IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS

updated by Tanya Broder[*]

INTRODUCTION

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act)[1] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[2] made unprecedented changes in the area of immigrants'[3] eligibility for public benefits. As a result, immigrants face severe restrictions in their access to federal and state benefit programs. In 1997 and 1998, Congress restored some of the benefits it took away in 1996, especially to seniors and persons with disabilities.[4] In 2002, Congress restored food stamps to a significant number of immigrants.[5] Nevertheless, many classes of immigrants remain ineligible for federal public benefits.

Congress' stated purposes in barring immigrants from federal and state benefits were to encourage self-sufficiency and to remove an extra incentive for coming to the United States.[6] Congress was concerned with the apparent rise in applications for federal benefits during the previous decade from immigrants, particularly refugees and seniors,[7] even though data collected just before the law passed suggested that the rate had leveled off and even started to decline.[8] The real incentive behind the effort to curb benefits, however, was economic: the original estimated cost savings over the first six years from reducing coverage for lawfully present immigrants was $23.7 billion, or more than 44 percent of the total $53.4 billion savings package.[9]

In this year's legislative session, Congress will have a chance to revisit the 1996 Welfare Act's immigrant restrictions, and to improve opportunities for low-wage immigrant workers. Congress is expected to debate legislation reauthorizing the Temporary Assistance for Needy Families (TANF) and Workforce Investment Act (WIA) programs; in doing so, it will consider measures that restore benefits for some of the immigrants whose eligibility was curtailed by the 1996 law.

This article reviews the current law in the area of immigrant eligibility for federal programs.

IMMIGRANT CATEGORIES

Eligibility for public benefits varies by program, but relevant factors generally include the individual's current immigration status, the length of time he or she has held that status, whether the immigrant was receiving assistance when the Welfare Act was enacted, the immigrant's date of arrival in the U.S., and the rules and standards in the immigrant's state of residence.

The Welfare Act created three categories that serve as the starting point for determining eligibility for most benefit programs: (1) "qualified" immigrants; (2) "not qualified" immigrants; and (3) persons who are lawfully present in the United States.

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[1] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996) (codified as 8 USC §§1601 *et seq*.) (hereinafter Welfare Act).

[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104-207, 110 Stat. 3008 (Sept. 30, 1996)(codified as amended in scattered sections of 8 USC) (hereinafter IIRAIRA).

[3] This article uses the term "immigrant" to refer to all persons who are not U.S. nationals, rather than the more technical term "alien" used in the immigration and welfare laws.

[4] Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306 (Oct. 28, 1998); Balanced Budget Act of 1997, Pub. L. No. 105-33 (Aug. 5, 1997).

[5] The Farm Security and Rural Investment Act, Pub. L. No. 107-171, §4401 (May 13, 2002).

[6] Welfare Act §400 (codified as 8 USC §1601(1) and §1601(2)).

[7] Welfare Act §400(3).

[8] *See* Social Security Administration, "Lawfully Resident Aliens Who Receive SSI Payments," Dec. 1995, at 2 (Feb. 1996).

[9] Correspondence from Congressional Budget Office to Senator Pete Domenici, Chairman of the Senate Budget Committee (Aug. 1, 1996). About half of those savings, however, evaporated when Congress restored Supplemental Security Income (SSI) benefits to most recipients one year later.

The categories are not, by themselves, necessarily determinative of eligibility for any particular public benefit. In this sense, use of the terms "qualified" and "not qualified" in the statute is misleading because one would assume that a "qualified" immigrant is eligible for a given benefit, and one who is "not qualified" is likewise ineligible. In fact, the Welfare Act makes many "qualified" immigrants ineligible for a range of public benefits, whereas "not qualified" immigrants remain eligible for a core group of humanitarian services, as well as for certain types of assistance that are seen as benefiting the public as a whole.

Under the Welfare Act, only citizens and "qualified" immigrants are eligible for "federal public benefits,"[10] with the exception of certain designated programs.[11] In 1998, the Department of Health and Human Services (HHS) defined the term "federal public benefit" to include 30 programs.[12]

Under the current definition, "qualified" immigrants are as follows:

- Lawful permanent residents (LPRs);
- Refugees;
- Persons granted asylum;
- Persons granted withholding of deportation or withholding of removal;
- Cuban/Haitian entrants;
- Persons paroled into the United States for at least one year; and
- Certain battered spouses and children.[13]

The term "Cuban/Haitian entrant" is defined in §501(e) of the Refugee Education Assistance Act of 1980,[14] and includes nationals of Cuba and Haiti who were paroled into the United States, applied for asylum, or who are in exclusion or deportation proceedings and have not received a final order of exclusion or deportation.

To fall within the battered spouse or child category, the immigrant must have been battered or subjected to extreme cruelty in the United States by a family member with whom the immigrant resided, or the immigrant's parent or child must have been subjected to such treatment.[15] In addition, the immigrant must demonstrate a "substantial connection" between the domestic violence and the need for the benefit being sought. The battered immigrant, parent, or child must also have moved out of the household of the abuser, and the immigrant or the immigrant's child must have begun the process of legalizing based on the petition of a spouse or parent, or, in certain cases, based on a self-petition.[16] Applicants for cancellation of removal under the Violence Against Women Act (VAWA) found at 8 USC §1229b(b)(2), also fall within this category.[17]

On July 24, 1997, the Attorney General issued a nonbinding order setting forth eight situations that qualify as a "substantial connection."[18] These encompassed a wide range of situations where a battered spouse or child might need public assistance as a result of having to flee the abusive spouse or parent. Subsequent to that order, however, the Balanced Budget Act of 1997 transferred power for determining "substantial connection" from the Attorney General to the benefit

[10] Welfare Act §401 (codified as 8 USC §1641(b)).

[11] Welfare Act §401(b) (codified as 8 USC §1611(b)).

[12] 63 Fed. Reg. 41657 (Aug. 4, 1998). The 30 programs include the following: Adoption Assistance; Administration on Developmental Disabilities; Adult Programs/Payments to Territories; Agency for Health Care Policy and Research Dissertation Grants; Child Care and Development Fund; Clinical Training Grant for Faculty Development in Alcohol & Drug Abuse; Foster Care; Health Profession Education and Training Assistance; Independent Living Program; Job Opportunities for Low Income Individuals; Low Income Home Energy Assistance Program (single unit buildings); Medicare; Medicaid; Mental Health Clinical Training Grants; Native Hawaiian Loan Program; Refugee Cash Assistance; Refugee Medical Assistance; Refugee Preventive Health Services Program; Refugee Social Services Formula Program; Refugee Social Services Discretionary Program; Refugee Targeted Assistance Formula Program; Refugee Targeted Assistance Discretionary Program; Refugee Unaccompanied Minors Program; Refugee Voluntary Agency Matching Grant Program; Repatriation Program; Residential Energy Assistance Challenge Option; Social Services Block Grant; State Children's Health Insurance Program; and Temporary Assistance for Needy Families.

[13] Welfare Act §431, *as amended by* IIRAIRA §501 and the Balanced Budget Act of 1997, §§5303 and 5571 (codified as 8 USC §1641(b) and (c)).

[14] Pub. L. No. 96-422 (Oct. 10, 1980).

[15] Welfare Act §431, *as amended by* IIRAIRA §501 and the Balanced Budget Act of 1997 §5571 (codified as 8 USC §1641(c)).

[16] 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, 61346 (Nov. 17, 1997).

[17] 8 USC §1641(c)(1)(B)(v).

[18] 62 Fed. Reg. 39874 (July 24, 1997).

providers.[19] On December 11, 1997, the Justice Department rescinded its prior order, and issued new guidance on standards and methods for determining whether a substantial connection exists.[20] The standards are not binding on the benefit providers and essentially repeat the earlier guidelines.

All noncitizens in the United States who do not fit into one of the "qualified" categories are "not qualified." "Not qualified" immigrants include all undocumented persons who either entered without documents or overstayed an authorized period of stay, and who have no basis for obtaining lawful status. "Not qualified" immigrants also include some applicants for immigration benefits, such as applicants for cancellation of removal, adjustment of status, asylum, and registry, as well as persons who are otherwise lawfully present in the United States. (See below.) "Not qualified" immigrants generally are barred from receiving "federal public benefits."[21]

Persons who are "lawfully present," but are "not qualified," may nevertheless be eligible for Title II Social Security benefits. For Title II purposes, the term "lawfully present" includes all qualified immigrants, plus the following:

- Persons who have been inspected and admitted to the United States and have not violated the terms of admission (including nonimmigrants);
- Parolees for less than a year (other than those paroled pending a determination of excludability);
- Temporary residents;
- Persons granted temporary protected status (TPS);
- Beneficiaries under the Family Unity program;
- Persons granted deferred enforced departure (DED);
- Persons in deferred action status;
- Spouses or children of U.S. citizens whose petition has been approved and who have a pending application for adjustment of status; and
- Asylum or withholding of deportation applicants who have been granted employment authorization, or who are under 14 and have had their application pending for at least 180 days.[22]

The Victims of Trafficking and Violence Protection Act of 2000[23] established a new category of noncitizens who, while not listed among the "qualified" immigrants, are eligible for federal benefits at least to the same extent as refugees. Federal agencies are required to provide benefits and services to individuals who have been subjected to a "severe form of trafficking in persons" without regard to their immigration status. To receive these benefits, the victim must be either:

- under 18 years of age, or
- certified by the HHS as willing to assist in the investigation and prosecution of severe forms of trafficking in persons, and who either (a) has made a bona fide application for a T visa[24] that has not been denied, or (b) is a person whose continued presence in the United States is being ensured by the Attorney General in order to prosecute traffickers in persons.[25]

The Trafficking Victims Protection Reauthorization Act of 2003 provided that derivative beneficiaries of T visa applications (spouses and children of adult victims; spouses, children, parents, and minor siblings of child victims) also can secure federal benefits.[26]

RESTRICTIONS ON FEDERAL PROGRAMS

"Federal public benefits," which have not yet been identified by all of the relevant federal agencies, are defined generally by statute as "any grant, contract, loan, professional license or commercial license provided by" a U.S. agency and "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit or any similar benefit."[27]

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[19] Balanced Budget Act of 1997, Pub. L. No. 105-33, §5571 (Aug. 5, 1997).

[20] 62 Fed. Reg. 65285 (Dec. 11, 1997), *reprinted in* 75 *Interpreter Releases* 17 (Jan. 5, 1998).

[21] Welfare Act §401(a).

[22] 8 CFR §103.12.

[23] Pub. L. No. 106-386 (Oct. 28, 2000). For information on representing trafficking victims, see Sheila Neville and Susana Martinez, "The Law of Human Trafficking: What Legal Aid Providers Should Know" *Clearinghouse Review* (Mar.–Apr. 2004).

[24] INA §101(a)(15)(T).

[25] Pub. L. No. 106-386, §107 (Oct. 28, 2000) (codified at 22 USC §7105).

[26] Pub. L. No. 108-193, §4(a)(2) (Dec. 19, 2003).

[27] 8 USC §1611(c).

