

Overview of Immigrant Eligibility for Federal Programs

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Immigration status has always prevented some noncitizens from securing assistance from the major federal public benefits programs. Since the inception of programs such as Food Stamps, nonemergency Medicaid, Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF) and its precursor, Aid to Families with Dependent Children (AFDC), undocumented immigrants and persons in the United States on temporary visas have been ineligible for assistance. However, the 1996 federal welfare and immigration laws¹ introduced an unprecedented new era of restrictionism. Prior to the enactment of these laws, lawful permanent residents generally were eligible for assistance in a similar manner as citizens. Thereafter, most lawfully residing immigrants were barred from receiving assistance under one of the major federal benefits programs for five years or longer. Even where eligibility for immigrants was preserved by the 1996 laws or restored by subsequent legislation, many immigrant families hesitate to enroll in critical health care, job-training, nutrition, and cash assistance programs due to fear and confusion caused by the laws' chilling effects. As a result, the participation of immigrants in public benefit programs decreased sharply since passage of the 1996 law, causing severe hard-

ship for many low-income families who lacked the support available to other low-income families.²

This article focuses on eligibility and other rules governing immigrants' access to federal public benefits programs. Many states have attempted to fill some of the gaps in noncitizen coverage resulting from the 1996 laws. In fact, over half of the states spend their own money to cover at least some of the immigrants who are ineligible for federally funded services. A growing number of states or counties provide health coverage to children and/or pregnant women, regardless of their immigration status. State-funded programs, however, often are temporary or at risk of being cut or eliminated in state budget battles. In determining an immigrant's eligibility for benefits, it is necessary to understand the federal rules as well as the rules of the state in which an immigrant resides. Updates on federal and state rules are available on NILC's website.³

■ Immigrant Eligibility Restrictions

Categories of Immigrants: "Qualified" and "Not Qualified"

The 1996 welfare law created two categories of immigrants for benefits eligibility purposes: "qualified" and "not qualified." Contrary to what these names

¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter "welfare law"), Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996); and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA"), enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3008 (Sept. 30, 1996).

² Michael Fix and Jeffrey Passel, "The Scope and Impact of Welfare Reform's Immigrant Provisions" (Discussion Paper No. 02-03), *Assessing the New Federalism*, Washington, DC: The Urban Institute, Jan. 2002.

³ "Guide to Immigrant Eligibility for Federal Programs Update Page," www.nilc.org/pubs/Guide_update.htm.

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suggest, the law excluded most people in *both* groups from *eligibility* for many benefits, with a few exceptions. The qualified immigrant category includes:

- Lawful permanent residents, or LPRs (persons with green cards).
- Refugees, persons granted asylum or withholding of deportation/removal, and conditional entrants.
- Persons granted parole by the Department of Homeland Security (DHS) for a period of at least one year.
- Cuban and Haitian entrants.
- Certain abused immigrants, their children, and/or their parents.⁴

All other immigrants, including undocumented immigrants as well as many persons lawfully present in the U.S., are considered “not qualified.”⁵

In 2000, Congress established a new category of non-U.S. citizens, *victims of trafficking*, who, while not listed among the qualified immigrants, are eligible for federal public benefits to the same extent as refugees.⁶ In 2003, Congress clarified that “derivative

⁴ To be considered a “qualified alien” under the battered spouse or child category, the immigrant must have an approved visa petition filed by a spouse or parent, a self-petition under the Violence Against Women Act (VAWA) that has been approved or sets forth a prima facie case for relief, or an approved application for cancellation of removal under VAWA. The spouse or child must have been battered or subjected to extreme cruelty in the U.S. by a family member with whom the immigrant resided, or the immigrant’s parent or child must have been subjected to such treatment. The immigrant must also demonstrate a “substantial connection” between the domestic violence and the need for the benefit being sought. And the battered immigrant, parent, or child must not be living with the abuser.

⁵ Before 1996, some of these immigrants were served by benefit programs under an eligibility category called “permanently residing in the U.S. under color of law” (PRUCOL). PRUCOL is not an immigration status, but a benefit eligibility category that has been interpreted differently depending on the benefit program and the region. Generally, it means that the Dept. of Homeland Security (DHS) is aware of a person’s presence in the U.S. but has no plans to deport or remove him or her from the country. Some states continue to provide services to these immigrants using state or local funds.

