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August 11, 2006

U.S. Department of Health and Human Services
Centers for Medicare & Medicaid Services
P.O. Box 8017
Baltimore, MD 21244-8017

ATTN: CMS-2257-IFC

**RE: Medicaid Citizenship Documentation Interim Final Rule,
71 Federal Register 39214 (July 12, 2006)**

Dear Secretary Leavitt:

The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on immigration law and the employment and public benefit rights of low-income immigrants. We conduct policy analysis, advocacy, and impact litigation, provide training, publications, and offer technical assistance to a broad range of groups throughout the United States. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under federal public benefit laws is an important resource for immigrant rights coalitions and community groups, as well as national advocacy groups, policymakers, attorneys and legal aid organizations, government agencies, and the media.

We are providing comments on the Centers for Medicare and Medicaid Services' (CMS) Interim Final Rule on Citizenship Documentation, published in the Federal Register on July 12, which implements Section 6036 of the Deficit Reduction Act of 2005 (DRA). These comments are intended to ensure that critical health services for Medicaid eligible immigrants and their U.S. citizen family members are not jeopardized by the confusion or unnecessary burdens created by the Interim Final Rule ("Interim Rule"). Although Section 6036 of the DRA addresses only U.S. citizens who seek or receive Medicaid, the publicity and initial implementation efforts surrounding the new documentation rule has generated confusion which has prevented or deterred Medicaid eligible non-citizens from enrolling in Medicaid or seeking medical care.

NILC supports efforts to minimize the harm to eligible citizens and immigrants who may be affected inadvertently or otherwise harmed by the Interim Rule. In particular, we endorse the recommendations made by the National Health Law Program, Families USA, and the Center on Budget Policies and Priorities. In addition, we would like to raise specific concerns with the Interim Rule, which are discussed below.

**COMMENTS ON PROVISIONS OF THE INTERIM FINAL RULE AND
PREAMBLE WITH COMMENT PERIOD**

**Changes to regulations governing immigrant eligibility and verification of an
immigrant’s status (42 CFR 435.406 and 435.408)**

The Interim Rule, which is intended to implement the DRA’s citizenship verification provision, extends beyond this statutory authority to make changes in the rules governing immigrant eligibility and verification of immigrants’ eligibility for Medicaid. 71 Federal Register (FR) at 39217-39218. Even if authorized, however, the proposed regulations fail to include certain categories of immigrants who are eligible for federal Medicaid. The revised 42 CFR. 435.406 and 436.406 list only “qualified” immigrants, and omit several groups of immigrants who are eligible for coverage under laws passed after August 22, 1996. For example, victims of trafficking and their derivative beneficiaries are eligible for federal benefits, including Medicaid, to the same extent as refugees, without regard to their immigration status. 22 U.S.C. 7105(b)(1); Supplemental Security Income (SSI) recipients, including lawfully residing immigrants who were grandfathered into SSI as “permanently residing under color of law” remain eligible for Medicaid, in the states that link Medicaid to SSI receipt. 8 U.S.C. 1612(b)(2)(F); certain Native Americans also are eligible for Medicaid, without regard to their immigration status. See 8 U.S.C. 1612(a)(2)(G), as referenced in 8 U.S.C. 1612 (b)(2)(E).

These eligible immigrants and Native Americans already face barriers when they apply for services, based in part on confusion among state agency staff. To help address this confusion, we offer several recommendations.

First, the proposed regulations should list all categories of eligible immigrants, as discussed above. Second, because federal law, at 42 U.S.C. 1320b-7(d), expressly requires states to provide benefits to applicants who have declared a “satisfactory immigration status” pending verification, the immigrant eligibility list should be included in a provision separate from those governing verification of immigration status.

Third, the proposed regulations should clarify that the eligibility of some immigrants cannot be verified through the Department of Homeland Security (DHS), but must instead be verified with other agencies. The status of trafficking victims, for example, is verified through the U.S Department of Health and Human Service’s Office of Refugee Resettlement (ORR). See ORR State Letter #02-25, at <http://www.acf.hhs.gov/programs/orr/policy/sl02-25.htm>. Native Americans may have their documents verified by the Office of Tribal Justice or by certain tribal governments. See 62 Fed. Reg. 61411 (Nov. 17, 1997). Even some “qualified” immigrants, such as battered immigrants or certain Cuban/Haitian entrants may need to have their eligibility verified through alternative means. Any verification rule for immigrants therefore must address situations where agencies other than DHS are the appropriate resource.

