

Overview of Immigrant Eligibility for Federal Programs

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Low-income immigrants in the United States have faced substantial restrictions on access to public benefit programs since the enactment of the 1996 welfare and immigration laws.¹ 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.

The 1996 laws also attempted to transfer to state and local government certain powers traditionally held by the federal government. The welfare law allows states to offer or deny eligibility to most immigrants for three federal programs as well as for many state benefit programs.² The drain of federal resources makes it difficult for states to serve significant portions of their low-wage population, at a time when growing numbers of immigrants are settling in communities throughout the U.S.³

¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter "welfare law"), Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 2, 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 At least one court found that a state's denial of benefits to lawfully present immigrants is unconstitutional, even if "authorized" by the 1996 welfare law. *See* Aliessa v. Novello, 96 N.Y.2d 418 (N.Y. Ct. App. June 5, 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). *See also* Ehrlich v. Perez, 908 A.2d 1220 (MD. Ct. App. Oct. 12, 2006) (applying strict scrutiny review to governor's budget cuts to state medical services for qualified immigrants). *But see* Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004) (upholding Colorado's law terminating Medicaid to immigrants whose benefits are not mandated by federal law, but finding that the state failed to provide pre-termination hearings to some recipients, as required by the Medicaid Act).

³ During the 1990s, for example, the immigrant population in "new immigrant" states grew twice as quickly (61 percent vs. 31 percent) as the immigrant population in the 6

Despite these pressures, most states have chosen to continue providing services to low-income immigrants. Following the passage of the 1996 laws, nearly every state elected to provide benefits to immigrants wherever federal funding was available. 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. But funding for some of the state programs is temporary and has been threatened or eroded in state budget battles. Some state and local governments have enacted measures attempting to further limit access to services for immigrant families, while others have chosen to invest in immigrant communities.⁴

During the past decade, immigrants have organized to an unprecedented degree, naturalized and voted in record numbers, and forged coalitions to advocate for restoring equal treatment. Immigrants and their allies succeeded in reversing some of the federal restrictions, demonstrating that the voices of newcomers are increasingly powerful and reflecting a recognition by Congress that the 1996 laws went too far.

Immigrants comprise one-fifth of the nation's low-wage workforce.⁵ Although some immigrants do well economically, many others work long hours at low-wage jobs with no health insurance or other benefits. In fact, nearly half of immigrant workers

states that receive the greatest numbers of immigrants. Michael Fix, Wendy Zimmermann, and Jeffrey Passell, THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES (Urban Institute, July 2001). *See also* A DESCRIPTION OF THE IMMIGRANT POPULATION (Congressional Budget Office, Nov. 2004).

⁴ *See* STATE AND LOCAL POLICIES ON IMMIGRANT ACCESS TO SERVICES: PROMOTING INTEGRATION OR ISOLATION? (National Immigration Law Center, May 2007); PRO-IMMIGRANT MEASURES AVAILABLE TO STATE OR LOCAL GOVERNMENTS: A QUICK MENU OF AFFIRMATIVE IDEAS. (National Immigration Law Center, Sept. 2007).

⁵ Randy Capps, Michael Fix, TABULATIONS OF CURRENT POPULATION SURVEY (Urban Institute, Nov. 2001).

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earn less than twice the minimum wage,⁶ and only 26 percent of immigrants have job-based health insurance.⁷ Reauthorization of the State Children's Health Insurance Program (SCHIP) and the Farm Bill before Congress this year provided ideal vehicles for restoring health care and food stamps to immigrants residing lawfully in the U.S. Congress, however, chose to adopt other priorities and to block proposals to restore fairness to immigrants.

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 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 Dept. 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.⁸

⁶ Randy Capps, Michael Fix, et al., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE (Urban Institute, Nov. 2003).

⁷ Leighton Ku and Shannon Blaney, HEALTH COVERAGE FOR LEGAL IMMIGRANT CHILDREN: NEW CENSUS DATA HIGHLIGHT IMPORTANCE OF RESTORING MEDICAID AND SCHIP COVERAGE (Center on Budget and Policy Priorities, Oct. 2000).