⁶ The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386 § 107 (Oct. 28, 2000). 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 U.S. Department of Health and

beneficiaries” listed on trafficking victims’ visa applications (spouses and children of adult trafficking victims; spouses, children, parents, and minor siblings of child victims) also may secure federal benefits.⁷

Federal Public Benefits Generally Denied to “Not Qualified” Immigrants

With some important exceptions detailed below, the law prohibits “not qualified” immigrants from enrolling in most federal public benefit programs.⁸ Federal public benefits include a variety of safety-net services paid for by federal funds.⁹ But the welfare law’s definition does not specify which particular programs are covered by the term, leaving that clarification to each federal benefit-granting agency. In 1998, the U.S. Department of Health and Human Services (HHS) published a notice clarifying which of its programs fall under the definition.¹⁰ The list of 31 HHS programs includes Medicaid, the Children’s Health Insurance Program (CHIP), Medicare, Temporary Assistance for Needy Families (TANF), Foster Care, Adoption Assistance, the Child Care and Development Fund, and the Low-Income Home Energy Assistance Program.

The welfare law also attempted to force states to enact new laws, after August 22, 1996, if they choose to provide state or local public benefits to “not quali-

Human Services (HHS) as willing to assist in the investigation and prosecution of severe forms of trafficking in persons. In the certification, HHS confirms that the person either (a) has made a bona fide application for a T visa that has not been denied, or (b) is a person whose continued presence in the U.S. is being ensured by the attorney general in order to prosecute traffickers in persons.

⁷ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, § 4(a)(2) (Dec. 19, 2003).

⁸ Welfare law § 401 (8 U.S.C. § 1611).

⁹ “Federal public benefit” is described in the 1996 federal welfare law as (a) any grant, contract, loan, professional license, or commercial license provided by an agency of the U.S. or by appropriated funds of the U.S., and (b) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment, benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the U.S. or appropriated funds of the U.S.

¹⁰ HHS, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), “Interpretation of ‘Federal Public Benefit,’” 63 FR 41658–61 (Aug. 4, 1998). The HHS notice clarifies that not every benefit or service provided within these programs is a federal public benefit.

fied” immigrants.¹¹ Such micromanagement of state affairs by the federal government is potentially unconstitutional under the Tenth Amendment.

Exceptions to the Restrictions

The law includes important exceptions for certain types of services. Regardless of their status, “not qualified” immigrants remained eligible for emergency Medicaid¹² if they are otherwise eligible for their state’s Medicaid program.¹³ The law does not restrict access to public health programs providing immunizations and/or treatment of communicable disease symptoms (whether or not those symptoms are caused by such a disease). School breakfast and lunch programs remain open to all children regardless of immigration status, and every state has opted to provide access to the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).¹⁴ Also exempted from the restrictions are in-kind services necessary to protect life or safety, as long as no individual or household income qualification is required. In January 2001, the U.S. attorney general published a final order specifying the types of benefits that meet these criteria. The attorney general’s list includes child and adult protective services; programs addressing weather emergencies and homelessness; shelters, soup kitchens, and meals-on-wheels; medical, public health, and mental health services necessary to protect life or safety; disability or substance abuse services necessary to protect life or safety; and programs to protect the life or safety of workers, children and youths, or community residents.¹⁵

¹¹ Welfare law § 411 (8 U.S.C. § 1621).

¹² Emergency Medicaid covers the treatment of an emergency medical condition, which is defined as “a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in: (A) placing the patient’s health in serious jeopardy, (B) serious impairment to bodily functions: or (C) serious dysfunction of any bodily organ or part.” 42 U.S.C. § 1396b(v).

¹³ Welfare law § 401(b)(1)(A) (8 U.S.C. § 1611(b)(1)(A)).

¹⁴ Welfare law § 742 (8 U.S.C. § 1615).

¹⁵ U.S. Dept. of Justice (DOJ), “Final Specification of Community Programs Necessary for Protection of Life or Safety under Welfare Reform Legislation,” A.G. Order No. 2353–2001, published in 66 FR 3613–16 (Jan. 16, 2001).