"Federal means-tested public benefits" is a subset of "federal public benefits." Programs that have been designated as federal means-tested public benefits include only Supplemental Security Income (SSI), food stamps, non-emergency Medicaid, Temporary Assistance for Needy Families (TANF), and the State Children's Health Insurance Program (SCHIP).[28] The U.S. Department of Housing and Urban Development (HUD) has clarified that none of its programs fall within the definition of federal means-tested public benefits.[29] Programs designated as "federal means-tested public benefits" are subject to additional restrictions, including a five-year ban for most "qualified" immigrants who physically enter the United States on or after August 22, 1996.[30]

Eligibility for Supplemental Security Income (SSI)

***Program Description*—**SSI is a needs-based program available to low-income persons who are 65 years of age or older, blind, or have a disability. A finding of disability is conditioned on establishing a physical or mental impairment that has prevented or will prevent the person from substantial gainful employment for 12 continuous months. SSI payments consist of a monthly check; the amount varies depending on the basis for SSI eligibility and whether the state supplements the basic federal grant.[31]

***Immigrant Eligibility*—**The Welfare Act would have barred almost all immigrants from receiving SSI.[32] Before the restrictions went into effect, however, the Balanced Budget Act of 1997 restored eligibility to most immigrants who were receiving SSI benefits on the date that the Welfare Act (August 22, 1996) was signed. The remainder, an estimated 17,000 who were scheduled to lose benefits in September 1998, were allowed to retain them through the special legislation.[33] Under current law, immigrants who meet any of the following exemptions are eligible for SSI, assuming they satisfy the following income and other basic requirements:

- Immigrants who were receiving SSI benefits on August 22, 1996.[34]
- Qualified immigrants who were lawfully residing in the United States on August 22, 1996, and who have a disability at the time of application for assistance, regardless of the date of onset of the disability. Age unaccompanied by disability does not suffice, but the diseases that commonly occur with old age are incorporated into the disability determination.[35] The person need not have been physically present on August 22, 1996, as long as on that date he or she qualified as "lawfully residing in the United States."[36] This phrase means that the person resides here and fits within one of the "lawfully present" immigrant categories listed above.[37] Residence entails physical presence plus an intent to remain. Short absences of less than six months do not terminate residency unless there is an intent to do so.[38]
- Refugees, Cuban/Haitian entrants, Amerasians, and persons granted asylum or withholding of deportation/removal, but only during the first seven years after entry as a refugee, Cuban/Haitian entrant, Amerasian immigrant, or the grant of asylum or withholding of deportation. Note that if these individuals were receiving SSI benefits on August 22, 1996, there is no seven-year limitation.
- Victims of trafficking.

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[28] *See* 62 Fed. Reg. 45256 (Aug. 26, 1997); 63 Fed. Reg. 36653 (July 7, 1998).

[29] 65 Fed. Reg. 49994 (Aug. 16, 2000).

[30] 8 USC §1613.

[31] 42 USC §§1381 *et seq.*; 20 CFR §§416.101 *et seq.*

[32] Welfare Act §402(a)(1), (3).

[33] Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306 (Oct. 28, 1998).

[34] *Id.*

[35] For immigrants who are 65 years or older, their age, impairments associated with advanced age, illiteracy, or inability to communicate in English are weighed in the disability determination; for immigrants who are 72 years or older, any medically determinable impairments are considered "severe." Social Security Ruling, SSR 03-3p, "Titles II and XVI: Evaluation of Disability and Blindness in Initial Claims for Individuals Age 65 or Older," 68 Fed. Reg. 63833 (Nov. 10, 2003), *reprinted in* Social Security Administration, Program Operations Manual System (hereinafter POMS) DI 25015.25.

[36] POMS SI 00502.142. Theoretically, but rarely, some grandfathered residents who are or become disabled may be rendered ineligible by the "deeming" rules that are described below in the section discussing eligibility for Temporary Assistance for Needy Families (TANF), the State Children's Health Insurance Program (SCHIP), and Medicaid.

[37] POMS SI 00502.142.B (referring to the categories of immigrants listed in 8 CFR §103.12). *But see Yang v. Barnhart*, Civ. No. 01-2307 (RHK/SRN) (D. Minn. 2002) (finding that for SSI purposes, "lawfully residing" also includes *parents* of U.S. citizens whose visa petitions have been approved and who have filed an application for adjustment of status).

[38] POMS SI 00502.142(B)(2)(b).

- Qualified immigrants who are active-duty service members or veterans, as well as their spouses and unmarried dependent children under 21.[39]
- American Indians who were born in Canada and are members of federally recognized tribes and those defined in INA §289.
- LPRs who have worked at least 40 "qualifying quarters" for Social Security purposes or who can be credited with those quarters under special procedures.[40]

The refugee exemption applies during the first seven years after the person was granted the requisite status, and is not lost if he or she subsequently adjusts to LPR status. In this context, the term "Amerasian" refers only to children fathered by U.S. citizens and born in Vietnam between January 1, 1962 and January 1, 1976, when the United States was involved in military operations there.[41] Amerasian children, and in some cases their immediate relatives, are entitled to immigrate to the United States under special statutory provisions.

The Social Security Administration (SSA) estimated that over 1,000 immigrants in the refugee group "timed off" of their SSI benefits as of September 2003, another 3,000 lost benefits in 2004.[42] SSA projects that 6,429 will lose benefits in 2005, 8,126 in 2006, and thousands more in subsequent years.[43] Due to a combination of factors, including adjustment and naturalization backlogs, language, disabilities and other barriers, many of these immigrants have been unable to naturalize within the seven-year period. Those who entered the United States after August 22, 1996 have fewer alternative grounds of SSI eligibility and are more likely to lose benefits. Legislation currently pending in the House and Senate, however, would provide SSI benefits to "refugee" groups for an additional two years.

A "veteran" is defined as "a person who served in the active military, naval, or air services, and who was discharged or released therefrom."[44] The person must have received an honorable discharge, and the release must not have been based on alienage.[45] To qualify for benefits as a spouse of a veteran or active-duty service member, the applicant must be married under state law or, along with the spouse, be holding themselves out to the community as husband and wife.[46] To qualify as the child of a veteran or active-duty service person, the child must be unmarried, claimable as a dependent on the veteran's or service member's tax return, and under 18 years of age (or under 22 and a student regularly attending school). Children with disabilities who are over 18 also qualify for the exemption if the child had a disability and was dependent on the veteran or active-duty service member before the child's eighteenth birthday.[47]

The veteran's exemption also includes the unremarried surviving spouse of a veteran or active-duty service person.[48] To qualify as a surviving spouse of a veteran, at least one of the following conditions must be met: (1) the spouse must have been married to the veteran for at least one year; (2) the spouse must have had a child with the veteran; or (3) the veteran's death must have been due to an injury or disease incurred during military service and the marriage must have been in existence some time within 15 years after the period of service in which the injury or disease was incurred or aggravated.[49] The surviving unmarried minor children of veterans or persons killed in active duty also qualify for the exemption if they were dependent on the veteran at the time of the veteran's death. Spouses whose marriage ended in divorce lose the benefits of the veteran's exemption.

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[39] Theoretically, but rarely, some immigrants who qualify for the veteran's exemption may be rendered ineligible by the "deeming" rules that are described below in the section discussing eligibility for TANF, SCHIP, and Medicaid.

[40] Welfare Act §402(b)(2), as amended by the Balanced Budget Act of 1997 §§5301–5306, codified at 8 USC §1645.

[41] Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in §101(c) of Pub. L. No. 100-202 and *amended by* the 9th proviso under Migration and Refugee Assistance in Title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989, Pub. L. No. 100-461, *as amended*).

[42] Social Security Administration, "Number of 7-Year SSI Noncitizens with Benefits Suspended Due to the Expiration of the 7-Year Eligibility Period, by Year of Suspension and State" (Dec. 2004).

[43] Social Security Administration, "Number of 7-year SSI Noncitizens Receiving Benefits in December 2004, by Estimated Year of Suspension of SSI Benefits, Type of Noncitizen, State, and Region of Origin" (Dec. 2004).

[44] 38 USC §101(2).

[45] Welfare Act §402(b)(2)(C).

[46] POMS SI 00502.140(A)(7).

[47] POMS SI 00502.140(A) Special Note.

[48] Balanced Budget Act of 1997 §5563(b).

[49] 38 USC §1304.

The definition of a "veteran" includes Filipino war veterans who fought under U.S. command during World War II.[50] One might argue that it should include Hmong and other Highland Laotian veterans who fought on behalf of the U.S. Armed Forces during the Vietnam War, although advocates have not been successful in obtaining these benefits for Hmong veterans.[51]

***Qualifying Quarters*—**"Qualifying quarters" are quarters of coverage as defined in Title II of the Social Security Act.[52] The calculation of qualifying quarters is determined by the amount of wages in covered employment or self-employment income earned during a calendar year.[53] Noncovered employment, such as certain work performed for state or local governments, can also be counted for purposes of determining whether an immigrant can satisfy the 40-quarter exemption.[54] The amount of earnings needed to qualify as a quarter of coverage has increased steadily over time, such that a worker needs $920 in earnings in 2005 to qualify for one quarter. The worker can earn a maximum of four quarters per year, but these quarters do not have to be earned in a corresponding three-month calendar period. For example, as soon as a worker earns $3,680 in 2005, he or she can be credited with the maximum four quarters of coverage for that year.

Persons who have valid Social Security numbers but who have not been properly credited with past earnings or Federal Insurance Contributions Act (FICA) deductions can amend their Social Security records to gain credit for these qualifying quarters.[55] This is true even if the worker did not have a valid Social Security number at the time of the employment and the earnings were posted to either a fictitious account or another person's account. The Social Security Administration (SSA) has a policy of assisting persons in "unscrambling" their earnings records. While the agency does not as a rule prosecute persons who use a Social Security card not their own for purposes of reporting earnings, technically it is illegal to do so.[56]

In addition to earning qualifying quarters, an LPR can gain credit for the quarters earned by either parent before the immigrant reaches age 18; the LPR need not be under 18 at the time of applying for SSI. In fact, due to a 1997 clarification in the law, the LPR can gain credit for quarters earned by either parent before the immigrant's birth.[57] The LPR can also be credited with quarters earned by a spouse during their marriage, provided the marriage did not end in divorce. For quarters to be credited that are earned on or after January 1, 1997, the working immigrant, spouse, or parent must not have received assistance from SSI, TANF, the Food Stamp Program, Medicaid, or SCHIP during the quarter.[58]

The LPR can both earn, and be credited with, more than four qualifying quarters during a given calendar year, since the immigrant could potentially earn up to four quarters and be credited with all those earned by his or her spouse and each parent. Quarters credited from the spouse or parent can be counted only toward establishing eligibility for SSI and food stamps, not for eligibility for Title II Social Security benefits.

***Five-Year Ban*—**Immigrants who physically entered the United States on or after August 22, 1996 are banned from SSI and other federal "means-tested public benefits" until they have been a qualified immigrant for at least five years.[59] Refugees, asylees, Amerasian immigrants, Cuban/Haitian entrants, persons granted withholding of deportation, victims of trafficking, and veterans are exempt from

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[50] Balanced Budget Act of 1997 §5563(c).

[51] Balanced Budget Act of 1997 §5566; *see* U.S. Department of Agriculture Food and Consumer Services Administrative Notice 97-107, Aug. 1997; *Matter of Hearing No. 97249847 for Claimant Chong Yia Yang*, California Dept. of Social Services (Oct. 31, 1997).

[52] Social Security Act, Title II, 42 USC §401 *et seq*.

[53] 20 CFR §404.140-46.

[54] POMS SI 00502.135.

[55] 42 USC §405(c)(5); 20 CFR §404.820–22.

[56] In the years following the September 11 attacks, SSA's Inspector General has increased pressure on the agency to report these workers to the Office of Inspector General for having engaged in fraud. Although we are not aware of any reporting by SSA of persons attempting to amend their earnings records, advocates may wish to contact their local SSA office regarding the field office's current practice.

[57] Balanced Budget Act of 1997 §5573.

[58] Welfare Act §§402(a)(2)(B)(ii)(II) and 435, *as amended by* the Balanced Budget Act of 1997 §5573.