⁸ To fall within 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 sets forth a prima facie case for relief, or an application for cancellation of removal under the 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 demonstrate a "substantial

All other immigrants, including many persons lawfully present in the U.S., are considered "not qualified."⁹

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 most federal public benefits.¹⁰ In 2003, Congress clarified that "derivative 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.¹¹

"Federal Public Benefits" Denied to "Not Qualified" Immigrants

The law prohibits "not qualified" immigrants from enrolling in most "federal public benefit" programs.¹² However, there are important exceptions to these bars. "Federal public benefits" include a vari-

connection" between the domestic violence and the need for the benefit being sought. And the battered immigrant, parent, or child must have moved out of the household of the abuser. Benefit agencies are encouraged to process these applications preliminarily, to inform immigrants of the resources that might become available to them should they decide to move.

⁹ 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 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.

¹⁰ 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. Dept. of Health and 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 (1) has made a bona fide application for a T visa that has not been denied, or (2) is a person whose continued presence in the U.S. is being ensured by the attorney general in order to prosecute traffickers in persons.

¹¹ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(2)(Dec. 19, 2003).

¹² Welfare law § 401 (8 U.S.C. § 1611).

ety of safety-net services paid for by federal funds.¹³ But the welfare law's definition does not specify which programs are covered by the term, leaving that clarification to each federal benefit-granting agency. In 1998, the U.S. Dept. of Health and Human Services (HHS) published a notice clarifying which of its programs fall under the definition.¹⁴ The list of 31 HHS programs includes Medicaid, the State Children's Health Insurance Program (SCHIP),¹⁵ 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 HHS notice clarifies that not every benefit or service provided within these programs is a federal public benefit. For example, in some cases not all of a program's benefits or services are provided to an individual or household; they may extend, instead, to a community of people—as in the weatherization of an entire apartment building.¹⁶

The welfare law also attempted to force states to pass additional laws, after Aug. 22, 1996, if they choose to provide state public benefits to “not qualified” immigrants.¹⁷ 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, all

immigrants remain eligible for emergency Medicaid, if they are otherwise eligible for their state's Medicaid program.¹⁸ The law did 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).¹⁹ Also exempted from the restrictions are in-kind services necessary to protect life or safety, as long as no individual income qualification is required. In January 2001, the 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.²⁰

Verification Rules

When a federal agency designates a program as a federal public benefit for which “not qualified” immigrants are ineligible, the law requires the state or local agency to verify all applicants' immigration and citizenship status. But many federal agencies have not specified which of their programs provide federal public benefits. Until they do so, state and local agencies are under no obligation 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.²¹

¹³ “Federal public benefit” is described in the 1996 federal welfare law as (1) 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 (2) 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.

¹⁴ HHS, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), “Interpretation of ‘Federal Public Benefit,’” 63 FR 41658–61 (Aug. 4, 1998).

¹⁵ SCHIP (Title XXI of the Social Security Act) was created in § 4901 *et seq.* of the Balanced Budget Act of 1997 (hereinafter “BBA”), Pub. L. No. 105-33, 111 Stat. 552 (Aug. 5, 1997).

¹⁶ HHS, Division of Energy Assistance, Office of Community Services, Memorandum from Janet M. Fox, Director, to Low Income Home Energy Assistance Program (LIHEAP) Grantees and Other Interested Parties, re. Revision-Guidance on the Interpretation of “Federal Public Benefits” Under the Welfare Reform Law (June 15, 1999).

¹⁷ Welfare law § 411 (8 U.S.C. § 1621).

¹⁸ Welfare law § 401(b)(1)(A) (8 U.S.C. § 1611(b)(1)(A)).

¹⁹ Welfare law § 742 (8 U.S.C. § 1615).

²⁰ 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).

²¹ IIRIRA § 508 (8 U.S.C. § 1642(d)).