Verification Rules

When a federal agency designates a program as a federal public benefit foreclosed to “not qualified” immigrants, the law requires the state or local agency to verify the immigration and citizenship status of all applicants. However, many federal agencies have not specified which of their programs provide federal public benefits. Until they do so, state and local agencies are not obligated to verify immigration status. Also, under an important exception contained in the 1996 immigration law, nonprofit charitable organizations are not required to “determine, verify, or otherwise require proof of eligibility of any applicant for such benefits.” This exception relates specifically to the immigrant benefits restrictions in the 1996 laws.¹⁶

Eligibility for Major Federal Benefit Programs

Congress restricted eligibility even for many qualified immigrants by arbitrarily distinguishing between those who entered the U.S. before or “on or after” the date the law was enacted, August 22, 1996. The law barred most immigrants who entered the U.S. on or after that date from “federal means-tested public benefits” during the five years after they secure qualified immigrant status.¹⁷ Federal agencies clarified that “federal means-tested public benefits” are Medicaid (except for emergency care), CHIP, TANF, food stamps, and SSI.¹⁸

TANF, Medicaid, and CHIP

States can receive federal funding for TANF, Medicaid, and CHIP to serve qualified immigrants who have completed the federal five-year bar.¹⁹ “Humani-

¹⁶ IIRIRA § 508 (8 U.S.C. § 1642(d)).

¹⁷ Welfare law § 403 (8 U.S.C. § 1613).

¹⁸ HHS, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), “Interpretation of ‘Federal Means-Tested Public Benefit,’” 62 FR 45256 (Aug. 26, 1997); U.S. Dept. of Agriculture (USDA), “Federal Means-Tested Public Benefits,” 63 FR 36653 (July 7, 1998). The CHIP program, created after the passage of the 1996 welfare law, was later designated as a federal means-tested public benefit program. See Health Care Financing Administration, “The Administration’s Response to Questions about the State Child Health Insurance Program,” Question 19(a) (Sept. 11, 1997).

¹⁹ States were also given an option to provide or deny federal TANF and Medicaid to most qualified immigrants who were

tarian immigrants” — refugees, persons granted asylum or withholding of deportation/removal, Cuban/Haitian entrants, certain Amerasian immigrants,²⁰ and victims of trafficking — are exempt from the five-year bar, as are “qualified” immigrant veterans, active duty military, and their spouses and children.

Approximately half of the states have been using state funds to provide TANF, Medicaid, and/or CHIP to some or all of the immigrants who are subject to the five-year bar on federally funded services, or to a broader group of immigrants.²¹

In February 2009, when Congress reauthorized the CHIP program, states were granted an option to provide federally funded Medicaid and CHIP to “lawfully residing” children and pregnant women, regardless of their date of entry into the United States.²² States currently are deciding whether to take advantage of this federal funding for immigrant health coverage, which became available on April 1, 2009.

in the U.S. before Aug. 22, 1996, and to those who enter the U.S. on or after that date, once they have completed the federal five-year bar. Welfare law § 402 (8 U.S.C. § 1612). Only one state, Wyoming, denies Medicaid to immigrants who were in the country when the welfare law passed. Colorado’s proposed termination of Medicaid to these immigrants was reversed by the state legislature in 2005 and never took effect. 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. Texas and Virginia, however, provide health coverage to qualified immigrant children during and after the five-year period, and Virginia also provides coverage to children who are PRUCOL. Five states (Indiana, Mississippi, South Carolina, Texas, and Wyoming) fail to provide TANF to all qualified immigrants who complete the federal five-year ban.

²⁰ For purposes of the exemptions described in this article, the term Amerasians applies only to individuals granted lawful permanent residence under a special statute enacted in 1988 for Vietnamese Amerasians. See § 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in § 101(c) of Public Law 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, Public Law 100-461, as amended).

²¹ See *Guide to Immigrant Eligibility for Federal Programs*, 4th ed., Los Angeles: National Immigration Law Center, 2002, and updated tables at www.nilc.org/pubs/Guide_update.htm.

²² Section 214 of the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA)(H.R.2), Public Law 111-3 (Feb. 4, 2009).

Food Stamps

Although the 1996 law severely restricted immigrant eligibility for food stamps, subsequent legislation restored access for many of these immigrants. Qualified immigrant children, the humanitarian immigrants and veterans groups described above, lawful permanent residents with credit for 40 quarters of work history, certain Native Americans, lawfully residing Hmong and Laotian tribe members (described below), and immigrants receiving disability-related assistance²³ are now eligible regardless of their date of entry into the U.S. Qualified immigrant seniors who were born before August 22, 1931, may be eligible if they were lawfully residing in the U.S. on August 22, 1996. Other qualified immigrant adults, however, must wait until they have been in qualified status for five years before they may become eligible for food stamps.