Fourth, the proposed regulations should clarify that an immigrant’s eligibility is not conditioned on *prior* verification with DHS or other agency. The proposed regulations

must be consistent with 42 U.S.C. 1320b-7, which mandates that benefits be provided once a declaration of satisfactory immigration status has been made, and if documents are submitted within a reasonable period, pending verification of an immigrant's status. The Interim Rule's revised 42 CFR 435.406 and 436.406 could be misconstrued to require verification of an eligible immigrant's status prior to the issuance of benefits. To comply with federal statutes, prior verification of an immigrant's status cannot be made a condition of coverage.

It is important to maintain the concept of "satisfactory immigration status" used for declarations of status under 42 USC 1320b-7. A rule requiring a declaration of "satisfactory immigration status" would conform with federal law on verification of status under 42 USC 1320b-7, would allow states to maintain their verification procedures (regardless of whether federal financial participation is available),¹ and would help ensure that eligible immigrants who do not fall within the "qualified" immigrant categories are able to secure coverage without undue bureaucratic delays.

Medicaid benefits must be provided equally to all citizen infants born on Medicaid regardless of the scope of the mother's Medicaid coverage.

We appreciate CMS' clarification in the Preamble that U.S. born infants who have met the criteria for automatic and continuous eligibility do not need to provide citizenship documentation during the first year of life. 71 FR 39216.

However, we are deeply concerned about the statement in the Preamble which attempts to deny automatic and continuous eligibility to infants born in the United States whose mothers were receiving Medicaid only for labor and delivery or other emergency services. 71 FR 39216. Nothing in Section 6036 of the DRA, which pertains only to citizenship documentation for the purpose of a State's receipt of federal financial participation, permits this restriction. These infants, regardless of the mother's immigration status or scope of Medicaid coverage, are by definition U.S. citizens, a fact known to the Medicaid agency because it will have paid for the child's birth in a U.S. hospital. This statement in the Preamble will likely cause unnecessary delays in access to medical care for citizen infants during the most vulnerable and critical time in their life and development. Finally, this position reflects a radical departure from the federal agency's previous position, contradicts the plain meaning of the federal statute establishing the criteria for automatic and continuous, or "deemed" eligibility, and violates the Equal Protection clause of the U.S. Constitution.

We strongly urge CMS to withdraw the statement in the Preamble and instruct the states that an infant born in the U.S. whose mother was receiving Medicaid, including emergency Medicaid, is automatically and continuously eligible for Medicaid coverage

¹ Since some lawfully present SSI recipients who obtained coverage as "permanently residing in the U.S. under color of law" (PRUCOL) maintained eligibility for Medicaid, and since several states continue to cover PRUCOLs or other persons lawfully residing in the US, the regulations in 42 CFR 435.408 and 436.408 continue to serve as a helpful reference. Even if the U.S. Health and Human Services Agency opts to delete the PRUCOL concept from the federal regulations, the variation in coverage of immigrants from state to state argues for maintaining a more flexible approach, such as "satisfactory immigration status."

throughout the first year of life, if the infant otherwise meets the criteria for this eligibility category.

With regard to infants whose mothers did not have Medicaid at the time of the birth and older children, we urge CMS to adopt citizenship documentation rules that will minimize delays and denials of coverage. Many citizen newborns will be unable to document their citizenship status through state vital record matches because time delays and processing lags often prevent vital records from being created immediately at time of birth. Other documentation can take even longer to obtain. Recognizing the important need for all children to have access to medical care for their health and development, CMS should amend 42 CFR 435.407(a) or (b) to include a record of payment for a child's birth within the United States as acceptable evidence of that child's citizenship and identity.

The interim rule should not limit the types of evidence that may be used to document citizenship and should recognize that any list of documents cannot be exhaustive.

CMS has asked for comments regarding whether the documentation that can be used to prove citizenship should be limited to primary or secondary levels of evidence. 71 FR 39219-39220. We strongly urge CMS not to limit in any way the types of documents that can be used to document citizenship status. In fact, we strongly recommend CMS allow for additional documentary evidence to be considered acceptable under Section 6036 because no list of citizenship documentation can be an exhaustive list.