[59] Welfare Act §403. For more on "means-tested public benefits," see 62 Fed. Reg. 45256, 45284 (Aug. 26, 1997), *reprinted in* 74 *Interpreter Releases* 1326 (Aug. 29, 1997). Federal means-tested public benefits include SSI, TANF, Medicaid, food stamps, and SCHIP. With regard to SCHIP, see Health Care Financing Administration, "The Administration's Response to Questions About the State Children's Health Insurance Program," question 19(a) (Sept. 11, 1997).

the five-year ban, as are those who entered the United States before August 22, 1996. For purposes of this ban, individuals are considered to have "entered" the United States before August 22, 1996, if they: (1) obtained a qualified status before that date; or (2) obtained a qualified status after that date, but were continuously present in the United States from August 22, 1996, until becoming qualified.[60] Continuous presence is not broken by trips outside the United States of less than a full calendar month or 30 calendar days, or aggregated absences of 90 days or less.[61]

Eligibility for Food Stamps

***Program Description*—**The Food Stamp Program provides coupons or electronic benefits cards (similar to bank cards) to low-income persons to buy food at participating stores. It is the major food and assistance program for low-income individuals and families. In addition to financial eligibility criteria, participants may also have to register for work and accept suitable employment.[62] The Welfare Act made extensive changes to the Food Stamp Program, such as limits on the amount of time able-bodied, childless adults can receive benefits.

***Immigrant Eligibility*—**Food stamp benefits are calculated based on the number of eligible household members. Therefore, mixed households, composed of both immigrants and citizens, suffered food stamp reductions as a result of the immigrant cuts. Although the Balanced Budget Act of 1997 failed to restore food stamp eligibility to many qualified immigrants, legislation in 1998 provided some important amelioration.[63]

In 2002, Congress restored benefits to three additional groups of qualified immigrants: (1) persons receiving disability assistance, regardless of their date of entry (effective October 1, 2002); (2) persons who have lived in the United States as qualified immigrants for at least five years (effective April 1, 2002); and (3) children, regardless of their date of entry (effective October 1, 2003).[64] The Bush Administration estimated that the bill would restore access to nutrition assistance for 400,000 immigrants.[65]

The following categories of immigrants are now eligible for federally funded food stamps:

- Refugees, Cuban/Haitian entrants, Amerasian immigrants, persons granted asylum or withholding of deportation, and victims of trafficking. Eligibility is not lost if these immigrants adjust to LPR status;
- Qualified immigrant children under age 18;[66]
- Persons who have been in qualified immigrant status in the United States for five years or more;
- Qualified immigrants who are either active-duty service members or veterans, as well as their spouses and unmarried dependent children under 21;
- LPRs who have worked at least 40 qualifying quarters for Social Security purposes or who can be credited with those quarters;
- Qualified immigrants who are blind or have a disability at the time of application for assistance, regardless of the date of onset of the disability, and who are also receiving disability benefits;
- American Indians who were born in Canada and are members of federally recognized tribes and those defined in INA §289;
- Qualified immigrants who were lawfully residing in the United States on August 22, 1996, and were 65 years of age or older on that date; and
- Persons who are lawfully residing in the United States and were members of a Hmong or Highland Laotian tribe at the time that the tribe (not

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[60] POMS SI 00502.135. *See also* Attorney General Order No. 2129-97, "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, 61414–15 (Nov. 17, 1997) (hereinafter Interim Guidance); U.S. Department of Health and Human Services, TANF Program Policy Questions, available at *www.acf.dhhs.gov/programs/ofa/polquest/index.htm*; Centers for Medicare and Medicaid Services, "Questions and Answers on Application of the Five-Year Bar" available at *www.cms.gov/immigrants*.

[61] POMS SI 00502.135; Interim Guidance, *supra* note 60, at 61415.

[62] 7 USC §§2011 *et seq*.; 7 CFR §§271 *et seq*.

[63] Agriculture Research, Extension and Education Reform Act (AREERA), Pub. L. No. 105-185 (June 23, 1998), §§503–510.

[64] The Farm Security and Rural Investment Act, Pub. L. No. 107-171, §4401 (May 13, 2002).

[65] U.S. Department of Agriculture, "Non-Citizen Requirements in the Food Stamp Program" (Jan. 2003), at *www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non_Citizen_Guidance.pdf* (hereinafter Non-Citizen Requirements).

[66] Children are not subject to immigrant sponsor deeming in the food stamp program.

necessarily the individual immigrant) rendered assistance to U.S. personnel by taking part in military or rescue operation during the Vietnam era, their spouses, unmarried dependent children, or their unremarried surviving spouses.[67]

These categories use the same definitions and generally have been interpreted to operate in the same manner as the analogous categories applicable to SSI.

Although immigrants who do not meet these requirements are ineligible for federally funded food stamps, eight states currently provide food aid to immigrants using state funds to partially offset the lost federal assistance. About half of these states took advantage of a special provision passed during 1997 that permits states to avoid setting up an entirely separate program for this purpose. Rather, states have the option of contracting with the U.S. Department of Agriculture (USDA) to include these immigrants in the regular Food Stamp Program if they reimburse the federal government for all associated costs.[68] Immigrants in these states who receive food stamps will not necessarily be told whether they are receiving federal or state-funded assistance.

The USDA has issued regulations and guidance memoranda explaining how the immigrant restrictions should be implemented. State food stamp agencies may request information regarding an applicant's work history through SSA's "Quarters of Coverage History System," as well as from the household.[69] Using this system, the food stamp agencies are authorized to obtain access to the earnings information of the person applying for benefits, as well as of the applicant's spouse and parents.[70] New applicants in those states should be told within a short time after applying whether their Social Security earnings history indicates that they have 40 quarters of earnings.

If the applicant's Social Security records show fewer than 40 quarters, the individual still may qualify for the 40-quarter exemption, either because the Social Security records are wrong, or because they do not provide the needed information (there is a lag time of up to a year and a half before quarters are entered into the Social Security system). Where an individual believes that the Social Security records do not reflect his or her quarters earned or creditable, he or she can work with the SSA to correct the Social Security records or otherwise demonstrate that the requisite quarters have been earned. States must certify the individual for up to six months of assistance while the SSA investigation is pending.[71]

Eligibility for Medicaid, State Children's Health Insurance Program (SCHIP), and Temporary Assistance for Needy Families (TANF)

***Program Descriptions*—**Medicaid provides reimbursement for doctors' services, hospital care, and prescription drugs to participating providers who care for low-income persons. The federal government matches state expenditures under Medicaid according to a statutory formula. In addition to satisfying financial eligibility requirements, recipients must be "categorically" eligible for Medicaid, which generally means that they must be eligible for either the Temporary Assistance for Needy Families program (TANF) or SSI.[72] It also includes families who would have been eligible for Aid to Families with Dependent Children (AFDC) under the old laws, whether they are eligible for or are receiving TANF, as well as other categories (*e.g.*, "medically needy") defined by states and permitted under the federal rules.

SCHIP (Title XXI of the Social Security Act) was signed into law by former President Clinton on August 5, 1997, as part of the Balanced Budget Act of 1997.[73] SCHIP allocates funds to states to provide health insurance coverage for uninsured, low-income children. To be eligible, "targeted low-income children" must be ineligible for Medicaid yet live in families with incomes under 200 percent of the federal poverty line. The states must pay for part of the program under a federal-state matching formula, defined in the statute.

The U.S. Department of Health and Human Services (HHS) has issued regulations allowing states to provide SCHIP coverage to fetuses.[74] Because the

[67] Welfare Act §402(a)(2), (b)(2), *as amended by* AREERA §§503–510.

[68] Pub. L. No. 105-18 (June 12, 1997).

[69] Non-Citizen Requirements, *supra* note 65, Section V.

[70] Balanced Budget Act of 1997 §5573(a).

[71] U.S. Dept. of Agriculture, "Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of Pub. L. 104-193, as Amended by Public Laws 104-208, 105-33 and 105-185," 65 Fed. Reg. 70133, 70196 (Nov. 21, 2000), amending 7 CFR §273.2(f).

[72] 42 USC §§1396 *et seq*.; 42 CFR Part 430 *et seq*.

[73] Pub. L. No. 105-33.

[74] 67 Fed. Reg. 61955–74 (Oct. 2, 2002).

immigration status of the parent is not relevant in determining eligibility for SCHIP (and because fetuses, the "recipients," do not have an immigration status), states can use this option to provide prenatal care services to women, regardless of their immigration status.[75]

States also have the option of pursuing a waiver to cover parents of children enrolled in the Medicaid and SCHIP programs. As a condition of securing such waivers, states must meet certain requirements aimed at maximizing the enrollment of eligible children. To be eligible for federally funded SCHIP, parents also must meet the citizenship/immigration requirements of the SCHIP program**.**

The TANF program, which replaced AFDC, provides cash payments, vouchers, social services, and other forms of assistance to low-income families with children. The program is funded through block grants to the states. To receive the full block grant, each state must contribute its own funds at a level equal to at least 75 percent of what it spent on AFDC in 1994. Using these federal and state funds, each state has set up a TANF program. The state determines the type of benefits or services provided, the standards governing eligibility, and the application process used. Even the name of each state's TANF program is selected by the state. The federal TANF law requires states to impose durational time limits and mandatory work requirements on recipients, with some exceptions.[76]

***Immigrant Eligibility Overview*—**Immigrant eligibility is very similar for Medicaid, SCHIP, and TANF. In all three programs, "not qualified" immigrants are generally ineligible for assistance. On the other hand, qualified immigrants who entered the United States before August 22, 1996, are eligible. Those who entered on or after that date are subject to a five-year ban on federally funded assistance, unless they qualify under the refugee or veterans exemptions discussed above. After five years, those who entered using the new affidavits of support (Form I-864) that went into effect on December 19, 1997, may be subject to "deeming" of income, discussed later in this chapter. States have discretion to impose further restrictions on eligibility for federally funded TANF and Medicaid, but not SCHIP.

"Not qualified" immigrants (other than trafficking victims) are generally ineligible for Medicaid, SCHIP, or TANF. The exceptions include emergency services under Medicaid, and possibly under SCHIP, which are available without immigrant restrictions.[77] Another exception, potentially available under SCHIP but not under Medicaid, applies to immunizations and the testing and treatment of communicable disease symptoms, even if, on later examination, it is determined that the symptoms were not caused by a communicable disease.[78]

Immigrants who entered the United States on or after August 22, 1996, are ineligible for TANF, SCHIP and nonemergency Medicaid until five years after the date they become a qualified immigrant. As in the SSI and Food Stamps programs, refugees, asylees, persons granted withholding of deportation, Amerasian immigrants, Cuban/Haitian entrants, and victims of trafficking are exempt from the five-year ban, as are those who qualify for the veteran's exemption. Those who qualify for the American Indian SSI exemption are also exempt from the five-year ban on Medicaid, but they remain subject to the ban on SCHIP and TANF. And, qualified immigrant children receiving federal foster care assistance are eligible for Medicaid, regardless of when they entered the United States.

Immigrants applying for TANF, SCHIP, and Medicaid will be considered to have "entered" the United States before August 22, 1996, and will thus be unaffected by the five-year ban, if they (1) obtained a qualified status before that date; or (2) obtained a qualified status after that date, but were continuously present in the United States from August 22, 1996, until becoming qualified.[79]

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[75] To date, seven states have adopted this option, employing different approaches. *See* HHS press release, at *www.hhs.gov/news/press/2004pres/20040630.html*. Services provided under this option are limited to those benefiting the fetus. Post-partum care is not covered by these funds unless a state normally pays for this care as part of a bundled payment or global fee method. HHS Letter to State Health Officials (Nov. 12, 2002). In deciding whether or how to implement this option, a number of issues must resolved at the state level, which depend in part on the laws and policies in the particular state. *See, e.g.*, National Immigration Law Center, "Prenatal Coverage through the State Children's Health Insurance Program" (June 2003), available at *www.nilc.org/immspbs/health/index.htm.*

[76] Welfare Act, Title I, repealing 42 USC §§601 *et seq*.

[77] Welfare Act §401(b)(1)(A).

[78] Welfare Act §401(b)(1)(C).