Several states provide state-funded food stamps to some or all of the immigrants who were rendered ineligible for the federal program.²⁴

Supplemental Security Income

Congress imposed its most harsh restrictions on immigrant seniors and immigrants with disabilities who seek assistance under the SSI program.²⁵ Although advocacy efforts in the two years following the welfare law’s passage achieved a partial restoration of these benefits, significant gaps in eligibility remained. SSI, for example, continues to exclude “not qualified” immigrants who were not already receiving the benefits, as well as most qualified immigrants who entered the country after the welfare law passed²⁶ and seniors without disabilities who were in the United States before that date.

²³ For this purpose, disability-related programs include SSI, Social Security disability, state disability or retirement pension, railroad retirement disability, veteran’s disability, disability-based Medicaid, and disability-related General Assistance, if the disability determination uses criteria as stringent as those used for SSI.

²⁴ See NILC’s updated tables on state-funded services at www.nilc.org/pubs/Guide_update.htm.

²⁵ Welfare law § 402(a) (8 U.S.C. § 1612(a)).

²⁶ Most new entrants cannot receive SSI until they become citizens or secure credit for 40 quarters of work history (including work performed by a spouse during marriage, persons “holding out to the community” as spouses, and by parents before the immigrant was 18 years old).

“Humanitarian” immigrants (refugees, persons granted asylum or withholding of deportation/removal, certain Amerasian immigrants, or Cuban and Haitian entrants) can receive SSI, but only during the first seven years after having obtained the relevant status. The main rationale for the seven-year time limit was that it was supposed to provide a sufficient opportunity for humanitarian immigrant seniors and those with disabilities to naturalize and retain their eligibility for SSI as U.S. citizens. However, a combination of factors, including immigration backlogs, processing delays, former statutory caps on the number of asylees who can adjust their status, language barriers, and other obstacles made it impossible for most of these individuals to naturalize within seven years.

Effective October 1, 2008, a new law provides a two-year extension of SSI eligibility to humanitarian immigrants who are approaching the end of the seven-year period or were terminated from assistance due to this time limit. The new law also allows humanitarian immigrants who have a naturalization application pending at the end of this two-year extension to receive an additional year of SSI. The legislation “sunsets,” or expires, on September 30, 2011.²⁷ Advocates will continue to press for a broader restoration of noncitizen eligibility for SSI, including the complete elimination of the time limit, so that humanitarian immigrants who are seniors or persons with disabilities would be eligible for SSI in the same manner as citizens.

A few states provide cash assistance to immigrant seniors and persons with disabilities who were rendered ineligible for SSI; some others provide much smaller general assistance grants to these immigrants.²⁸

²⁷ The SSI Extension for Elderly and Disabled Refugees Act (H.R. 2608 and S. 821). “Humanitarian” immigrants can get two additional years of SSI if they: (1) are under 18 or over 70; or (2) have been LPRs for less than 6 years; or (3) have a pending application for LPR status, filed within 4 years of getting SSI; or (4) are a Cuban or Haitian entrant; or (5) were granted withholding of deportation or removal; or (6) have a pending application for citizenship. Persons over 18 years of age must submit a declaration that they are making a good faith effort to pursue citizenship, and can receive an additional third year of SSI if they have an application for citizenship pending.

²⁸ See *Guide to Immigrant Eligibility for Federal Programs*, 4th ed., Los Angeles: NILC, 2002, and updated tables at www.nilc.org/pubs/Guide_update.htm.

Sponsor Deeming

Under the 1996 welfare and immigration laws, family members and some employers eligible to file a petition to help a person immigrate must become financial sponsors of the immigrant by signing a contract with the government (an affidavit of support). Under the enforceable affidavit (Form I-864), the sponsor promises to support the immigrant and to repay certain benefits that the immigrant may use.