Eligibility for Major Federal Benefit Programs

Congress restricted eligibility even for “qualified” immigrants by arbitrarily distinguishing between those who entered the U.S. before or “on or after” the date the law was enacted, Aug. 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.²² Federal agencies clarified that “federal means-tested public benefits” are Medicaid (except for emergency care), SCHIP, TANF, Food Stamps and Supplemental Security Income (SSI).²³

TANF, Medicaid & SCHIP. States can receive federal funding for TANF, Medicaid, and SCHIP to serve qualified immigrants who have completed the federal “five-year bar.”²⁴ Refugees, persons granted asylum or withholding of deportation/removal, Cuban/Haitian entrants, Amerasian immigrants, and victims of trafficking are exempt from the five-year bar, as are veterans, active duty military and their spouses and children.

Over half of the states use state funds to provide TANF, Medicaid, and/or SCHIP 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.²⁵ Some of these programs have been threatened by state budget shortfalls

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 “refugee” and “veterans” groups described above, lawful permanent residents with 40 quarters of work history, certain Native Americans, lawfully residing Hmong and Laotian tribe members, and immigrants receiving disability-related assistance²⁶ are now eligible regardless of their date of entry into the U.S. Qualified immigrant seniors who were born before Aug. 22, 1931, may be eligible if they were lawfully residing in the U.S. on Aug. 22, 1996. Other “qualified” immigrant adults, however, must wait until they have been in “qualified” status for five years before they can secure critical nutrition assistance.

Eight states provide state-funded food stamps to some or all of the immigrants who were rendered ineligible for the federal program.²⁷

Supplemental Security Income. Congress imposed its most harsh restrictions on immigrant seniors and immigrants with disabilities who seek assistance under the SSI program.²⁸ 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 passed²⁹ and seniors without disabilities who were in

²² Welfare law § 403 (8 U.S.C. § 1613).

²³ 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 SCHIP 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).

²⁴ States were also given an option to provide or deny federal TANF and Medicaid to most “qualified” immigrants who were 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 bar. Five states (Indiana, Mississippi, South Carolina, Texas, and Wyoming) fail to provide TANF to all qualified immigrants who complete the federal five-year bar.

²⁵ See GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, 4th ed. (NILC, 2002), and updated tables at www.nilc.org/pubs/Guide_update.htm. See also Shawn Fremstad and Laura Cox, “Covering New Americans: A Review of Federal and State Policies Related to Immigrants’ Eligibility and Access to Publicly Funded Health Insurance” (Kaiser Commission on Medicaid and the Uninsured, Nov. 2004), www.kff.org/medicaid/7214.cfm.

²⁶ 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.

²⁷ See NILC’s updated tables on state-funded services, at www.nilc.org/pubs/Guide_update.htm.

²⁸ Welfare law § 402(a) (8 U.S.C. § 1612(a)).

²⁹ 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 mar-

the U.S. before that date. “Humanitarian” immigrants (refugees, persons granted asylum or withholding of deportation/removal, Amerasian immigrants, or Cuban and Haitian entrants) can receive SSI, but only during the first seven years after having obtained the relevant status.

A few states provide cash assistance to seniors and persons with disabilities who were rendered ineligible for SSI; some others provide much smaller general assistance grants to these immigrants.³⁰

Sponsored Immigrants

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 an LPR’s financial eligibility for a program, 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. Previously, fewer programs imposed “deeming” and when they did, it was applied for only three years. By contrast, the 1996 laws authorize deeming for approximately 10 years,³¹ or longer for immigrants applying for TANF, food stamps, SSI, nonemergency Medicaid, and SCHIP.³² Domestic violence survivors and immigrants who would go hungry or homeless without assistance can get benefits without deeming for at least 12 months (the “indigence exemption”).³³ The U.S. Dept. of

riage, persons “holding out to the community” as spouses, and by parents before the immigrant was 18 years old).

³⁰ See GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, 4th ed. (NILC, 2002), and updated tables at www.nilc.org/pubs/Guide_update.htm.