First, Section 6036 of the DRA does not require that documentary evidence be limited or that a hierarchy of documentary evidence be established. As CMS acknowledges in the Interim Rule, Section 1903(x)(3)(C)(v) of the DRA specifically authorizes “the Secretary to identify additional documentary evidence of citizenship beyond that contained in section 1903(x).” We appreciate CMS broadening the list of documentary evidence beyond those specified in the statute. However, the statute does not require any limitation on the evidence. Indeed, limiting the documents defeats the statutory purpose of granting authority to the Secretary -- to account for the range of documents that may serve as proof of U.S. citizenship or identity.

Second, the hierarchy or additional limits to documentary evidence will likely prevent citizens or nationals who are otherwise eligible from obtaining Medicaid simply because they do not have one of the listed documents. Because of the complexity of U.S. immigration and naturalization laws and ongoing development of new documents, we urge CMS to recognize that it is impossible to create a comprehensive or exhaustive list of evidence to prove citizenship. Although CMS is charged with administering the new Medicaid documentation requirement, neither CMS nor the U.S. Department of Health and Human Services (the Agency) are responsible for making determinations of citizenship. That responsibility rests with the U.S. Department of Homeland Security (DHS) and its agency the United States Citizenship and Immigration Services (USCIS). The federal immigration agency has acknowledged the impossibility of creating an

exhaustive list of documentary evidence as it attempted to define categories of citizens for federal public benefit purposes:

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

“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, 61347 (Nov. 17, 1997).

The complex immigration and naturalization laws give rise to numerous alternative methods and documents that may demonstrate citizenship or national status, including for example, court orders. A U.S. citizen or national granted status by USCIS cannot be deemed by CMS to be a “non-citizen” simply because his or her documentary evidence is not on the CMS list.

We urge CMS not to limit the evidence any further. We also urge the Agency to remove the hierarchical structure of the documentary evidence requirement, and to clarify that any documentary evidence presented will be sufficient for states to meet their obligation to secure federal financial participation.

Finally, we strongly recommend that CMS include a “catch-all” category in its guidance to ensure that other appropriate documents of which the Agency may not be aware, or which may be developed in the future, will serve as acceptable evidence of citizenship or national status. The lack of a particular document does not make a citizen or national any less of a citizen or national. As the Secretary was granted authority to expand the list of documents under Section 1903(x)(3)(C)(v), we urge the Agency to use this authority to acknowledge that other appropriate documents not specified on a particular list may be acceptable by state Medicaid agencies as proof of U.S. citizenship for purposes of securing federal financial participation.

For example, CMS may adopt an approach similar to the one used by the Social Security Administration (SSA) for documentary evidence of citizenship. SSA includes a safety-net provision for applicants who do not have one of the enumerated documents. SSA’s regulations allow citizens who cannot present one of the specified documents that indicate citizenship status to explain why they cannot provide the documents and to provide any information that they may have. 20 CFR 416.1610. This approach would allow states to obtain documentary evidence for purposes of federal financial participation for citizens and nationals who have a document to prove their status that is not listed on the current list or who for numerous reasons may not have or be able to obtain one of the specified documents. We recommend that CMS add a new provision at 42 CFR 435.407(k) adopting SSA’s safety net provision found at 20 CFR 416.1610.

The limitation of documents to prove citizenship for citizens who are born outside the United States should be eliminated.

Under the Interim Rule, the acceptable citizenship documents for citizens born outside the United States appears to be limited to a U.S. passport, certificate of naturalization, or certificate of citizenship. 71 FR 39218. This restriction is not required by Section 6036 of the DRA and ignores the realities of the citizenship and naturalization process. Most significantly, the restriction will effectively deny Medicaid to eligible citizens based solely on their place of birth even though they are U.S. citizens.

Citizens born outside of the United States include not only naturalized citizens, but also individuals who became citizens through birth abroad to a citizen parent, and individuals who became U.S. citizens through automatic operation of law. The latter include individuals who automatically became citizens as the children of a naturalized citizen (derivative citizens), as well as children adopted by a citizen parent. As discussed below, many of these citizens, particularly children, will not have one of the specified three documents but may have other supporting documentation to prove their citizenship status. CMS should accept as satisfactory evidence alternative documentation as proof of citizenship for citizens born outside the United States.