Congress imposed additional eligibility restrictions on immigrants whose sponsors sign an enforceable affidavit of support. When an agency is determining a lawful permanent resident’s financial eligibility for TANF, food stamps, SSI, nonemergency Medicaid, or CHIP,²⁹ in some cases the law requires the agency to deem the income of the immigrant’s sponsor or the sponsor’s spouse as available to the immigrant. The sponsor’s income and resources are added to the immigrant’s, which often disqualifies the immigrant as over-income for the program. The 1996 laws imposed deeming rules until the immigrant becomes a citizen or secures credit for 40 quarters (approximately 10 years) of work history in the U.S.³⁰

Domestic violence survivors and immigrants who would go hungry or homeless without assistance (“indigent” immigrants) are exempt from sponsor deeming for at least 12 months.³¹ Some programs apply additional exemptions from the sponsor deeming rules.³²

²⁹ Welfare law § 421 (8 U.S.C. § 1631).

³⁰ That is, until the immigrant has credit for 40 quarters of work history.

³¹ IIRIRA § 552 (8 U.S.C. § 1631(e) and (f)). HHS and the U.S. Department of Agriculture (USDA) have issued helpful guidance on the applicability of and exemptions from sponsor deeming and liability. See 7 C.F.R. § 274.3(c); USDA, “Non-Citizen Requirements in the Food Stamp Program” (Jan. 2003),

www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non_Citizen_Guidance.pdf. See also USDA’s proposed rule, “Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002,” 69 FR 20723, 20758–9 (Apr. 16, 2004); HHS, “Deeming of Sponsor’s Income and Resources to a Non-Citizen,” TANF-ACF-PI-2003–03 (Apr. 17, 2003), www.acf.hhs.gov/programs/ofa/policy/pi-ofa/2003/pi2003-3.htm.

³² Children, for example, are exempt from deeming in the food stamp program. In states that choose to provide Medicaid and CHIP to lawfully residing children and pregnant women, regardless of their date of entry, deeming and other sponsor-related barriers do not apply to these groups.

■ Beyond Eligibility: Overview of Barriers That Impede Access to Benefits for Immigrants

Confusion about Eligibility

Confusion about eligibility rules pervades benefit agencies and immigrant communities. The confusion stems from the complex interaction of the immigration and welfare laws, differences in eligibility criteria for various state and federal programs, and a lack of adequate training on the rules as clarified by federal agencies. Consequently, many eligible immigrants have assumed that they should not seek services, and eligibility workers mistakenly have turned away eligible immigrants.

Public Charge

The immigration laws allow officials to deny applications for lawful permanent residence or to deny entry into the U.S. if the authorities determine that the immigrant is “likely to become a public charge.” In deciding whether an immigrant is likely to become a public charge, immigration or consular officials review the “totality of the circumstances,” including an immigrant’s health, age, income, education and skills, employment, family circumstances, and, most importantly, the affidavits of support. In May 1999, the Immigration and Naturalization Service (INS) issued helpful guidance and a proposed regulation on the public charge doctrine.³³ The guidance clarifies that receipt of health care and other noncash benefits will not jeopardize the immigration status of recipients or their family members by putting them at risk of being considered a public charge.³⁴ Nevertheless, nearly a

³³ DOJ, “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689–93 (May 26, 1999); see also DOJ, “Inadmissibility and Deportability on Public Charge Grounds,” 64 FR 28676–88 (May 26, 1999); U.S. Dept. of State, INA 212(A)(4) Public Charge: Policy Guidance, 9 FAM 40.41.

³⁴ The use of all health care programs, except for long-term institutionalization (e.g., Medicaid payment for nursing home care), was declared to be irrelevant to public charge determinations. Programs providing cash assistance for income maintenance purposes are the only other programs that are relevant in the public charge determination. The determination is based on the “totality of a person’s circumstances,” and

decade after the issuance of this guidance, widespread confusion and concern about the public charge rules remain, deterring many eligible immigrants from seeking critical services.

Affidavit of Support

The 1996 laws enacted rules that make it more difficult to immigrate to the U.S. to reunite with family members. Effective December 19, 1997, relatives (and some employers) have been required to meet strict income requirements and to sign a long-term contract, or affidavit of support (USCIS form I-864), promising to maintain the immigrant at 125 percent of the federal poverty level and to repay any means-tested public benefits the immigrant may receive.³⁵ The specific federal benefits for which sponsors may be liable have been defined to be TANF, SSI, food stamps, nonemergency Medicaid, and SCHIP. Federal agencies have issued little guidance on these provisions, however. Regulations on the affidavits of support issued in 2006 make clear that states are not obligated to pursue sponsors and that states cannot collect reimbursement for services used prior to public notification that they are considered means-tested public benefits for which sponsors will be liable.³⁶

Most states have not designated the programs that would give rise to sponsor liability, and NILC is aware of only one state that has attempted to pursue reimbursement. However, the specter of sponsor liability has deterred some eligible immigrants from applying for benefits, based on concerns about exposing their sponsors to government collection efforts.