³¹ That is, until the immigrant has credit for 40 quarters of work history.

³² Welfare law § 421 (8 U.S.C. § 1631).

³³ IIRIRA § 552 (8 U.S.C. § 1631(e) and (f)). The domestic violence exemption can be extended for a longer period if the abuse has been recognized by U.S. Citizenship and Immigration Services (USCIS), a court, or an administrative law judge. The indigence exemption may be renewed for additional 12-month periods.

Agriculture (USDA) issued helpful guidance on the indigence exemption and other deeming and liability issues, including exceptions from liability for sponsors who are also receiving food stamps.³⁴ HHS also issued guidance on deeming in the TANF program, for immigrants with enforceable affidavits of support who reach the end of the five-year bar and become potentially eligible for the federal program.³⁵

OVERVIEW OF IMMIGRANT ACCESS BARRIERS

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 misapplication of the public charge ground of inadmissibility has contributed significantly to the chilling effect on immigrants’ access to services. The “public charge” provision in the immigration laws allows officials to deny applications for permanent residence if the authorities determine that the immigrant seeking permanent residence is “likely to become a public charge.” In deciding whether an immigrant is likely to become a public charge, immigration or consular officials look at the “totality of the circumstances,” including an immigrant’s health, age, income, education and skills, and affidavits of support. The law on public charge did not change in 1996, and the use of programs such as Medicaid or food stamps had never weighed heavily in public charge determinations. Yet shortly after enactment of the welfare law, immigration officials and judges

³⁴ 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).

³⁵ 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/pi2003-3.htm.

began to prevent immigrants from reentering the U.S. or obtaining LPR status, unlawfully demanding that they repay benefits such as Medicaid, and denying green cards until the applicants withdrew from programs such as WIC.³⁶

Immigrants' rights advocates, health care providers, and state and local governments organized to persuade federal agencies to clarify the limits of the laws. In May 1999, the Immigration and Naturalization Service (INS) issued guidance and a proposed regulation on the public charge doctrine.³⁷ 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.³⁸ Immigrants' rights advocates have been monitoring the implementation of this guidance and its effect on immigrants' willingness to seek services. Several years after the issuance of this guidance, widespread confusion and concern about the public charge rules remain.

Affidavit of Support

The 1996 laws also enacted rules that make it more difficult to immigrate to the U.S. to reunite with family members. Effective Dec. 19, 1997, relatives (and some employers) must meet strict income requirements and must sign a long-term contract—an affidavit of support—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.³⁹ Although the federal benefits for which sponsors may be liable have been named (TANF, SSI, food stamps, nonemergency Medicaid, and SCHIP), few immigrants with enforceable affidavits of support have been eligible for these federal services. Federal agencies have issued little guidance on these provisions. Recently issued

regulations on the affidavits of support 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 “means-tested.”⁴⁰

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 already has deterred 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 18 percent of the U.S. population (5 years of age and older) speak a language other than English at home.⁴¹ Almost 8 percent of the people living in the U.S. speak English less than very well.⁴² 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, an obligation that includes providing reasonable language assistance to LEP persons. Recipients' compliance with this requirement has been limited. In Aug. 2000, the White House issued an executive order directing federal agencies, by Dec. 11, 2000, to submit to the U.S. Dept. of Justice (DOJ) plans to improve language access to federal programs and activities.⁴³ DOJ published guidance emphasizing that agencies, programs, and services receiving federal funds must ensure that persons with limited English proficiency can participate effectively and explaining that failure to do so may constitute national origin discrimination prohibited by Title VI.⁴⁴ The guidance reviews “reasonable

³⁶ Claudia Schlosberg and Dinah Wiley, “The Impact of INS Public Charge Determinations on Immigrant Access to Health Care” (National Health Law Program and NILC, May 22, 1998).

³⁷ 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.

³⁸ The use of all health care programs, except for long-term institutionalization, was declared to be irrelevant to public charge determinations.

³⁹ Welfare law § 423, amended by IIRIRA § 551 (8 U.S.C. § 1183a).