The Interim Rule fails to take into account the naturalization process for many citizens and incorrectly assumes that all naturalized citizens will have one of the three specified documents in their possession. In particular, children under age 18, who derive their citizenship automatically through the naturalization and/or citizenship status of one or both parents, do not file a separate naturalization application to become U.S. citizens and do not receive any of the three specified documents when they become citizens. Unlike the parent who receives a certificate of naturalization, a child, who automatically obtains derivative citizenship through the naturalization of a parent, does not automatically receive a certificate of citizenship as documentary evidence of citizenship and instead must affirmatively apply for the certificate to USCIS. Most children who receive derivative citizenship do not immediately apply for a certificate of citizenship, and many never have done so.

Although the Preamble to the Interim Rule indicates “children born outside the United States and adopted by U.S. citizens may establish citizenship using the process established by the Child Citizenship Act of 2000,” there is no reference to this provision in the proposed regulation at 435.407 in the Interim Rule. Moreover, the above quotation describes only a narrow subset of the different categories of individuals who automatically obtain U.S. citizenship through operation of law under Title 8 U.S.C. Section 1431. As amended by the Child Citizenship Act, this statute provides for the automatic acquisition of citizenship by any individual born abroad who meets all of the following conditions at any time prior to reaching the age of eighteen years: (1) has at least one parent who is a U.S. citizen, whether by birth or naturalization, and (2) is residing in the U.S. in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence. The statute also provides that a child adopted by a U.S. citizen parent who meets these conditions also obtains automatic citizenship if

the child meets the requirements for an adopted child contained in Title 8 U.S.C. Section 1101(b)(1). Yet the Interim Rule completely fails to acknowledge the process of obtaining citizenship through automatic process of law, whether due to the naturalization of a parent, the acquisition of lawful permanent resident status by a child, or a child's adoption by a U.S. citizen parent. In all of the above circumstances, the acquisition of U.S. citizenship occurs automatically, and the Interim Rule and proposed regulations should recognize the citizenship status of anyone who presents evidence that these requirements have been met.

Moreover, limiting acceptable citizenship documentation for any citizen born outside the United States to a U.S. passport, certificate of naturalization, or certificate of citizenship will be a major barrier to obtaining Medicaid because many low-income Medicaid eligible citizens who do not have these specific documents or have to obtain replacement documents will find it difficult, inordinately time-consuming and costly to obtain. First, as most Medicaid eligible citizens are low-income, it is unlikely they have the monetary means to travel abroad and are less likely to already have a U.S. passport. Second, as explained below, the significant costs involved in obtaining these documents will make it cost-prohibitive for Medicaid eligible citizens who do not have disposable income to obtain the documents. Third, they will face significant delays, sometimes more than a year, in obtaining the documents which will prevent them from obtaining Medicaid coverage and critical access to care if they are denied or terminated for failure to provide one of the three specified documents. Because of the inherent cost and time barriers involved in obtaining these documents, eligible Medicaid citizens who are born outside the United States will in effect be prohibited from seeking or obtaining Medicaid under the current restriction in the Interim Rule.

Below is a detailed explanation of the difficulty and cost of obtaining a certificate of citizenship, certificate of naturalization, and U.S. passport.

Certificate of Citizenship: The current application fee for a certificate of citizenship is \$255 (\$215 for a child). There are additional costs associated with obtaining such a certificate, including the cost of passport photos, a certified foreign birth certificate, if necessary, and travel to and from the USCIS office for a required in-person interview by a USCIS officer. An applicant may have to travel hundreds of miles to the nearest USCIS office because there only are 79 USCIS offices, excluding those located in Puerto Rico and U.S. territories. The vast majority of states have a single USCIS office, and there are not any USCIS offices located in Alabama, Mississippi, North Dakota, or South Dakota. Including travel costs, the total cost of obtaining a certificate of citizenship easily can exceed \$500.

Once the request is submitted, it currently can take nearly two years to obtain a certificate of citizenship depending upon the particular USCIS office. As of July 17, 2006, the Phoenix office was interviewing persons who submitted applications on September 30, 2004. In California, the backlog extends back to March 1, 2005 for the Fresno office and January 5, 2006 for the Los Angeles office.

Certificate of Naturalization: The current application fee for a replacement certificate of naturalization (or citizenship) is \$220, and there is an additional cost of passport photos that must be submitted with an application. It can take over one year to obtain a replacement certificate of naturalization. In fact, given the long delay, USCIS' A Guide to Naturalization recommends that naturalized citizens apply for a U.S. passport to more quickly obtain documentation of citizenship.