Language Policies

Many immigrants face significant linguistic and cultural barriers to obtaining benefits. Almost 20 percent of the U.S. population speaks a language other than

therefore even the past use of cash assistance can be weighed against other favorable factors, such as a person’s current income or skills or the contract signed by a sponsor promising to support the intending immigrant.

³⁵ Welfare law § 423, amended by IIRIRA § 551 (8 U.S.C. § 1183a).

³⁶ U.S. Department of Homeland Security, “Affidavits of Support on Behalf of Immigrants,” 71 FR 35732, 35742–43 (June 21, 2006).

English at home.³⁷ Although ninety-seven percent of long-term immigrants to the U.S. eventually learn to speak English well,³⁸ many are in the process of learning the language. Almost 8 percent of people living in the U.S. speak English less than very well.³⁹ These limited-English proficient (LEP) residents cannot effectively apply for benefits or meaningfully communicate with a health care provider without language assistance.

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding from discriminating on the basis of national origin, and such discrimination can include failure to address language barriers that prevent LEP persons from securing assistance. Recipients' compliance with this requirement has been limited. In August 2000, the White House issued an executive order directing federal agencies, by December 11, 2000, to submit to the U.S. Department of Justice (DOJ) plans to improve language access, and to publish guidance for programs receiving federal financial assistance regarding compliance with the Title VI requirement to take "reasonable steps" to assure "meaningful access" to federally funded services.⁴⁰ DOJ published final guidance to its recipients on June 18, 2002.⁴¹ Several agencies, including HHS, developed and published guidance for public comment,⁴² but many remain delinquent.

Verification

In 1997, DOJ issued an interim guidance for federal benefit providers to use in verifying immigration status until DOJ issues final regulations governing

verification.⁴³ The guidance, which remains in effect, directs benefit agencies already using DOJ's computerized Systematic Alien Verification for Entitlements (SAVE) program to continue to do so. It recommends that agencies make financial and other eligibility decisions before asking the applicant for information about his or her immigration status. The guidance also directs agencies to seek information only about the person applying for benefits and not about his or her family members.

Questions on Application Forms

In September 2000, HHS and the U.S. Department of Agriculture issued guidance recommending that states delete from benefits application forms questions that are unnecessary and may chill participation by immigrant families.⁴⁴ The guidance confirms that only the immigration status of the applicant for benefits is relevant. It encourages states to allow family or household members who are not seeking benefits to be designated as nonapplicants early in the application process. Similarly, under Medicaid, TANF, and the Food Stamp Program, only the applicant must provide a Social Security number (SSN). SSNs are not required for persons seeking only emergency Medicaid. In June 2001, HHS indicated that states providing SCHIP through separate programs (rather than through Medicaid expansions) are authorized, but not obligated, to require SSNs on their SCHIP applications.⁴⁵

³⁷ American Community Survey table, "Percent of People 5 Years and Over Who Speak a Language Other Than English at Home" (2006) (hereinafter "American Community Survey").

³⁸ James P. Smith and Barry Edmonston, eds., "The New Americans," Washington, DC: National Research Council, 1997, p. 377, www.nap.edu/catalog.php?record_id=5779#toc.

³⁹ American Community Survey, *supra*.

⁴⁰ Executive Order No. 13166, "Improving Access to Services for Persons with Limited English Proficiency," 65 FR 50121 (Aug. 16, 2000).

⁴¹ "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons," 67 FR 41455 (June 18, 2002).

⁴² See the federal interagency language access website, www.lep.gov.

⁴³ DOJ, "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 FR 61344-416 (Nov. 17, 1997). In Aug. 1998, the agency issued proposed regulations that draw heavily on the interim guidance and the Systematic Alien Verification for Entitlements (SAVE) program. See DOJ, "Verification of Eligibility for Public Benefits," 63 FR 41662-86 (Aug. 4, 1998). Final regulations have not yet been issued. Once the regulations become final, states will have two years to implement a conforming system for the federal programs they administer.