⁴⁰ U.S. Dept. of Homeland Security, “Affidavits of Support on Behalf of Immigrants,” 71 FR 35732, 35742-43 (June 21, 2006).

⁴¹ U.S. Census Bureau, PROFILE OF SELECTED SOCIAL CHARACTERISTICS: CENSUS 2000 SUPPLEMENTAL SURVEY SUMMARY TABLES.

⁴² *Id.*

⁴³ Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” 65 FR 50121 (Aug. 16, 2000).

⁴⁴ DOJ, Civil Rights Division, “Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimi-

steps” that agencies should include in their plans for providing “meaningful” language access. Several agencies, including HHS, developed and published guidance for public comment, but many remained delinquent.

DOJ published final guidance to its recipients on June 18, 2002, after presenting two prior versions for public comment.⁴⁵ The final guidance noted DOJ’s unique responsibility for ensuring consistency among federal agencies’ guidance. DOJ’s guidance was followed by a letter to federal agency heads and civil rights officers from Assistant Attorney General Ralph Boyd, directing other agencies to conform their guidance to that published by the DOJ.⁴⁶ HHS revised its guidance to conform to the DOJ standards and published the revised guidance on Aug. 4, 2003.⁴⁷ To date, a number of agencies have failed to issue guidance.

Advocates will continue to monitor agencies’ development of guidance, which is posted on the federal interagency language access website, www.lep.gov, as it is issued. They are encouraging states to take advantage of federal funds available for the reimbursement of language assistance services provided through Medicaid and SCHIP. And they are urging states to take language and cultural needs into account in providing benefits and implementing welfare-to-work and job-training programs.

Verification and Reporting

Rules that require benefit agencies to verify immigration and citizenship status⁴⁸ have been misinter-

nation Against Persons with Limited English Proficiency; Policy Guidance,” 65 FR 50123 (Aug. 16, 2000).

⁴⁵ “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).

⁴⁶ Memorandum from Assistant Attorney General Ralph F. Boyd Jr. to Heads of Federal Agencies, General Counsels, and Civil Rights Directors re: Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency), July 8, 2002, available at www.usdoj.gov/crt/cor/lep/BoydJul82002.htm.

⁴⁷ HHS, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,” 68 FR 47311–23 (Aug. 8, 2003).

⁴⁸ Welfare law § 432, amended by IIRIRA § 504 (8 U.S.C. § 1642). The Deficit Reduction Act of 2005’s citizenship verification requirement, which applies only to U.S. citizens, did not change the verification rules for immigrants. However, the provision has generated a great deal of confusion in immigrant communities and among the

public. Health care advocates, providers, and state agencies are working to limit the harm to Medicaid applicants and recipients who are citizens, as well as the chilling effect for immigrants caused by states’ implementation of the new law. Yet the requirement has prevented tens of thousands of U.S. citizen children from securing Medicaid. Donna Cohen Ross, “New Medicaid Citizenship Documentation Requirement Is Taking a Toll: States Report Enrollment Is Down and Administrative Costs Are Up” (Center on Budget and Policy Priorities, March 13, 2007). Proposals to reduce the burden imposed by this documentation requirements are pending in Congress. However, Congress also has proposed to apply the strict documentation requirement to the State Children’s Health Insurance Program. *See e.g.*, Section 211 of The Children’s Health Insurance Program Reauthorization Act (CHIPRA) (H.R. 976) (vetoed by the president).

preted by some agencies as allowing benefit personnel to act as immigration enforcers. Because some federal agencies still have not determined which of their programs provide federal public benefits that require verification of immigration status, some institutions are confused about their duty to screen applicants. As a condition of eligibility, some agencies demand immigration documents or Social Security numbers (SSNs) even when applicants are not legally required to submit such information. Lack of federal clarification in the reporting and verification areas led some state and local agencies to ask unnecessary questions on application forms and even to issue unnecessary warnings to immigrants in notices on the walls of agency waiting rooms. And increased scrutiny of immigrant communities in the name of national security, as well as publicity generated by proposals that would require hospitals to inquire about immigration status, raised additional privacy concerns for immigrant families, who may avoid applying for services.⁴⁹