U.S. Passport: The application fee for a passport, which has a normal processing time of six weeks, is \$97 (\$82 if under age 16). The cost of an expedited passport, which is processed within two weeks, is an additional \$60 plus overnight delivery fees. There is an additional cost of passport photos that must be submitted with an application. In addition for children under age 18, parents will incur additional costs associated with travel to a passport-issuing office because children must appear in person. Furthermore, a certificate of naturalization or certificate of citizenship must be submitted with the passport application. For those citizens who have lost or never obtained these documents, there may be another means of obtaining a passport but it requires additional paperwork and costs so that the time and barriers involved in obtaining a passport increases. Thus, while obtaining a passport may appear to be the easiest and cheapest option for a document, it is likely as or more difficult and time-consuming to obtain as obtaining the certificate of naturalization or certificate of citizenship.

For all of these reasons, limiting acceptable citizenship documents for naturalized citizens to a U.S. passport, certificate of naturalization, or certificate of citizenship will undoubtedly delay and prevent the receipt of Medicaid benefits to a number of citizens born outside the United States. We urge CMS to consider the following changes:

- Eliminate the restriction for citizens born outside the U.S. to provide only U.S. passport, certificate of naturalization, or certificate of citizenship as proof of citizenship under Section 6036.
- Eliminate the hierarchy structure of the documents so that any document listed can be accepted as satisfactory evidence.
- Accept any evidence presented by citizens that demonstrates that they met the requirements for automatically obtaining citizenship.
- Include a catch-all provision to allow states to accept other documents that can serve as reliable documentation as SSA's regulations allow, as previously discussed above.
- Allow electronic verification of citizenship status for naturalized citizens against the Department of Homeland Security's (DHS) SAVE system, which has the capacity to verify naturalized citizenship status, just as it currently verifies the immigration status of all Medicaid applicants and recipients who declare that they have satisfactory immigration status pursuant to Section 1137(d) of the Social Security Act. SSA's procedures include verification of citizenship through the SAVE system in recognition of the fact that DHS has citizenship data for all naturalizations from 1906 to present and that what matters is whether an individual is a U.S. citizen, not whether someone has a specific citizenship

document. See SSA's Program Operations Manual (POMS) Section RM 00203.310 for further information.

Low-income citizens born outside the United States who lack a passport, certificate of naturalization, or certificate of citizenship should not be required to undergo the major cost and time of obtaining such documents when their citizenship can be verified by other documents or other means of verification. They are citizens even without one of the three specifically listed documents, and if otherwise eligible, they should be able to receive Medicaid.

Copies of documents should be sufficient proof of citizenship (435.407(h)(1))

The Interim Rule requires that individuals submit original documents (or copies certified by the issuing agency) to satisfy the citizenship and identity requirements. 71 FR 39225 Nothing in Section 6036 of the DRA requires Medicaid applicants or recipients to submit original or certified copies to the Medicaid agency in order to fulfill this new documentation requirement.

This provision of the rule poses a significant burden for both individuals and state agencies. Over the years many states have simplified and streamlined application procedures for Medicaid, including adopting a mail-in application process and eliminating face-to-face interviews. These processes reduce Medicaid administrative costs by eliminating the timely interview process and reducing staff time required for each application and renewal. They have been shown to make Medicaid more effective by increasing participation in Medicaid among people who are eligible for it. While CMS clarifies in the preamble of the rule that the documentation requirement does not prohibit utilization of mail-in application and renewal processes, the requirement that individuals submit original documents undermines those efforts.

Moreover, due to the significant costs and time involved in obtaining particular citizenship documents as described above, it is highly unlikely that individuals will want to mail their original documents and rely on the Medicaid agency to return them. This provision of the Interim rule will only delay coverage for new applicants who will be forced to schedule appointments with the Medicaid agency to fulfill this requirement. Some applicants may even be discouraged from completing the application process.

We urge CMS to eliminate the requirement in 42 CFR 435.407(h)(1) that original documents or certified copies be submitted.

Collection of Information Requirements

Based on detailed explanations above regarding the length of time it will take citizens born outside the United States to obtain one of the three specified documents, it clearly will take far more time than the estimated ten minutes to acquire and provide acceptable documentation to a state. 71 FR 39220. Even assuming a citizen or national has one of the prescribed documents in his/her possession, it will take substantially longer than the estimated 10 minutes to mail or, more likely, to present the original documents in person

to the local Medicaid office. Yet some of the information collection burden for individuals and states can be reduced by implementing at least the recommended changes described above.

Persons making an affidavit of citizenship on behalf of a citizen applicant or beneficiary should not be required to provide proof of their own citizenship.