⁴⁴ Letter and accompanying materials from HHS and USDA to State Health and Welfare Officials: "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" (Sept. 21, 2000).

⁴⁵ HHS, Health Care Financing Administration, Interim Final Rule, "Revisions to the Regulations Implementing the State

Reporting to the Dept. of Homeland Security

Another source of fear in immigrant communities is the occasional misapplication of a 1996 reporting provision that is in fact quite narrow in scope.⁴⁶ The reporting requirement applies only to three programs — SSI, public housing, and TANF — and requires the administering agency to report to the INS (now the DHS) only persons whom the agency *knows* are not lawfully present in the U.S.⁴⁷

In September 2000, federal agencies issued a joint guidance outlining the limited circumstances under which the reporting requirement may be triggered.⁴⁸ The guidance clarifies that only persons who are actually seeking benefits (not relatives or household members applying on their behalf) are subject to the reporting requirement. Agencies are not required to report such applicants unless there has been a formal determination, subject to administrative review, on a claim for SSI, public housing, or TANF. The conclusion that the person is unlawfully present also must be supported by a determination by the immigration authorities, “such as a Final Order of Deportation.”⁴⁹ Findings that do not meet these criteria (e.g., a DHS response to a SAVE computer inquiry indicating an immigrant’s status,⁵⁰ an oral or written admission by

Children’s Health Insurance Program,” 66 FR 33810, 33823 (June 25, 2001).

⁴⁶ Welfare law § 404, amended by BBA §§ 5564 and 5581(a) (42 U.S.C. §§ 608(g), 611a, 1383(e), 1437y).

⁴⁷ *Id.* See also H.R. Rep. 104–725, 104th Cong. 2d Sess. 382 (July 30, 1996). In other contexts, the knowledge requirement has been interpreted to apply only where an agency discovers that a person is “under an order of deportation.” See “Memorandum of Legal Services Corporation General Counsel to Legal Services Corporation Project Directors,” Dec. 5, 1979 (knowledge of unlawful presence includes only instances involving an “immigrant against whom a final order of deportation is outstanding”).

⁴⁸ Social Security Administration, HHS, U.S. Dept. of Labor, U.S. Dept. of Housing and Urban Development, and DOJ – Immigration and Naturalization Service, “Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity ‘Knows’ Is Not Lawfully Present in the United States,” 65 FR 58301 (Sept. 28, 2000).

⁴⁹ *Id.*

⁵⁰ SAVE, or Systematic Alien Verification for Entitlements, is the DHS process currently used to verify eligibility for several major benefit programs. See 42 U.S.C. § 1320b-7. DHS verifies an applicant’s immigration status through a computer database and/or through a manual search of its records. This information is used only to verify eligibility for benefits and cannot be used to initiate deportation or removal proceedings

(applicants, or suspicions of agency workers) are insufficient to trigger the reporting requirement.⁵¹ Finally, the guidance stresses that agencies are not required to make immigration status determinations that are not necessary to confirm eligibility for benefits.

■ Looking Ahead

The 1996 welfare law produced sharp decreases in public benefits participation, particularly among immigrants. Proponents of welfare “reform” see that fact as evidence of the bill’s success, noting that a reduction of welfare use, particularly among immigrants, was precisely what the legislation intended. Critics question, among other things, the fairness of excluding immigrants from programs that are supported by the taxes they pay. They challenge the nation to return to its traditional principle of equal treatment for citizens and lawfully residing immigrants. There is growing evidence that providing access to essential services to all community members — regardless of citizenship or immigration status — would improve the public health and the well-being of the country as a whole.

(with exceptions for criminal violations). See the Immigration Reform and Control Act of 1986, 99 Pub. L. 603, § 121 (Nov. 6, 1986); DOJ, “Verification of Eligibility for Public Benefits,” 63 FR 41662, 41672, and 41684 (Aug. 4, 1998).

⁵¹ The Food Stamp Program had a reporting requirement that preexisted the 1996 law. USDA has confirmed that the knowledge standard set forth in the Sept. 2000 guidance is consistent with the preexisting requirement. See USDA, “Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of Public Law 104–193, as Amended by Public Laws 104–208, 105–33 and 105–185,” 65 FR 70166 (Nov. 21, 2000).