Verification. In 1997, DOJ issued an interim guidance for federal benefit providers to use in veri-

public. Health care advocates, providers, and state agencies are working to limit the harm to Medicaid applicants and recipients who are citizens, as well as the chilling effect for immigrants caused by states’ implementation of the new law. Yet the requirement has prevented tens of thousands of U.S. citizen children from securing Medicaid. Donna Cohen Ross, “New Medicaid Citizenship Documentation Requirement Is Taking a Toll: States Report Enrollment Is Down and Administrative Costs Are Up” (Center on Budget and Policy Priorities, March 13, 2007). Proposals to reduce the burden imposed by this documentation requirements are pending in Congress. However, Congress also has proposed to apply the strict documentation requirement to the State Children’s Health Insurance Program. *See e.g.*, Section 211 of The Children’s Health Insurance Program Reauthorization Act (CHIPRA) (H.R. 976) (vetoed by the president).

⁴⁹ Health care providers and advocates worked to minimize the harm stemming from Section 1011 of the Medicare Prescription Drug, Modernization and Improvement Act. Section 1011 provides limited reimbursement to hospitals and health providers for emergency services to certain uninsured immigrants, including undocumented immigrants. Patients seeking emergency services are *not* required to provide immigration documents or to disclose information about their immigration status in order to receive treatment or to be claimed for section 1011 reimbursement. However, advocates and providers were concerned that the forms and procedures recommended by the Centers for Medicare and Medicaid Services (CMS) would lead to intrusive or intimidating questions, which could deter immigrants and their family members from seeking care.

fy ing immigration status until DOJ issues final regulations governing verification.⁵⁰ The guidance provides that benefit agencies already using DOJ’s computerized Systematic Alien Verification for Entitlements (SAVE) program 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 Sept. 2000, HHS and USDA issued guidance recommending that states delete from benefits application forms questions that are unnecessary and may chill participation by immigrant families.⁵¹ 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 an 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.⁵²

Reporting to DHS. Another source of fear in immigrant communities is the occasional misapplication of a 1996 reporting provision that is in fact quite

narrow in scope.⁵³ The reporting requirement applies to only 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.⁵⁴

In Sept. 2000, federal agencies issued a joint guidance outlining the limited circumstances under which the reporting requirement may be triggered.⁵⁵ 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.”⁵⁶ Findings that do not meet these criteria (e.g., a DHS response to a SAVE computer inquiry indicating an immigrant’s status,⁵⁷ an oral or written admission by applicants, or suspicions of agency workers) are insufficient to trigger the reporting requirement. Fi-

⁵⁰ 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.

⁵¹ 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).

⁵² HHS, Health Care Financing Administration, Interim Final Rule, “Revisions to the Regulations Implementing the State Children’s Health Insurance Program,” 66 FR 33810, 33823 (June 25, 2001).

⁵³ Welfare law § 404, amended by BBA §§ 5564 and 5581(a) (42 U.S.C. §§ 608(g), 611a, 1383(e), 1437y).

⁵⁴ *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”).

⁵⁵ 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).

⁵⁶ *Id.*

⁵⁷ 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 (with exceptions for criminal violations). See 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).

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nally, the guidance stresses that agencies are not required to make determinations about immigration status that are not necessary to determine eligibility for benefits. Similarly, agencies are not required to submit reports to DHS unless they have “knowledge” that meets the above requirements. USDA has confirmed that this “knowledge” standard is consistent with a preexisting reporting requirement in the Food Stamp Program.⁵⁸

SHORT-TERM OPPORTUNITIES FOR CHANGE

In 2007, Congress debated the reauthorization of both SCHIP and the Farm Bill. These debates provided opportunities to revisit the harmful immigrant eligibility restrictions and access barriers in health and nutrition programs. The deliberations also posed a threat that new restrictions on access to services for immigrants would be considered. Advocates have focused their efforts on the following federal changes:

Extension of SSI Benefits for Refugees, Asylees, and Other Humanitarian Immigrants

As previously discussed, refugees and other “humanitarian immigrants” are eligible for SSI for a period of seven years after obtaining status.⁵⁹ However, a combination of factors, including immigration backlogs, processing delays, statutory caps on the number of asylees who can adjust their status, language barriers, and other obstacles have made it impossible for most of these individuals to naturalize within seven years. Bipartisan legislation known as the “SSI Extension for Elderly and Disabled Refugees Act,” introduced in the House (H.R. 2608) and Senate (S. 821), would provide a two-year extension of SSI eligibility. Advocates are working to pass the SSI extension as stand-alone legislation or to incorporate the provision into other legislation that will move through Congress this session.

Restoration of Federal Health Coverage for Lawfully Residing Immigrants

Removing the five-year bar on immigrants’ eligibility for Medicaid and SCHIP has been a top priority for health providers and immigrant groups for

several years. Advocates have urged Congress to support the Immigrant Children’s Health Improvement Act (ICHIA), which would allow states to provide federally funded Medicaid and SCHIP to lawfully residing children and pregnant women, regardless of their date of entry into the U.S. Under the ICHIA, deeming and sponsor liability for Medicaid and SCHIP used by these children and pregnant women would be waived in the states electing to provide coverage. Most state and local policymakers have become aware that prevention and early treatment is better public policy than providing health care through hospital emergency rooms. Expanding access to health care has become a priority in a number of local jurisdictions, some of which are creating medical insurance programs that serve residents regardless of their immigration status.

Promoting Immigrant Access to Food Stamps

The 2002 Farm Bill provided access to critical nutrition assistance for many, but not all, of the immigrants rendered ineligible by the 1996 federal welfare law. However, the data reflects a continuing disparity between immigrants and citizens, with relatively low participation rates and higher rates of hunger in immigrant families, including those with eligible immigrant and U.S. citizen children.⁶⁰ The 2007 Farm Bill debate provided an opportunity to promote immigrant participation, by eliminating the five-year waiting period for “qualified” immigrant adults, providing assistance to other lawfully residing immigrants, and revisiting the rules relating to sponsors that deter immigrants from securing assistance. Despite the broad policy support for immigrant restorations, Congress chose other priorities for this bill and declined to restore equity in food stamp eligibility for immigrants.

DEVELOPING A LONGER-TERM STRATEGY FOR CHANGE

The post-1996 restorations of immigrant benefits eligibility primarily affected individuals who were present in the U.S. on Aug. 22, 1996. The impact of the restorations has diminished as new entrants arrive without access to services, and the exclusionary legacy of the 1996 laws remains.

⁵⁸ 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).

⁵⁹ 8 U.S.C. § 1612(a)(2)(A).

⁶⁰ See “Facts About Immigrants and the Food Stamp Program” (National Immigration Law Center, May 2007) and sources cited therein, www.nilc.org/immspbs/fnutr/foodasst/foodstampfacts_2007-05-30.pdf.

A longer-term agenda would challenge the United States to return to the traditional principle of equal treatment for citizens and lawfully present immigrants, a principle that generally prevailed in public benefits programs before Aug. 22, 1996.⁶¹ A multi-year approach could also seek opportunities to advance equal access to critical services for all members of our communities, regardless of their immigration status—for example, by ensuring that all per-

sons have access to preventive health services. Finally, the extent to which immigrants are served by public benefit programs depends in large part on the general effectiveness of such programs, signaling the need for immigrants to work in concert with broader networks of low-income families and their allies struggling to preserve and strengthen the safety net for all.

Cited in *Mendoza v. Miranda*,
No. 08-55067 archived on March 20, 2009

⁶¹ See Haskins, Greenberg, and Fremstad, *FEDERAL POLICY FOR IMMIGRANT CHILDREN: ROOM FOR COMMON GROUND?* (Brookings Institution Press, Summer 2004).