Although CMS has allowed written affidavits as a “fourth level of evidence” of citizenship, the restriction requiring the persons making the affidavits to prove their own citizenship and identity should be eliminated because it serves no meaningful purpose and is discriminatory. 71 FR 39224 and 435.407(d)(5)(iii)

This restriction, along with the other requirements for written affidavits, will prevent many Medicaid eligible citizens from using this last resort procedure to document their citizenship. In particular, the vast majority of households headed by non-citizens include at least one U.S. citizen, typically a child.² Limiting the ability of children to document their citizenship status by preventing non-citizen witnesses, including family members, from making affidavits in effect will deny much needed health coverage to these citizen children.

Without any statutory authority for this restriction, it is unclear why this limitation was imposed. It is discriminatory to prevent non-citizens from making the affidavit if they can meet all the other requirements, especially when they too would be required to make the declaration under penalty of perjury. In effect, this restriction in the Interim Rule conclusively presumes that only U.S. citizens are credible, reviving an offensive concept that harkens back to the roundly-condemned “White witness” rule of the Chinese Exclusion laws of the late 1800’s.

Finally, the restriction requiring persons who are not applying for Medicaid to provide proof of citizenship in order to sign an affidavit in support of an applicant or beneficiary is inconsistent with the principles outlined in the Tri-Agency Guidance. The Tri-Agency Guidance prohibits inquiry into, or denial of benefits to a benefits applicant based on the immigration or citizenship status of persons who are not applying for the benefit. See <http://www.hhs.gov/ocr/immigration/triagency.html>. The current restriction requiring the person making the affidavit prove their citizenship and identity in effect requires non-applicants to establish citizenship. Their inability to do so could cause the denial of benefits to an eligible U.S. citizen applicant whose only means of establishing citizenship is by written affidavit. By preventing citizens from obtaining affidavits from non-citizens, the Interim Rule effectively denies Medicaid to eligible citizens due to a non-applicant’s lack of citizenship status.

The requirement that written affidavits can be made only by persons who can prove their own citizenship should be eliminated.

² According to the Urban Institute, 85% of immigrant households include at least one U.S. citizen, typically a child. (Michael Fix, Wendy Zimmermann and Jeffrey S. Passel, *Integration of Immigrant Families in the United States*, Urban Institute (July 2001)).

Medicaid coverage should not be delayed because of lack of citizenship documentation.

We are concerned that the Interim Rule is more stringent than required by Section 6036 of the DRA by denying enrollment in Medicaid to eligible applicants who have declared that they are a U.S. citizen or national until they have submitted satisfactory evidence of their citizenship or national status. 71 FR 39216 and 39225.

There is no statutory requirement to prohibit applicants who are otherwise eligible for Medicaid from enrolling in the program immediately. Section 6036's citizenship documentation requirement is a condition for states to receive federal matching funds, not an eligibility requirement for individuals. Once an applicant has declared under penalty of perjury that s/he is an U.S. citizen or national and meets all eligibility requirements for Medicaid, s/he should be enrolled in Medicaid pending submission of the appropriate documentation of citizenship.

As previously discussed, a significant number of citizens may not have the prescribed documents and it will be difficult and time-consuming to obtain the documents required under the Interim Rule's hierarchy. While we commend CMS for allowing electronic data matches and encourage the appropriate use of additional databases to ease the burden of the Interim Rule on applicants and recipients, currently there is no single national database that can provide electronic verification for all U.S. citizens. For these reasons, it is critical that a citizen applicant's Medicaid coverage not be delayed, reduced, or denied while they wait for electronic verification or for the specified document.

This interpretation of the statute which denies coverage to citizens until they provide the specifically listed documents is short-sighted: it will exacerbate individual and public health problems and likely increase costs for both the Medicaid program and safety-net providers in the long-term. As CMS acknowledges in the Interim Rule, Medicaid applicants and beneficiaries are among the most "frail and vulnerable" individuals in the nation and their delay or loss of access to Medicaid would be "contrary to public interest." 71 FR 39221. Delaying enrollment for eligible citizens due to a lack of a specific document will not alleviate their need for medical care and will force these citizens to either delay or forego critical health care. They will wait to seek care until their conditions deteriorate or become acute, which not only jeopardizes their health but is often more costly to treat.

