEAP, Indian Health Service programs, Ryan White, SSBG, child care, and others (some of which were already off-limits to illegal aliens before welfare reform).

HHS Draft Definition: HHS argues that the term "public benefit" as used in the law is ambiguous and requires interpretation. Ambiguity is created, in part, by the term "eligibility unit" in the Act. Given the ambiguity, HHS looks to the provision on verification rules (Section 432) for clarification. This provision requires the Attorney General to "promulgate regulations requiring verification that a person applying for a federal public benefit... is a qualified alien

HHS argues that this implies that a federal public benefit is something that requires an "application," and an application requires provision of information for the purpose of determining eligibility. To minimize administrative burden, HHS thinks that programs that do not currently verify eligibility should not be required to begin doing so now. Therefore, 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.

Advocates' Position: Groups are concerned that verifying immigration status in order to comply with this provision will be very burdensome administratively. They are also very concerned that legal immigrants will be discouraged from applying for benefits if they also have illegal immigrants in their household. They argue that programs like CHCs provide important health services, such as prenatal care, that are in the national interest to have widely available. They believe that, in spite of the non-profit exemption, groups will be afraid not to enforce the definition.

Legal Arguments Offered by Advocates:

- The phrase "any other similar benefit" should allow HHS to exclude programs like child care, which are not similar to any of the enumerated benefits.

- The phrase "payments or assistance" has a legal meaning in the health world that distinguishes it from health services.

- Federal funds that pass through many hands before benefitting members of the public should not be considered "appropriated funds of the United States."

- The phrase "individual, household, or family eligibility unit" should allow HHS to exclude all block grants.

- DOJ should consider revisiting the AG list of exempt programs to see if any additional programs should be listed there.

WR-public benefit definition

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Federal public benefit definition

Rob Weiner just told me the following: OLC has informed HHS that they think their proposed definition of federal public benefits is "not tenable." HHS has therefore gone back to the drawing board. Presumably they will run their next proposal by OLC.

HHS may choose to consider Rob's suggested reading of the law, but OLC has not expressed an opinion on that reading yet (nor were they asked to).

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