[79] Attorney General Order No. 2129-97, "Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and

continued

Sponsor-to-Immigrant Deeming of Income—After the five-year ban, LPRs may be subject to new sponsor-to-immigrant deeming rules that could continue to make most of them ineligible for SSI, food stamps, TANF, Medicaid, and SCHIP benefits until they naturalize or have earned credit for 40 qualifying quarters. This is because their sponsor's (and the sponsor's spouse's) income and resources would be counted as belonging to them in determining their financial eligibility for the benefit program.[80] A sponsor is the person who executes an I-864 affidavit of support on the immigrant's behalf.[81]

Under prior law, the sponsor's (and the sponsor's spouse's) income was deemed in three programs: AFDC, food stamps, and SSI.[82] Deeming occurred for only a three-year period, which began on the immigrant's entry to the United States as an LPR or on adjustment to that status while in the United States. The rules for determining the amount of the sponsor's income to be deemed differed in each program, but each program attempted to take into consideration the fact that not all of a sponsor's income could be made available to the sponsored immigrant. Therefore, a subsistence amount of the sponsor's money was allocated to the sponsor and the sponsor's family, and the rest of the sponsor's income was counted as available to the sponsored immigrant.

These old AFDC deeming rules were initially repealed when the TANF program was created, but they were reinstated, in modified form, by the Balanced Budget Act of 1997.[83] Under the new rules, immigrants who enter using the old affidavits of support may, at state option, be subject to deeming in the TANF program during their first three years after entry, using rules that are similar to those previously in effect under the AFDC program.

Technically, the old deeming rules under the SSI program remain in force for those using the old affidavits of support.[84] These old rules, however, only affect a tiny number of people, because almost all of those who would be made ineligible by the old deeming rules have already been rendered ineligible by other provisions in the Welfare Act.

The new sponsor-to-immigrant deeming provisions apply to nonemergency Medicaid, TANF, SCHIP, food stamps, and SSI, although their application to SSI is limited due to the fact that few of the immigrants who arrived after August 22, 1996, remain eligible under this program.

LPRs who are sponsored pursuant to the new affidavits of support will be subject to deeming until they either naturalize or have earned 40 qualifying quarters in covered employment.[85] Under procedures explained earlier, LPRs may be credited with the qualifying quarters of their spouse or parents, provided that beginning in 1997 they do not receive any federal means-tested public benefits during a period when qualifying quarters were earned.

Because refugees and asylees do not need to overcome the public charge ground of inadmissibility or submit affidavits of support when they adjust to permanent residence, they are exempt from the new deeming provisions.[86] As explained above, so are LPRs who have earned or been credited with 40 qualifying quarters.

IIRAIRA provides another exemption from sponsor deeming for certain battered spouses and children. It allows for a one-year exemption from the deeming provisions for LPR spouses and children who have been battered or subjected to extreme cruelty in the United States by their spouses or parents, or by another family member residing in the household who was allowed to commit such acts. The battery or extreme cruelty must have a "substantial connection" to the need for the public benefits for which the battered person applied.[87] Standards for interpreting the term "substantial connection" were discussed earlier. In addition, the spouse or child subjected to the battery or extreme cruelty must not be

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Work Opportunity Reconciliation Act of 1996," 62 Fed. Reg. 61344, 61414–15 (Nov. 17, 1997); U.S. Department of Health and Human Services, TANF Program Policy Questions, available at *www.acf.dhhs.gov/programs/ofa/polquest/index.htm*; POMS SI 00502.135; Centers for Medicare and Medicaid Services (CMS), "Questions and Answers on the application of the five-year bar," available at *www.cms.gov/immigrants* (Sept. 11, 2002).

[80] Welfare Act §421(a), (b).

[81] 62 Fed. Reg. 34346 (Oct. 20, 1997).

[82] *See* 45 CFR §233.51 (AFDC); 20 CFR §416.1160 (SSI); 7 CFR §273.11(j) (Food Stamps).

[83] Balanced Budget Act of 1997 §5505(e).

[84] *See* 20 CFR §416.1160; SSA POMS SI 00502.220.

[85] Welfare Act §421(b).

[86] INA §209(c).

[87] IIRAIRA §552, *amending* §421(f)(1)(A) of the Welfare Act, which added 8 USC §1631(f)(1)(A).

residing with the person who committed the abusive acts.[88]

The battered spouse deeming exemption may extend beyond the initial one-year period, if DHS, a judge, or an administrative law judge formally recognizes that the battery or extreme cruelty occurred and the agency providing the benefits determines that it continues to have a connection with the spouse's or child's need for benefits.[89]

IIRAIRA also added an important "indigence" exemption for LPRs who are abandoned by their sponsor or where the sponsor's contribution is so inadequate that the immigrant would otherwise go without food and shelter. This exemption lasts for one year after the agency providing benefits makes an indigency determination.[90] The SSA and USDA provided helpful guidance on the standards for making indigence determinations, which are renewable for additional 12-month periods.[91]

The USDA allows additional exemptions from deeming where the immigrant's sponsor lives in the same food stamps household, or where the sponsored immigrant is not among the groups of immigrants that are eligible for food stamps.[92] And, under the 2002 Farm Bill, immigrant children are exempt from deeming in the food stamp program.[93]

State Options in TANF and Medicaid—In addition to the above restrictions, the Welfare Act gives states the option to deny TANF and Medicaid to many qualified immigrants who are eligible for federally funded services. This state option does not apply to immigrants who qualify for the veteran or "40 quarters" exemptions discussed previously. Similarly, states may not deny these services to the refugee groups discussed above, for several years after they obtained the relevant status.[94] States also are barred from terminating Medicaid to certain American Indians, and to immigrants receiving SSI (in states that link Medicaid to SSI eligibility). No similar option to deny assistance to otherwise eligible qualified immigrants exists in the SCHIP program.

Only one state, Wyoming, denies access to Medicaid to qualified immigrants who were present when the 1996 Welfare law was enacted**.** In addition to Wyoming, six states (Alabama, Mississippi, North Dakota, Ohio, Texas, and Virginia) do not provide Medicaid to all qualified immigrants who complete the federal five-year ban. Five states (Indiana, Mississippi, South Carolina, Texas, and Wyoming) fail to provide TANF to all qualified immigrants who complete the federal five-year ban.[95] Such state discrimination against immigrants may be unconstitutional.[96]

In March 2003, Colorado passed a law terminating Medicaid eligibility to "qualified" immigrants who do not fall within one of the exemptions listed in 8 USC §1612(b)(2). In 2005, the Colorado legislature restored coverage for these immigrants. The cuts never took effect, because litigation challenging Colorado's action delayed their implementation.[97]

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[88] IIRAIRA §552, *amending* §421(f)(2) of the Welfare Act, which added 8 USC §1631(f)(2).

[89] IIRAIRA §552, *amending* §421(f)(1)(B) of the Welfare Act, which added 8 USC §1631(f)(1)(B).

[90] IIRAIRA §552, *amending* §421(e) of the Welfare Act, which added 8 USC §1631(e).

[91] 7 CFR §273.4(c)(Food Stamps); SSA POMS SI 00502.280 (SSI). *See also* Dept. of Health and Human Services, "Deeming of Sponsor's Income and Resources to a Non-Citizen," TANF-ACF-PI-2003-03 (Apr. 17, 2003) (states may adopt all or part of the Food Stamps standards, or develop their own standards for determining indigence), at *www.acf.dhhs.gov/programs/ofa/pi2003-3.htm*.

[92] 7 CFR §273.4(c). *See also* Non-Citizen Requirements, *supra* note 65.

[93] The Farm Security and Rural Investment Act, Pub. L. No. 107-171, §4401(b) (May 13, 2002).

[94] States may not deny Medicaid to refugees, persons granted asylum or withholding of deportation/removal, or Cuban/Haitian entrants during the seven-year period after they obtained this status, or to Amerasian immigrants during the five-year period after they obtained this status. States may not deny TANF to any of the "refugee" groups during the five-year period after they obtained the relevant status.

[95] For more details on state policies, see National Immigration Law Center, *Guide to Immigrant Eligibility for Federal Programs* (4th ed. 2002). *See also* updated eligibility tables on NILC's website, *www.nilc.org*.

[96] For example, New York's highest court found that the state's denial of benefits to lawfully present immigrants was unconstitutional, even if "authorized" by the 1996 Welfare Act *Aliessa v. Novello*, 96 N.Y.2d 418 (2001). *See also Graham v. Richardson*, 403 U.S. 365 (1971). But, the 10th Circuit reached a contrary conclusion in *Soskin v. Reinertson*, 333 F.3d 1242 (10th Cir. 2004).

[97] Plaintiffs argued that Colorado's law violates the Equal Protection and Due Process clauses of the U.S. Constitution, as well as the Medicaid Act. In a 2-1 decision, a Tenth Circuit Court of Appeals panel upheld Colorado's authority to terminate Medicaid for these immigrants, but found that the state failed to provide pretermination hearings to certain class members, as required by the Medicaid Act. *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004).

States also have the option of using state funds to replace federal benefits lost due to the immigrant restrictions in the Welfare Act, such as the five-year ban.[98] In the TANF program, such state expenditures on immigrants who would have been eligible for TANF but for the immigrant provisions of the Welfare Act can be counted as an expenditure on an "eligible family" for purposes of meeting a state's maintenance of effort requirement in that program.[99] Approximately 20 states are using state money to provide TANF, and about 21 states are providing medical assistance to new immigrants during their first five years in the United States, or to some groups of lawfully present immigrants who are "not qualified" under the federal definition.[100] Funding for these state programs has been threatened by unprecedented state budget shortfalls.

Eligibility for Title XX Services

***Program Description*—**Title XX of the Social Security Act provides block grants to the states, which they use for a wide variety of purposes, including child care, in-home care for persons with disabilities, programs to combat domestic violence, programs for abused and neglected children, and many others.[101] States often contract with nonprofit agencies for the delivery of Title XX services.

***Immigrant Eligibility*—**States have the option to restrict the eligibility of immigrants for Title XX programs in the same manner as in Medicaid and TANF, subject to the same restrictions.[102] There is no federally imposed five-year ban or deeming in Title XX, as there is in the Medicaid and TANF programs.

Eligibility for Other Federal Public Benefits

Immigrants' access to assistance traceable to federal dollars is determined by a multi-step process, which is outlined in guidance promulgated by the Justice Department in November 1997.[103] Under the guidance, agencies should first determine whether a benefit they administer is a "federal public benefit" under the statutory definition of that term and, if it is, whether the benefit falls within any of the exemptions from the restrictions on federal public benefits enumerated in the Welfare Act. If an agency is administering a nonexempt federal public benefit, it should determine each applicant's general eligibility for assistance under the program before verifying immigrant eligibility. Once an applicant has been determined otherwise eligible for a nonexempt federal public benefit, the agency should determine whether the applicant is a U.S. citizen, U.S. national, or qualified immigrant. The same procedure for verifying immigration status must be used for all applicants, without regard to factors that could lead to discrimination, such as foreign surnames or accents. Finally, the agency should apply any particular immigrant restrictions that apply to the program.

***"Federal Public Benefits"*—**The threshold question, then, is whether the agency is administering a "federal public benefit" as that term is defined in the Welfare Act. "Federal public benefits" are accessible to noncitizens, but generally only if they are qualified immigrants, or victims of trafficking, as defined earlier.[104] The statutory definition includes the following:

- Any grant, contract, loan, professional license, or commercial license provided by a U.S. government agency or by appropriated federal funds; and
- 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 a U.S. government agency or by appropriated federal funds.

Exceptions to this definition are made for employment-authorized nonimmigrants, who obtain a "contract, professional license, or commercial license" that is related to their authorized employment, or if they receive any assistance authorized under a reciprocal treaty with their home country.[105]

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[98] Welfare Act §402(b).

[99] Balanced Budget Act of 1997 §5506(d).

[100] For details on the state-funded programs in effect in June 2002, see *Guide to Immigrant Eligibility for Federal Programs*, *supra* note 95. See also updated state tables on NILC's website at *www.nilc.org*, and *Covering New Americans: A Review of Federal and State Policies Related to Immigrants' Eligibility and Access to Publicly Funded Health Insurance*, Center on Budget and Policy Priorities (Nov. 2004) available at *www.kff.org/medicaid*.

[101] Social Security Act, Title XX, 42 USC §§303 *et seq.*

[102] Welfare Act §402(b).