We urge CMS to revise 42 CFR 435.407(j) so that applicants who declare that they are U.S. citizens and meet the Medicaid eligibility criteria can be enrolled in Medicaid with full federal financial participation during a "reasonable opportunity period" to obtain the documentation necessary to prove their U.S. citizenship and identity. Without this change, many vulnerable citizens with immediate health care needs will delay seeking care and may ultimately require more expensive care if their condition worsens.

Privacy and confidentiality protections must be strictly followed in any automated, electronic data matching.

We appreciate the Interim Rule’s recognition that privacy protections must be in place for electronic data matching of citizenship or identity documentation under Section 6036. 71 FR 39217. To the extent that electronic data matches are conducted to meet the requirements under Section 6036, CMS should ensure that states limit the use of the data matches to this purpose alone and that neither CMS nor the states undermine existing federal or state privacy protections in implementing the Interim Rule. We urge CMS to ensure states’ compliance with the Tri-Agency’s Guidance and other privacy laws and guidance in implementing electronic data matches, to ensure that information requested by non-applicants is limited and does not form the basis of denial or termination of benefits for eligible applicants. See <http://www.hhs.gov/ocr/immigration/triagency.html>

Concerns regarding electronic verification of Social Security Numbers

The Interim Rule requires states to “conduct a match of the applicant’s name against the corresponding Social Security Number that was provided as part of the SSN verification specified in §435.910.” 71 FR 39217. Although subsequent verification of a recipient’s Social Security number may be an appropriate measure to ensure the integrity of the program, CMS and the state Medicaid agencies should be aware of the numerous errors and problems with the Social Security Number database experienced in the process used for employment verification.³ For example, the Social Security Administration’s database cannot verify the Social Security numbers of hundreds of thousands of workers each year for reasons which include errors or obsolete data, missing first or last names, and use of non-alphabetic characters, which has resulted in unnecessary and illegal employment terminations.⁴ As errors may occur in the electronic verification, it is essential that an applicant or recipient who has provided a Social Security Number not be denied coverage or otherwise harmed by such errors, and that coverage be maintained during a period in which the recipient is resolving or appealing any discrepancies or errors found in his or her records.

We are concerned that CMS’ implementation of this requirement to electronically match Social Security numbers without more detailed guidance to states will cause Medicaid applicants and recipients who are citizens to be denied or terminated from coverage if there is any problem with the Social Security Number data match.

As CMS is not currently issuing further guidance to states regarding actions to take in the case of a negative match (71 FR 39217), we recommend that CMS clearly instruct states in its guidance or regulations that no action be taken as a result of a negative match until further guidance is provided by CMS to prevent unnecessary denial or terminations of

³ Government Accountability Office, *Immigration Enforcement: Benefits and Limitations to Using Earnings Data to Identify Unauthorized Work*, GAO-06-814R, July 11, 2006. See also, Government Accountability Office, *Social Security, Better Coordination Among Federal Agencies Could Reduce Unidentified Earnings Reports*, GAO-05-154, February 2005.

⁴ Center for Urban Economic Development, *Social Security Administration’s No-Match Letter Program: Implications for Immigration Enforcement and Workers’ Rights*, November 2003 available at: http://www.nilc.org/immseplymnt/SSA_no-match_survey_final_report_11-20-03.pdf

benefits. CMS should instruct states that applicants must be afforded due process protections for any action taken with regard to electronic data matches of their Social Security numbers.

Finally, CMS should ensure that states comply with 42 CFR 435.910 and the Tri-Agency Guidance when they conduct electronic verification of Social Security numbers. States are prohibited from delaying, denying, or discontinuing aid to applicants who do not have a Social Security number or whose non-applicant family members do not provide one. 42 CFR 435.910(f); Tri-Agency Guidance at <http://www.hhs.gov/ocr/immigration/triagency.html>. States are also required to assist applicants who do not have Social Security numbers in applying for a Social Security number. 42 CFR 435.910(e)(1).

CMS should amend the Interim Rule to create a meaningful outreach program as required by Section 6036(c) of the DRA.

The Interim Rule does not describe or otherwise address any “outreach program” designed to inform and assist persons affected by the new documentation requirements. The failure to have developed such a program ignores the mandate of Section 6036(c) of the DRA, but more importantly has left beneficiaries and states in the dark regarding what is mandated, permissible or prohibited in helping beneficiaries comply with these new provisions.