[103] 62 Fed. Reg. 61344 (Nov. 17, 1997).

[104] Welfare Act §401(a) (codified at 8 USC §1611(a)).

[105] Welfare Act §401(c)(2)(A).

This definition of "federal public benefits" requires some regulatory interpretation. As of this writing, only the HHS (and a few other federal agencies) have identified which programs are considered "federal public benefits" under the Welfare Act.[106] The term also includes SSI and food stamps, but as described earlier, the immigrant bars to those programs are even more restrictive.

Undocumented persons generally were ineligible for many of these programs before passage of the Welfare Act and the IIRAIRA. Prior law, however, did allow individuals who had employment authorization from the INS and a valid Social Security account number to qualify for Social Security benefits and most employment-related programs.[107] In addition, some immigrants who are not "qualified," but who previously would have been considered "permanently residing in the U.S. under color of law" (PRUCOL), are now ineligible to receive Medicaid, SSI, and TANF.[108] The Welfare Act eliminated PRUCOL as an eligibility category. This category formerly included applicants for adjustment of status, persons granted deferred action or Family Unity status, persons who had resided in the United States since before January 1, 1972, and persons whom legacy INS knew were here without status but nevertheless allowed to remain for humanitarian or other reasons. However, PRUCOLs who were receiving SSI benefits on August 22, 1996, remain eligible for federal SSI, and many states, including California, Maine, New York, Pennsylvania, and Washington, continue to use that term in their state-funded programs.

***Exempt Federal Public Benefits*—**Not all federal public benefits are subject to immigrant restrictions under the Welfare Act. Programs specifically exempt from the restrictions on "federal public benefits" include emergency Medicaid, public health programs for immunizations and the testing and treatment of the symptoms of communicable diseases, short-term, noncash, in-kind emergency disaster relief programs, and school lunches and breakfasts.[109] In addition, states have the option to provide or deny assistance under certain other nutrition programs, although no states have exercised this option.[110]

The term "emergency Medicaid" is defined to include only treatment for a medical condition (including labor and delivery) with acute symptoms that could place the patient's health in serious jeopardy, result in serious impairment of bodily functions, or cause dysfunction of any bodily organ or part.[111] The exemption for the testing and treatment of communicable diseases applies even if the medical provider later learns that the symptom was not, in fact, caused by a communicable disease.

Finally, no restrictions apply under the Welfare Act to certain programs, services or assistance designated by the Attorney General. To be designated as exempt, the benefit must be in-kind, delivered at the community level, not based on the individual applicant's income and resources, and necessary for the protection of life or safety.[112] On August 23, 1996, the Attorney General made a "provisional specification" of these programs.[113] The list was quite extensive, and included such programs as short-term shelter and housing assistance for the homeless, violence prevention programs, soup kitchens, community food banks and other nutrition programs, medical and public health services, and "any other programs, services, and assistance necessary for the protection of life or safety." On September 15, 1997, the Attorney General published a for-

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[106] 63 Fed. Reg. 41658 (Aug. 4, 1998).

[107] 42 USC §405(c)(2)(B)(I)(i); 20 CFR §422.104 (eligibility for Social Security card); 26 USC §3304(a)(14)(A) (unemployment insurance compensation); 29 USC §1577(a)(5) (JTPA).

[108] The PRUCOL categories were defined slightly differently for each of these three federal programs. *See* 42 CFR §435.408 (Medicaid); 20 CFR §416.1618 (SSI); and 45 CFR §233.50 (AFDC).

[109] Welfare Act §401(b)(1) (codified at 8 USC §1611(b)(1)).

[110] Welfare Act §742(b). The programs are those under the National School Lunch Act (42 USC §§1751 *et seq.*) (other than school lunches and breakfasts); the Child Nutrition Act of 1966 (42 USC §§1771 *et seq.*); Section 4 of the Agriculture and Consumer Protection Act of 1973 (7 USC §612c note); the Emergency Food Assistance Act of 1983 (TEFAP) (7 USC §612c note); and the food distribution program on Indian reservations established under section 4(b) of the Food Stamp Act of 1977 (7 USC §2013(b)).

[111] 42 USC §1396b(v)(3).

[112] Welfare Act §401(b)(1)(D) (codified as 8 USC §1611(b)(1)(D)).

[113] Department of Justice, Specification of Community Programs Necessary for Protection of Life or Safety under Welfare Reform Legislation, A.G. Order No. 2049-96, *published in* 61 Fed. Reg. 45985–86 (Aug. 30, 1996), *reprinted in* 73 *Interpreter Releases* 1185 (Sept. 9, 1996).

mal notice seeking comments on the provisional list,[114] which was finalized on January 16, 2001.[115]

Prospective Restrictions on Social Security and Medicare Benefits

Title II and Title XVI Programs—Title II of the Social Security Act provides for a federal insurance program that grants benefits to qualified workers, and in some cases their dependents, who are seniors, blind, or who have disabilities. Eligible persons over the age of 62 can begin receiving partial Social Security retirement benefits, and those over 65, full benefits.[116] The definition of "disabled" is similar to that used to measure eligibility for SSI. A worker's surviving spouse and children can also receive "auxiliary" Social Security benefits.[117]

Title XVI of the Social Security Act governs the Medicare program, which is a two-part health insurance program for seniors and persons with disabilities. To receive Medicare, the person must be either 65 or older or have a disability. If under 65, the person must have been receiving Social Security benefits for at least two years. Part A Hospital Insurance helps pay for inpatient hospital care, skilled nursing care, home health care, and hospice care. Part B Medical Insurance helps pay for doctor care, outpatient hospital services, medical equipment, and other services.[118]

Eligibility for each of these benefits generally depends on being "fully insured" under the Social Security program. This requires accumulated work in covered employment for a certain minimum number of quarters, during which time the employer withheld FICA taxes from the worker's paycheck and paid it into the worker's Social Security account. For the past two decades, only LPRs and noncitizens with INS-issued employment authorization have qualified for a Social Security card.[119] In most cases, the person must have earned 40 qualifying quarters of work history to be fully insured and eligible for benefits.

Effect of Immigrant Restrictions—Noncitizen applicants for Title II benefits who are residing in the United States and apply for benefits on or after December 1, 1996, will be denied unless they establish that they are "lawfully present."[120] That term was defined earlier ("Immigrant Categories" section).

Persons receiving Title II Social Security benefits on the date of enactment of the Welfare Act are unaffected by this restriction, as are noncitizens residing abroad.[121] Some persons residing in the United States who have their Social Security benefits suspended because they are determined not to be lawfully present can have them reinstated once they leave the United States. Whether benefits can be paid to a noncitizen who remains outside the United States indefinitely depends on factors such as the person's country of origin, international treaties and agreements, and the existence of reciprocal social security or pension systems in that foreign country. Fifty-seven countries have been determined to have reciprocal social security or pension systems.[122]

The Social Security Protection Act of 2004 introduced another requirement for Title II benefit applicants: they must have been assigned a social security

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[114] 62 Fed. Reg. 48308 (Sept. 15, 1997), *reprinted in* 74 *Interpreter Releases* 1436 (Sept. 22, 1997).

[115] The final list includes: "(1) crisis counseling and intervention programs, child protection, adult protective services, violence and abuse preventions, services for victims of domestic violence or other criminal activity and treatment of mental illness and substance abuse; (2) short-term shelter or housing assistance for homeless persons, victims of domestic violence, or runaway, abused or abandoned children; (3) assistance for individuals during periods of adverse weather conditions, including periods of heat or cold; (4) soup kitchens, community food banks senior nutrition programs such as Meals on Wheels, and other nutritional services for persons requiring special assistance; (5) medical and public health services, including treatment and prevention of diseases and injuries, and mental health, disability or substance abuse assistance necessary to protect life and safety; (6) activities designed to protect life and safety of workers, children and youth, or community residents; and (7) any other programs, services, or assistance necessary for the protection of life or safety." 66 Fed. Reg. 3613–16 (Jan. 16, 2001).

[116] For many years, full retirement age has been 65. However, the age at which a worker may receive full retirement benefits will increase gradually over time. Beginning with persons born in 1938 or later, retirement age will gradually increase until the year 2027, when the age will reach 67 for persons born on or after January 2, 1960. 68 Fed. Reg. 4700, 4708 (Jan. 30, 2003).

[117] 42 USC §§401 *et seq*.; 20 CFR §§404 *et seq*.

[118] 42 USC §§1395 *et seq*.; 42 CFR Part 405 *et seq*.

[119] 42 USC §405(c)(2)(B)(I); 20 CFR §422.104. SSA clarified that asylees and refugees do not need a work permit in order to obtain a card. SSA Memo, "Processing SSN Card Requests from Asylees," No. EM-01061 (Apr. 4, 2001). *See also* POMS RM 00203.460.

[120] Welfare Act §401(b)(2); IIRAIRA §503, adding 42 USC §402(y).

[121] Welfare Act §401(b)(2).

[122] 20 CFR §404.463.

number that was, at the time assigned, or at any later time, valid for work purposes.[123] Alternatively, the applicants must have been admitted to the United States temporarily for business or as a crewman when the relevant quarters were earned. These requirements pertain only to applications based on social security numbers issued on or after January 1, 2004.

The Balanced Budget Act of 1997 provided that to qualify for Medicare Part A benefits, the applicant must be lawfully present and must have worked with INS/DHS employment authorization during the period when he or she was earning quarters toward insured status.[124] Persons who are ineligible for Part A may purchase the premiums for Medicare Parts A and B, or Part B only (Part A may not be purchased by itself). However, only lawful permanent residents who have resided in the United States for at least five years are allowed to participate in this "buy-in" Medicare program.

Several premium assistance programs can help pay the costs of Medicare Parts A and B for low-income individuals who are also eligible for Medicaid. For example, the Qualified Medicare Beneficiary (QMB) program pays for Part A and B premiums, co-payments, and deductibles. Only lawful permanent residents who have resided in the United States for at least five years can take advantage of these premium assistance programs.

Restrictions on Federal Housing Programs

IIRAIRA imposed further restrictions on immigrant access and continued receipt of benefits under most federal housing programs.[125] To interpret these new restrictions, it is necessary to understand the prior restrictions, which had been implemented just before the 1996 changes.

***Prior Immigrant Restrictions*—**Federal housing programs provide tenants and home buyers with a variety of subsidized benefits, including public housing, vouchers and rental payments to landlords, and rural housing for farm workers. Eligibility is based on financial status, and priority is given to certain persons, such as those who are homeless or displaced by a disaster, who currently live in substandard housing, or who pay more than 50 percent of their income in rent.[126]

Pursuant to immigrant restrictions imposed by a 1980 statute, only the following immigrants could participate in certain rental housing programs financed by HUD: LPRs, lawful temporary residents, refugees, asylees, persons granted withholding of deportation, parolees, and conditional entrants.[127] A 1986 lawsuit, however, which based its challenge on the constitutional right of families to live together, successfully enjoined implementation of these restrictions.[128] A 1987 statute that tried to address this issue clarified that some "mixed families" (those that contain both eligible and ineligible family members) can remain in their current subsidized housing provided that either the head of the household or the spouse was eligible.[129]

It took until June 1995, for HUD to fully implement the 1980 and 1987 statutory changes. The final regulations provided landlords and public housing authorities (PHAs) with detailed instructions on how to implement the new immigrant restrictions, verify immigration status, use the list of acceptable documents, and safeguard the rights of mixed families.[130]

One of the key provisions in the regulations allowed ineligible immigrants who were residing in subsidized housing on June 19, 1995, to continue receiving the benefit if they were part of a mixed household. Families in that situation were either granted a full subsidy, assuming the head of the household or spouse was a citizen or eligible immigrant, or allowed to pay a prorated share of the value of the housing subsidy, assuming other close family members were eligible. If no family members were eligible, the household could still apply for "deferred termination," which would allow them to remain in the housing for up to three years. Mixed families

[123] Pub. L. No. 108-203, §211 (Mar. 2, 2004).