CMS should develop an outreach program that is truly designed to address the confusion that already has occurred because of the new documentation requirement. First, all notices and any outreach conducted by CMS and the states should meet federal and state guidelines for linguistic and cultural competence. Second, all outreach should be targeted only to applicants and beneficiaries who have declared that they are citizens or nationals to ensure that any notices, outreach materials, or instructions are not provided unnecessarily to families or individuals to whom the new rules do not apply.

Finally, we urge CMS to develop outreach material that will not cause further confusion by implying for example that only citizens or nationals are eligible for Medicaid. CMS’ outreach materials should confirm that Section 6036 did not change the eligibility rules for citizens or non-citizens. While the Interim Rule recognizes that Section 6036 does not affect Medicaid applicants and recipients who declare that they are in “satisfactory immigration status,” CMS’ outreach materials produced to date can be misinterpreted to indicate that citizenship is required for all Medicaid applicants. We have received reports from communities across the nation of non-citizens being denied or delayed access to Medicaid and medical care, or who believe that they cannot seek Medicaid because of the new documentation requirement. The media and outreach material developed by some states have added to the misinformation. We urge CMS to develop outreach material that is targeted to eligible non-citizens to reassure them that they remain eligible for Medicaid. We also urge CMS to ensure that state and federal outreach materials

developed for citizens are worded carefully to avoid the appearance that there has been a change in Medicaid eligibility.

Regulatory Impact Statement

NILC strongly objects to the conclusory statement in the Interim Rule that all of the projected cost savings from these regulations will be attributed to “those who are truly in the country illegally.” 71 FR 39221. There has been no concrete evidence of fraud by undocumented immigrants in the states that have permitted self-declaration of citizenship for Medicaid. Department of Health and Human Services, “Self Declaration of U.S. Citizenship for Medicaid,” Office of the Inspector General (July 2005). In our experience, most immigrants are unaware of Medicaid; regardless of their status, many immigrants hesitate to seek government benefits including Medicaid for themselves or their eligible family members, even when told that they may be eligible, based on concerns about immigration consequences.⁵ Due to the severe immigration consequences, and consistent with the lack of evidence, it is highly unlikely that an undocumented immigrant would falsely allege citizenship when applying for Medicaid.⁶ In fact, the projected cost “savings” from this ill conceived provision undoubtedly will arise from the fact that eligible U.S. citizens will be denied or terminated from Medicaid based on their lack of and inability to obtain a particular document to prove their citizenship.

Many of the provisions in the Interim Rule, including the conclusory statements cited above, single out and penalize foreign-born citizens or non-citizens without any statutory requirement or other valid purpose. We urge CMS to recognize that such policies and penalties do not advance the goal of providing critical health coverage to millions of vulnerable Americans, and will cause unnecessary delays or denial of coverage for eligible U.S. citizens with potentially harmful health consequences.

⁵ See e.g., *How Race/Ethnicity, Immigration Status and Language Affect Health Insurance Coverage, Access to Care and Quality of Care among the Low-income Population*, The Kaiser Commission on Medicaid and the Uninsured, Leighton Ku and Timothy Waidmann (August 2003), pages 8-9, available at: <http://www.kff.org/uninsured/upload/How-Race-Ethnicity-Immigration-Status-and-Language-Affect-Health-Insurance-Coverage-Access-to-and-Quality-of-Care-Among-the-Low-Income-Population.pdf>

⁶ Under the Immigration and Nationality Act (INA), “any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act [the INA]...or any other Federal or State law is inadmissible.” INA 212(a)(6)(C)(ii); 8 U.S.C. 1182(a)(6)(C)(ii). This ground of inadmissibility “applies to any representation made on or after September 30, 1996.” IIRIRA §344(c); Kurzban’s *Immigration Law Sourcebook*, 8th Ed. (2002-03), pg. 73). There is no waiver available for this ground of inadmissibility. INA 212(i) (waiving other kinds of misrepresentation at the discretion of the Attorney General, but not waiving false claims of citizenship); Kurzban’s *Immigration Law Sourcebook*, 8th Ed. (2002-03), pg. 73).

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We appreciate CMS's efforts to reduce the harm of the new Medicaid citizenship documentation requirement. However, unless the steps described above are taken, the citizenship documentation requirement will force Medicaid recipients and new applicants to lose or be denied coverage for critical health services. If you have any questions about these comments, please contact Sonal Ambegaokar at National Immigration Law Center at (213) 639-3900.

Sincerely,

/S/

Sonal Ambegaokar
Health Policy Attorney
National Immigration Law Center