[124] Balanced Budget Act of 1997 §5561(a).

[125] IIRAIRA §§572–77.

[126] 42 USC §§1401 *et seq.*; 12 USC §§1701 *et seq.*; 24 CFR §§1, 8, 100–125, 200–265, 800–999; 7 CFR §§1800–2099.

[127] Pub. L. No. 96-399, 94 Stat. 1637 (1980), adding 42 USC §1436a. In 2000, citizens of Micronesia, the Marshall Islands, and Palau were added to the groups of immigrants eligible for federal housing programs under 42 USC §1436a.

[128] *Yolano-Donnelly Tenant Association v. Cisneros*, No. S-86-846 MLS (E.D. Cal. 1986).

[129] Pub. L. No. 100-242, 101 Stat. 1815 (1987).

[130] 60 Fed. Reg. 14816 (Mar. 20, 1995), *amended and replaced by* 61 Fed. Reg. 13614 (Mar. 27, 1996).

applying for subsidized housing programs could also take advantage of the prorating system.[131]

Immigrant Restrictions—The Welfare Act did not affect the eligibility of existing tenants to continue receiving federal housing benefits, but rather imposed the "qualified" immigrant restriction on new applicants. This was a minor change, since the categories of immigrants eligible for subsidized housing pursuant to the 1980 statute were almost the same as those defined as qualified immigrants.[132] IIRAIRA, however, imposed significant changes on both applicants and existing tenants. HUD issued new regulations implementing these statutory changes on November 29, 1996.[133]

The immigration legislation eliminated the full subsidy for some mixed families residing in federal housing where the head of the household or spouse is a citizen or eligible immigrant. The law now requires persons who became entitled to continued assistance on or after November 29, 1996, to pay a prorated share, just as mixed families applying for housing benefits now have to pay.[134] At the same time, however, Congress appears to have ratified the principle of prorating by referring to it several times in the legislation. Previously, prorating existed only in regulations and court settlement agreements.

IIRAIRA provides that applicants for housing assistance may obtain prorated assistance, but only after the applicant has submitted immigration documents establishing eligibility.[135] While DHS is verifying eligibility, the landlord or PHA has the discretion to provide assistance to the applicant.[136] After one family member's status has been verified, however, all family members must be offered prorated assistance.[137]

Families who are eligible only for deferred termination, which once allowed them to continue residing in the housing for up to three years, were later limited to no more than 18 months.[138] This 18-month period only applied to persons granted deferred termination on or after November 29, 1996; those granted that status prior to that date retained the full three years.[139] IIRAIRA actually broadened relief for families containing a refugee or asylum applicant, however. Those families granted deferred termination were able to retain that status indefinitely.[140]

The law formerly permitted PHAs to "elect not to comply" with the immigrant restrictions contained in existing law.[141] This provision permitted PHAs to opt out of the verification requirements, and thus provide assistance to tenants and applicants without determining their citizenship or immigration status. However, this was later repealed, and PHAs that had opted out are now asking for verification of immigration status.[142]

Finally, IIRAIRA requires HUD to terminate housing assistance for two years to individuals who have "knowingly permitted another individual who is not eligible for such assistance to reside in the public or assisted unit."[143] This provision does not apply to

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[131] 60 Fed. Reg. 14825–31 (Mar. 20, 1995).

[132] Two categories of qualified immigrants, Cuban/Haitian entrants and qualified battered immigrants, were not listed in the 1980 statute. These immigrants, whom advocates have argued are eligible for federal housing, have been granted access to public housing in some jurisdictions. Congress has instructed HUD to work with the Dept. of Justice in developing technical corrections to the housing statutes, to ensure consistency with the welfare law regarding these two groups of "qualified" immigrants. *See* "Conference Report on H.J. Res 2, Consolidated Appropriations Resolution, 2003," H. Rept. 108-10, *reprinted in* Cong. Rec. at H1273 (Feb. 12, 2003). In addition, HUD clarified that none of its programs are considered federal means-tested public benefits, and therefore are available to eligible immigrants regardless of when they entered the United States. 65 Fed. Reg. 49994 (Aug. 16, 2000).

[133] 61 Fed. Reg. 60537 (Nov. 29, 1996), *amending* 24 CFR Part 5, *reprinted in* 73 *Interpreter Releases* 1724 (Dec. 16, 1996).

[134] IIRAIRA §573(2), *amending* 42 USC §1436a(c)(1)(A); 24 CFR §5.518(a)(2), *as amended by* 61 Fed. Reg. 60539 (Nov. 29, 1996).

[135] IIRAIRA §574, *amending* 42 USC §§1436a(d)(2), 1436a(d)(4)(A)(iii) and (B)(ii)(II).

[136] 24 CFR §5.514(b)(1)(i) and (iv), *as amended by* 61 Fed. Reg. 60539 (Nov. 29, 1996).

[137] IIRAIRA §572, *amending* 42 USC §1436a(b)(2); 24 CFR §5.514(b), *as amended by* 61 Fed. Reg. 60539 (Nov. 29, 1996).

[138] IIRAIRA §573(3), *amending* 42 USC §1436a(c)(1)(B).

[139] 24 CFR §5.518(b)(3), *as added by* 61 Fed. Reg. 60540 (Nov. 29, 1996).

[140] IIRAIRA §573(3), *adding* 42 USC §1436a(c)(1)(B)(ii) and (iii); 24 CFR §5.518(b)(3), *as amended by* 61 Fed. Reg. 60540 (Nov. 29, 1996).

[141] IIRAIRA §576, *adding* 42 USC §1436a(h)(2)(A).

[142] The Quality Housing and Work Responsibility Act of 1998, §592, Title V of the 1999 HUD Appropriations Act, Public Law 105-276, 112 Stat. 2461, Oct. 21, 1998. 64 Fed. Reg. 25726 (May 12, 1999).

[143] IIRAIRA §574(6), *amending* 42 USC §1436a(d)(6).

members of a mixed family where the presence of an ineligible member was made known at the time of applying for prorated assistance.

Ban on Eligibility for the Earned Income Tax Credit

The Welfare Act prohibits noncitizens who do not qualify for a Social Security number from claiming the earned income tax credit (EITC).[144] The EITC is a federal tax credit for working families who have moderately low incomes. The amount of the tax credit depends on the family's size and income.

Prior Practice—Under earlier Internal Revenue Service (IRS) guidelines and procedures, noncitizens who did not have a Social Security number were able to file a tax return and claim the EITC by writing in the words "applied for" or "section 503(c)" in lieu of providing a Social Security number. Beginning with the 1994 tax year, the IRS required each taxpayer, spouse, dependent, and EITC-qualifying child to provide a valid number, or be subject to delays and penalties. The practice varied, however, depending on the particular IRS office processing the claim.

Current Procedures—The Welfare Act removed any doubt about whether persons who lack a Social Security number can claim the earned income tax credit. It provides that only persons who include their taxpayer identification number (defined as the Social Security number) and that of their spouse may claim the EITC.[145] Any children included on the EITC application must also have a Social Security number. This provision applies to tax returns due at least 30 days after the effective date of the 1996 legislation, which means that noncitizens without a Social Security number were not permitted to claim the EITC beginning with returns filed in 1997 for the 1996 tax year.

The law allows some immigrants with a "non-work" Social Security number (SSN) to claim the EITC, if their immigration status does not prohibit them from working. Those who obtained the non-work SSN in order to secure a federal benefit are not eligible for the EITC. Those who secured the non-work number for other purposes may use that number to claim the EITC.[146] However, eligibility for this group is currently the subject of debate in Congress.

ELIGIBILITY FOR STATE AND LOCAL PROGRAMS

Eligibility of "Not Qualified" Immigrants

Unless states and localities take additional steps, they are prohibited from providing programs funded at the state or local level to immigrants who do not fit within certain categories.[147] States and localities may provide their benefits only to qualified immigrants, persons paroled for less than one year, and nonimmigrants. The Welfare Act, however, contains no enforcement mechanism against states that violate this federal prohibition and continue providing state-funded assistance to "not qualified" immigrants.

For states and localities to provide their own benefits to immigrants other than those designated above, the state must take the affirmative step of enacting laws specifically providing for such eligibility.[148] Such micromanagement of state affairs by the federal government, however, is potentially unconstitutional under the Tenth Amendment.

The definition of the term "state and local benefit" is nearly identical to that of "federal public benefit," but the terms are mutually exclusive.[149]

State and local benefits do not include the issuing of any "contract, professional license, or commercial license" to nonimmigrants if such issuance is related to their authorized employment.

Certain programs are exempt from these restrictions on state benefits. These include emergency medical assistance; short-term, non-cash, in-kind emergency disaster relief; public health assistance for immunizations; and those same programs, services, or assistance designated by the Attorney Gen-

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[144] Welfare Act §451.

[145] Welfare Act §451(a), adding §32(c)(1)(F) to the Internal Revenue Code of 1986.

[146] All immigrants may obtain a non-work number if they need one in order to secure a federal benefit, but cannot use this number to claim the EITC. SSA POMS RM 00203.560. "Non-work" SSNs also are available to lawfully present immigrants who need the numbers to secure a state or local benefit. SSA POMS RM 00203.510. These numbers can be used to claim the EITC.

[147] Welfare Act §411(a).

[148] Welfare Act §411(d).

[149] Welfare Act §411(c).

eral that were described earlier in this chapter.[150] In addition, work-authorized nonimmigrants and LPRs may continue to receive any benefit, if denying it would violate a reciprocal treaty agreement with another country.[151]

Deeming and Other Potential Restrictions in State Programs

The Welfare Act attempts to delegate to the states the same power the federal government holds in precluding access to persons lawfully residing in the United States. It allows the states to disqualify even qualified immigrants from certain state-funded public benefits.[152] State action discriminating against lawful immigrants in a benefits program, however, can be challenged on Fourteenth Amendment equal protection grounds.[153]

The Welfare Act also permits states and localities to impose sponsor deeming in their programs for LPRs who were required to submit the new affidavit of support.[154] States and localities cannot deem the sponsor's income in all of their programs, however; they cannot deem in the state counterparts of those programs exempted under the definition of "federal means-tested public benefits" programs set forth above.[155] These would include the following:

- Emergency medical assistance;
- Short-term, non-cash, in-kind emergency disaster relief;
- School lunch, school breakfast, and other child nutrition programs;
- Immunizations and testing and treatment of symptoms of communicable diseases, whether or not such symptoms are caused by a communicable disease; and
- Those same community-based programs, services, or assistance designated by the Attorney General, described earlier.[156]

States and localities are not prohibited from deeming in state-funded higher education loans and grants, elementary and secondary education means-tested programs, Head Start-type programs, and job training programs.[157]

States' efforts to implement sponsor-to-immigrant deeming for state-funded programs could also be challenged on constitutional grounds. In cases decided before the 1996 Welfare Act was passed, at least three state courts determined that such discriminatory treatment against LPRs violates the Fourteenth Amendment's equal protection clause.[158]

The same three categories of immigrants who remain eligible for SSI, food stamps, nonemergency Medicaid, Title XX block grants, and TANF must remain eligible for state-funded public benefits.[159] Also exempted are LPRs who have earned 40 qualifying quarters.[160] In meeting this 40-quarter requirement, LPRs may gain credit for the qualifying quarters earned by their spouses or parents under the same rules and procedures described above.[161] Veterans, and active-duty service members and their spouses and children are similarly exempted.[162]

VERIFICATION AND NOTIFICATION REQUIREMENTS

Quarterly Reporting Requirements

Agencies administering certain federal housing programs, SSI, and TANF programs must furnish DHS

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[150] Welfare Act §411(b).

[151] Welfare Act §411(c)(2). Currently, the countries with such reciprocal treaties are the Federated States of Micronesia and the Republic of the Marshall Islands. Compact of Free Association Amendment Act of 2003, Pub. L. No. 108-188 (Dec. 17, 2003).

[152] Welfare Act §412(a).

[153] *See Aliessa v. Novello*, 96 N.Y.2d 418 (2001) (New York law denying state-funded medical services to a subgroup of immigrants violates the Equal Protection Clause of the U.S. and New York State Constitutions and Article 17 of the New York State Constitution); *Graham v. Richardson*, 403 U.S. 365 (1971). *Cf. Doe v. Commissioner of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002) (upholding six-month residency requirement in state-funded TANF program available only to immigrants); *Avila v. Biedess*, 78 P.3d 280 (Ariz. App. 2003) (upholding under strict scrutiny a five-year bar in a state-funded medical program, because it was merged with and mirrored the rules of the federal Medicaid program).

[154] Welfare Act §422(a).

[155] Welfare Act §422(b).

[156] *Id.*

[157] *Id.*

[158] *Barannikova v. Town of Greenwich, et al.*, 229 Conn. 664 (1994); *Minino v. Perales*, 589 N.E.2d 385, 79 N.Y.2d 883 (1992); *El Souri v. Dept. of Social Services*, 414 N.W.2d 679, 429 Mich. 203 (1987).

[159] Welfare Act §412(b).

[160] Welfare Act §412(b)(2).

[161] Welfare Act §435.

[162] Welfare Act §412(b)(3).

with the name, address, and other identifying information on any person whom the state "knows is unlawfully in the United States."[163] This standard has been interpreted narrowly by the relevant federal agencies.

In September 2000, the Social Security Administration, HHS, DOL, HUD, and legacy INS issued a joint notice defining the limits of this reporting requirement.[164] In this joint notice, the agencies stated that "an entity will 'know' that a person is not lawfully present in the United States only when the unlawful presence is a finding of fact or conclusion of law."[165] The unlawful presence determination will only be made during the "administrative review on a noncitizen's claim for any of the statutorily specified programs."[166] Under these guidelines, any conclusion by an agency of unlawful presence must be supported by a determination by the Service or Executive Office of Immigration Review (EOIR), such as an order of deportation or removal.[167] The notice further explains that no agency is required to make an unlawful presence determination unless necessary to establish the applicant's eligibility for the benefit.[168] It also clarifies that only those individuals applying for the benefit need be scrutinized for unlawful presence. Any member of the benefit-seeking household may decline to be included as an applicant, and therefore, not be subject to the reporting requirement.

The Food Stamp Program requires reporting of household members whom the agency knows are "present in the United States in violation of the Immigration and Nationality Act."[169] Following federal guidelines, most states have interpreted this reporting requirement narrowly. Under the food stamp regulations, agencies are not required to verify the immigration status of family members who are not applying for food stamps.[170] And, the USDA has confirmed that the "knowledge" standard issued by the other federal agencies is consistent with the food stamp reporting rules.[171]

At least one state has enacted its own reporting requirements for state and local programs. Arizona's Proposition 200, passed in November 2004, imposes criminal sanctions on employees administering certain programs[172] if they fail to report "discovered immigration violations" to the Department of Homeland Security. Similar provisions in California's Proposition 187 were struck as unconstitutional, both before and after the passage of the 1996 welfare law.[173] Litigation challenging Arizona's initiative is pending before the Ninth Circuit Court of Appeals.[174]

Verification of Immigration Status

DHS, in consultation with HHS, is required to promulgate regulations implementing a uniform system for verifying applicants' immigration status.[175] Such a verification system already exists—the Systematic Alien Verification for Entitlements (SAVE) system—and is currently being used by many federal agencies, as well as some state agencies, to ver-

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[163] Welfare Act §404(b).

[164] 65 Fed. Reg. 58301 (Sept. 28, 2000).

[165] *Id*. at 58301–02.

[166] The programs include the following: (1) any state agency that administers a block grant under part A of Title IV of the Social Security Act, *as amended*, 42 USC §601 *et seq.* (Temporary Assistance for Needy Families, Welfare-to-Work); (2) the SSA (with respect only to the SSI program under Title XVI of the Social Security Act. 42 USC §1381 *et seq.*); (3) any state agency responsible for an SSI Optional State Supplementation under the SSI program if the state has entered into an agreement with the SSA for federal administrations of payments under that program pursuant to §1616(a) if the Social Security Act, *as amended*, 42 USC §1382e(a); (4) HUD (with respect only to the Public and Assisted Housing Program provided under the United States Housing Act of 1937, *as amended*, 42 USC §1437 *et seq.*); and (5) any public housing agency that enters into a contract for assistance under §§6 or 8 of Title I of the above-referenced Housing Act. 65 Fed. Reg. 58301 (Sept. 28, 2000), *reprinted in* 77 *Interpreter Releases* 1410–11 (Oct. 2, 2000).

[167] 65 Fed. Reg. 58301–02 (Sept. 28, 2000).

[168] *Id.*

[169] 7 USC §2020(e)(17).

[170] *See* 7 CFR §273.4(e)(2).

[171] 65 Fed. Reg. 70166 (Nov. 21, 2000). *See also* Non-Citizen Requirements, *supra* note 65.

[172] The state has determined that the Proposition applies only to five programs, none of which are available to undocumented immigrants.

[173] *See LULAC v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997), affirming the court's earlier ruling, at 908 F. Supp. 755 (C.D. Cal. 1995) (reporting requirements in California's initiative were an impermissible state scheme to regulate immigration, and were preempted by federal law).

[174] Plaintiffs argue, *inter alia*, that the state's verification and reporting requirements intrude on the federal government's exclusive power over immigration. Plaintiffs are appealing a district court order that departed from the reasoning in *LULAC v. Wilson* (discussion, *supra* note 173) and found that Arizona's initiative is "harmonious" with federal law. *Friendly House v. Napolitano*. CV 04-649 TUC DCB (D. Ariz., Order issued Dec. 22, 2004).

[175] Welfare Act §432(a).

ify noncitizen eligibility for the major programs.[176] The new system is required to be as similar as possible to the SAVE program, which incorporates privacy and civil rights protection provisions.[177]

The Department of Justice issued interim guidance, effective October 29, 1997, that federal benefit providers can use to verify citizenship, qualified immigrant status, and eligibility during the interim period before final regulations are issued.[178] The guidance, which is still in effect, adopts a four-step procedure: (1) determining if the program is a "federal public benefit" and thus subject to verification; (2) determining if the applicant is financially or otherwise qualified for the benefit program; (3) verifying the applicant's status as a U.S. citizen, national, or qualified immigrant; and (4) verifying eligibility under the Welfare Act's restrictions. With the exception of food stamp providers, federal agencies that currently use the SAVE system are to continue verifying immigration status through that program. The notice contains detailed procedures for verifying status, and includes several attachments to assist the provider.[179] It is a useful "how to" guide on the appropriate handling of applications and general information on U.S. citizenship, INS documents, civil rights, and special procedures for victims of domestic violence.

The 1996 Welfare Act requires that the verification program be expanded to cover all "federal public benefits," as defined earlier, except for that limited number of programs still accessible to "not qualified" immigrants. This means that immigration status will not be verified in determining an immigrant's eligibility for emergency Medicaid, testing and treatment for symptoms of communicable diseases, immunizations, and emergency disaster relief. Immigration status verification will be implemented in other federal programs administered by the federal government. IIRAIRA was expanded to include the additional requirement of verification of status for U.S. citizens.[180]

States will have an additional two years after adoption of the federal regulations discussed above to implement a verification system for federal programs administered at the state level.[181] Such programs include foster care, certain nutrition programs, and programs funded under Title XX social services block grants.

Nonprofit, charitable organizations are exempt from determining, verifying, or otherwise requiring proof of eligible immigration status under any of the Welfare Act's provisions.[182] An agency qualifies as "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 them. "Charitable" organizations are those dedicated to the relief of the poor and distressed, or the underprivileged, as well as religious-based or educational organizations.[183]

On August 4, 1998, legacy INS issued proposed rules for implementing the new verification requirements.[184] The proposed rules provide agencies with detailed procedures on obtaining access to DHS and other necessary information, as well as specific verification options and procedures. The proposed verification system is based on the current SAVE system and closely resembles it. The rules also set forth procedures for verifying U.S. citizenship.

The proposed rules contain four subparts. Subpart A provides general information and requirements, including definitions and an explanation of the scope of the verification obligations. Subpart B provides for the execution of a written declaration of status by a public benefits applicant and the examination of immigration or citizenship documents. Subpart C sets forth the procedure for verifying the applicant's immigration status through the automated SAVE system. Subpart D provides verification status information and procedures for eligibility factors besides immigration status, which are not verifiable through INS/DHS records.[185]

In September 2000, the HHS and USDA released policy guidance advising states not to ask unnecessary questions regarding an applicant's immigration status and Social Security number (SSN).[186] Many

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[176] The following federal programs already were using SAVE: AFDC, Medicaid, food stamps, Unemployment Insurance, Title IV education loans and grants, housing programs, and some Social Security offices administering Title II Social Security benefits.

[177] Welfare Act §432(a). *See also* 42 USC §1320b-7(d).

[178] 62 Fed. Reg. 61344 (Nov. 17, 1997).

[179] *Id.*

[180] IIRAIRA §504.

[181] Welfare Act §432(b).

[182] IIRAIRA §508, *amending* Welfare Act §432.

[183] 62 Fed. Reg. 61345–46 (Nov. 17, 1997).

[184] 63 Fed. Reg. 41662–86 (Aug. 4, 1998).

[185] *Id.*

[186] 77 *Interpreter Releases* 1411–13 and Appendix II, 1419–24 (Feb. 12, 2001).

states have been combining applications for food stamps, Medicaid, SCHIP, and TANF into a single form.[187] The HHS and USDA have clarified that the non-applicant's immigrant status will not be relevant, and that only the applicant seeking benefits should be required to provide immigration information.[188] Although applicants for Medicaid, food stamps, and TANF must apply for an SSN if they do not have one, the agency cannot delay or deny benefits while the SSN is pending.[189] The table that appears in the Appendix to this article summarizes the requirements for the programs covered by the guidance.

Although the policy guidance declared that SSNs are not required of SCHIP applicants, the HHS reversed its position in its "interim final rule" that grants states the option to require SSNs in the SCHIP program.[190]

Prohibition Against Confidentiality Restrictions

In an effort to trump any remaining "sanctuary" ordinances that limit state or local agencies from cooperating with DHS in their enforcement of immigration laws, the Welfare Act bars federal, state, or local laws from hindering state or local government entities' ability to exchange information with DHS regarding a person's immigration status.[191] Furthermore, no person or agency may restrict a federal, state, or local government entity from maintaining records or exchanging information about immigration status with another federal, state, or local governmental entity.[192]

It should be noted that while these provisions do not require any agency to turn information over to DHS, they have made it difficult for such agencies to assure their patients, clients, participants, and others that information will be kept confidential. Nevertheless, the HHS and at least one other federal agency have confirmed that existing privacy laws, including restrictions on sharing information about a person's Medicaid status, remain in force.[193]

PUBLIC CHARGE AND THE RECEIPT OF PUBLIC BENEFITS

The INA lists public charge as a ground for inadmissibility.[194] In addition, any noncitizen who within five years of entering the United States becomes a public charge based on conditions that existed before entry is "deportable."[195]

Although the law on public charge did not change in 1996, the passage of the Welfare Act and IIRAIRA generated considerable confusion about these rules. Legacy INS and State Department officials exacerbated this confusion by scrutinizing immigrants' use of benefits, including health care, in an unprecedented manner. Abuses of the rules, including unlawful demands for repayment of benefits legitimately received, also increased during this period. These practices profoundly affected immigrants' willingness to seek essential services.[196]

During this period, state and local officials, members of Congress, immigrant assistance organizations, and health care providers contacted legacy INS, and asserted that they were unable to give reliable guidance to their constituents on the public charge issue. Federal and state benefit-granting agencies declared

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[187] National Immigration Law Center, "Federal Policy Guidance regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Benefit Application Forms: Summary of Requirements," *reprinted in* 77 *Interpreter Releases* 1431, Appendix II (Feb. 12, 2001).

[188] "Questions and Answers regarding Policy Guidance regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits," *reprinted in* 77 *Interpreter Releases* 1425–30, Appendix II (Oct. 2, 2000).

[189] Federal Policy Guidance regarding Inquiries into Citizenship, etc., *supra* note 187.

[190] U.S. Department of Health Services, Health Care Financing Administration, Interim Final Rule, "Revisions to the Regulations Implementing the State Children's Health Insurance Program," 66 Fed. Reg. 33810, 33823 (June 25, 2001).

[191] Welfare Act §434.

[192] IIRAIRA §642(b).

[193] *See, e.g.*, letter from Sally K. Richardson, U.S. Dept. of Health and Human Services, to State Medicaid Directors (Dec. 17, 1997). *See also* U.S. Dept. of Justice, Office of Legal Counsel, Memorandum from Andrew J. Pincus, General Counsel, Dept. of Commerce, from Randolph D. Moss, Acting Assistant Attorney General, "The Effect of 8 USC §1373(a) on the Requirement Set Forth in 143 USC §9(a) That Census Official Keep Covered Census Information Confidential" (May 18, 1999); *Guide to Immigrant Eligibility for Federal Programs* at 183–86, *supra* note 95 (citing various privacy laws).

[194] INA §212(a)(4).

[195] INA §23(a)(5).

[196] *See, e.g.*, C. Schlosberg, and D. Wiley, "The Impact of INS Public Charge Determinations on Immigrant Access to Health Care," National Health Law Program and National Immigration Law Center (May 22, 1998), at *www.healthlaw.org/pubs/19980522publiccharge.html*.

that the confusion had produced "significant negative public health consequences across the country."[197]

In order to clarify the policy, and to combat the chilling effect on access to public benefits for eligible immigrants, in May 1999, legacy INS issued proposed rules and field guidance on the public charge issue.[198] The Department of State simultaneously issued a cable incorporating the INS rules.[199] The proposed definition of public charge is a person "who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense."[200]

DHS does not consider short periods of rehabilitative institutionalization to be primary dependence on the government.[201] It also does not consider primary dependence on the government use of Medicaid, SCHIP, food stamps, WIC, housing benefits, child care services, low-income energy assistance, emergency disaster relief, foster care and adoption assistance, education assistance, job training programs, and in-kind community programs, services, or assistance.[202]

The guidance explains that not all cash benefits will be relevant in the public charge determination. For example, vouchers or cash benefits earmarked for child care, energy assistance, food, or housing would not be considered. "Such supplemental special-purpose cash benefits should not be considered in public charge determinations because they are not evidence of primary dependence on the government for subsistence."[203] Similarly, cash benefits that are considered "earned," such as Title II Social Security benefits, government pensions, and veterans' benefits will not be weighed in the public charge determination.[204]

Government benefits that will be considered for public charge purposes include SSI, TANF, state and local income maintenance benefits, programs supporting persons who are institutionalized for long-term care (in this instance including Medicaid).[205] The guidance notes that use of benefits by family members will not be weighed in the public charge determination unless the immigrant is relying on these benefits as the sole means of support.[206]

In October 2000, Congress clarified that persons who have filed a self-petition for an immigrant visa under the Violence Against Women Act and who seek benefits as a "qualified" abused immigrant may use any benefits, including cash welfare, without affecting the public charge decision.[207] And, in December 2003, Congress exempted T visa applicants (trafficking victims) from the public charge ground of inadmissibility.[208]

Despite the issuance of the guidance, however, immigrants and their families continue to avoid critical services for which they are eligible. This is due in part to the fact that many immigration attorneys advise their clients not to apply for these benefit programs. Some of these attorneys are unfamiliar with the guidance; others may have witnessed abuses of these rules, or may have other legal concerns. To the extent that immigrants or their attorneys have identified abuses of the public charge guidance or State Department cables, or have other comments regarding the implementation of the guidance, the National Immigration Law Center (NILC) has developed a public charge monitoring form, which is available at *www.nilc.org*.[209]

Inadmissibility on Public Charge Grounds

For adjustment of status and admissibility purposes, DHS must use the "totality of the circumstances" test to determine a person's likelihood of becoming a public charge.[210] Under INA §212(a)(4)(B), the government at a minimum must consider the person's age, health, family status, assets, resources, and financial status, as well as edu-

[197] 64 Fed. Reg. 28676 (May 26, 1999).

[198] *Id*.

[199] U.S. Department of State, "INA 212(A)(4) Public Charge: Policy Guidance, Ref: 9 FAM 40.41" (May 1999).

[200] 64 Fed. Reg. 28689–93.

[201] *Id.* at 28693.

[202] *Id.*

[203] *Id.* at 28692–93.

[204] *Id.* at 28693.

[205] *Id.* at 28692.

[206] *Id*. at 28691–92.

[207] The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §1505(f) (Oct. 28, 2000), *adding* 8 USC §1182(p).

[208] The Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, §4(b)(4) (Dec. 19, 2003).

[209] NILC would like to learn of any other concerns or experiences regarding the immigration consequences of benefit use, including questions asked by immigration judges, USCIS officials, or consular officers.

[210] 64 Fed. Reg. 28689.

cation and skills. The determination should be a prospective evaluation. Neither the absence of one criterion nor the presence of current/past public cash assistance will be the sole factor for a public charge determination.[211] The guidance requires DHS officers to articulate the basis for a public charge denial. Noncitizens should not be required to repay benefits to qualify for admission or adjustment.[212]

Deportability on Public Charge Grounds

DHS points out that under the stricter rules of the Welfare Act, most immigrants no longer qualify for certain types of public benefits, so they do not run the risk of being considered public charges.[213] The DHS guidance also indicates that it is rare for immigrants to be deported on public charge grounds.[214] Deportation based on "public charge grounds" is covered under INA §237(a)(5), which states that deportation can only be executed if the Service can prove that immigrants became public charges within five years after entry into the United States. However, if the immigrant can prove that the causes for becoming public charges arose after they arrived in the United States, they may avoid deportation proceedings.[215]

Sponsor Liability

Sponsors who sign the affidavit of support Form I-864 agree to provide the financial support necessary to maintain the sponsored immigrant at an income that is at least 125 percent of the federal poverty level.[216] This obligation remains in force until the immigrant becomes a citizen, secures credit for 40 quarters of work history in the United States, abandons LPR status, or dies.

Sponsors who sign Form I-864 also agree to reimburse the government for "means-tested public benefits" that the immigrant may use during this period. As mentioned previously, the federal government has designated five programs as "means-tested public benefits": TANF, SSI, nonemergency Medicaid, SCHIP, and food stamps. To date, most immigrants whose sponsors signed Form I-864 have been ineligible for these federal programs. However, some of the immigrants with these affidavits have now completed the five-year ban on these programs. Therefore, federal agencies have begun to issue guidance on this subject.

The USDA, for example, has determined that sponsors who are receiving food stamps are not liable for food stamps received by the sponsored immigrant.[217] The USDA also noted that state agencies are not obligated to pursue sponsors for food stamp benefits used. If they choose to request reimbursement, food stamp agencies first must verify that the sponsor is subject to liability (for example, by determining whether the immigrant had credit for 40 quarters of work history, or whether the sponsor received food stamps). And, the USDA clarified that state food stamp agencies may not keep any portion of the reimbursement collected and will not be subject to review for quality control errors related to sponsor reimbursement.[218]

In its guidance on deeming in the TANF program, the Department of Health and Human Services confirmed that states are not obligated to pursue sponsors, and noted that states may wish to consider the sponsor's particular circumstances (*e.g.*, health, family status, assets, resources, financial status), and any other feasibility factors in deciding whether to pursue recovery of any unreimbursed TANF benefits. HHS also reminded states that certain TANF benefits are exempt from deeming and sponsor reimbursement.[219]

As this article goes to press, most states have not yet designated which programs, if any, would be considered "state or local means-tested public benefits" for this purpose. Although, at this time, we are aware of only one state that has attempted to enforce the affidavits, the specter of sponsor liability continues to deter immigrants from seeking benefits for which they are eligible.

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[211] *Id.* at 28690.

[212] *Id.*

[213] *Id*.

[214] *Id.*

[215] INA §237(a)(5), 8 USC §1227(a)(5).

[216] Immigration and Naturalization Service, Interim Rule with request for comments, "Affidavits of Support on Behalf of Immigrants," 62 Fed. Reg. 54346 (Oct. 20, 1997). Cash benefits cannot be counted toward the poverty line threshold for sponsorship purposes; however, receipt of public benefits does not disqualify a person from becoming a sponsor. 64 Fed. Reg. 28689, 28693.

[217] 7 CFR §273.4(c)(6).

[218] Non-Citizen Requirements, *supra* note 65.

[219] Dept. of Health and Human Services, "Deeming of Sponsor's Income and Resources to a Non-Citizen," TANF-ACF-PI-2003-03, Response No. 16 (Apr. 17, 2003) at *www.acf.dhhs.gov/programs/ofa/pi2003-3.htm*.

APPENDIX

FEDERAL POLICY GUIDANCE REGARDING INQUIRIES INTO CITIZENSHIP, IMMIGRATION STATUS, AND SOCIAL SECURITY NUMBERS IN STATE BENEFIT APPLICATION FORMS: SUMMARY OF REQUIREMENTS

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On September 21, 2000, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) issued guidance to state officials clarifying the proper treatment of immigration status and Social Security Number (SSN) questions on benefit application forms used by states. Many states have been combining applications for food stamps, Medicaid, State Children's Health Insurance Program (SCHIP), and Temporary Assistance for Needy Families (TANF) into a single form. However, the combined form used by states includes unnecessary and inappropriate questions regarding immigration status and SSNs, discouraging eligible immigrants and their citizen family members from applying for benefits. The guidance clarifies that only the immigration status of the "applicant" for benefits is relevant. And, although applicants for food stamps, Medicaid, and TANF must apply for SSNs if they do not have them, states must assist them in applying for SSNs and cannot delay or deny benefits while the SSN is pending. SSNs are not required of applicants for SCHIP benefits.

The table below summarizes the requirements for the programs covered by the guidance. For greater detail, please consult the guidance.

PROGRAM	IMMIGRATION STATUS QUESTIONS[220]	SOCIAL SECURITY NUMBER QUESTIONS	COMMENTS
Emergency Medicaid	No proof of immigration status required	States may not require SSN	If the state form asks for an SSN, it must also inform the applicant that providing an SSN is voluntary and explain how it will be used. States cannot deny benefits if the applicant does not provide an SSN.
Non-Emergency Medicaid (including Medicaid expansions under SCHIP)	Required only for persons seeking benefits	Required only for person seeking benefits	States must assist individuals in applying for SSNs.
SCHIP (separate State Children's Health Insurance Programs)	Required only for persons seeking benefits	State option to require SSN of applicants[*]	Although the Guidance originally declared that states may not require an SSN in separate SCHIP programs, HHS later reversed its position and granted states the option to impose this requirement.[*]
Food Stamps	Required for persons seeking benefits	Required for persons seeking benefits	States are encouraged to allow household members who are not seeking benefits to identify as "non-applicants" early in the process. Benefits cannot be denied to eligible persons based on a household member's choice not to disclose immigration status or SSN.
TANF (Temporary Assistance for Needy Families)	Required for persons seeking benefits	Required for persons seeking benefits	States may allow ineligible family members to designate themselves as "non-applicants" on the initial application form. States must assist individuals in applying for SSNs.

[220] Victims of trafficking who have been certified by the U.S. Department of Health and Human Services should be able to receive all of these benefits, if otherwise eligible, without showing proof of their immigration status.

[*] Health Care Financing Administration, Interim Final Rule, "Revisions to the Regulations Implementing the State Children's Health Insurance Program," 66 Fed. Reg. 33810, 33823 (June 25, 2001).