

Overview of Immigrant Eligibility for Federal Programs

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Low-income immigrants in the United States have faced substantial restrictions in 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 increasingly 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 Despite these pressures, and contrary

to initial expectations, states have been relatively generous in continuing services for low-income immigrants. Following the passage of the 1996 laws, nearly every state chose to provide benefits to immigrants wherever federal funding was available. Over half of the states continue to spend their own money to cover at least some of the immigrants who are ineligible for federally funded services. But funding for many of these programs is temporary and has been threatened or eroded by unprecedented state budget shortfalls.

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

Immigrants comprise one-fifth of the nation's low-wage workforce.⁴ 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 earn less than twice the minimum wage,⁵ and only 26 percent of immigrants have job-based health insurance.⁶ When Congress reauthorizes the Temporary Assistance for Needy Families (TANF) program and the Workforce Investment Act (WIA), it will have an opportunity to assist these low-wage workers by restoring health care and other essential work supports and by promoting effective vocational programs.

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

² 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). *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% vs. 31%) as the immigrant population in the 6 states that receive the greatest numbers of immigrants. Michael Fix, Wendy Zimmermann, and Jeffrey Passell, *The Integration of Immigrant Families in the United States*, The Urban Institute, July 2001. *See also A Description of the Immigrant Population* (Congressional Budget Office, Nov. 2004).

⁴ Michael Fix, *Tabulations of Current Population Survey* (Urban Institute, November 2001).

⁵ Randy Capps, Michael Fix, et al., *A Profile of the Low-Wage Immigrant Workforce* (Urban Institute, Nov. 2003).

⁶ 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).

Immigrant Eligibility Restrictions

CATEGORIES OF IMMIGRANTS: “QUALIFIED” & “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—LPRs (persons with “green cards”).
- Refugees, persons granted asylum or withholding of deportation/removal, and conditional entrants.
- Persons granted parole by the Immigration and Naturalization Service (INS) or the Dept. of Homeland Security (DHS) for a period of at least one year.
- Cuban/Haitian entrants.
- Certain abused immigrants, their children, and/or their parents.⁷

All other immigrants, including many persons lawfully present in the U.S., are considered “not qualified.”⁸

In 2000, Congress established a new category of non-U.S. citizens, *victims of trafficking*, who,

⁷ 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 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.

⁸ Before 1996, some of these immigrants were served by benefit programs under an eligibility category called “permanently residing in the U.S. under color of law” (PRUCOL). PRUCOL is not an immigration status, but a benefit eligibility category that has been interpreted differently depending on the benefit program and the region. Generally, it means that the 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.

while not listed among the “qualified” immigrants, are eligible for most federal public benefits.⁹ 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.¹⁰

“FEDERAL PUBLIC BENEFITS” DENIED TO “NOT QUALIFIED” IMMIGRANTS

The law prohibits “not qualified” immigrants from enrolling in most “federal public benefit” programs.¹¹ However, there are important exceptions to these bars. “Federal public benefits” include a variety of safety-net services paid for by federal funds.¹² 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.¹³ The list of 31 HHS programs includes Medicaid, the State Children’s Health Insurance

⁹ 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 (hereinafter “HHS”) as willing to assist in the investigation and prosecution of severe forms of trafficking in persons. In the certification, the 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.

¹⁰ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(2)(Dec. 19, 2003).

¹¹ Welfare law § 401 (8 U.S.C. § 1611).

¹² “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.

¹³ HHS, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), “Interpretation of ‘Federal Public Benefit,’” 63 FR 41658–61 (Aug. 4, 1998).

Program (SCHIP),¹⁴ Medicare, 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.¹⁵

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.¹⁶ Such micro-management 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.¹⁷ 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).¹⁸ 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 Jan. 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.¹⁹

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 still 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.²⁰

ELIGIBILITY FOR MAJOR FEDERAL BENEFIT PROGRAMS

SSI and Food Stamps. Congress imposed its most severe restrictions in two major programs: Supplemental Security Income (SSI), for seniors and persons with disabilities, and the Food Stamp Program.²¹ These programs initially were barred to most “qualified” immigrants, as well as “not qualified” immigrants. Although advocacy efforts in the two years following the welfare law's passage achieved a partial restoration of these benefits, significant gaps in eligibility remain.

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 passed,²² and seniors without disabilities

¹⁴ 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).

¹⁵ 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).

¹⁶ Welfare law § 411 (8 U.S.C. § 1621).

¹⁷ Welfare law § 401(b)(1)(A) (8 U.S.C. § 1611(b)(1)(A)).

¹⁸ Welfare law § 742 (8 U.S.C. § 1615).

¹⁹ U.S. Dept. of Justice (hereinafter “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).

²⁰ IIRIRA § 508 (8 U.S.C. § 1642(d)).

²¹ Welfare law § 402(a) (8 U.S.C. § 1612(a)).

²² Most new entrants cannot receive SSI until they become citizens or secure credit for 40 quarters of work history (including work performed by a spouse during marriage, persons “holding out to the community” as spouses, and by parents before the immigrant was 18 years old).

who were in the U.S. before that date. In 2002, Congress passed the Farm Security and Rural Investment Act (“Farm Bill”), which reauthorized the Food Stamp Program. The legislation restored food stamp eligibility to three groups of “qualified” immigrants: (1) persons who have lived in the U.S. as “qualified” immigrants for at least five years; (2) children regardless of their date of entry; and (3) persons receiving disability-related assistance regardless of their date of entry.²³ The Bush Administration estimated that the Farm Bill would restore nutrition assistance to 400,000 immigrants. Even this measure, however, falls short of a full restoration.

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. And about eight states provide state-funded food stamps to immigrants who were rendered ineligible for the federal program.²⁴

TANF, Medicaid & SCHIP. Congress further restricted eligibility for immigrant families 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 1996 law barred most “qualified” immigrants who entered the U.S. on or after Aug. 22, 1996, from “federal means-tested public benefits” during the five years after they secure “qualified” immigrant status.²⁵ Federal agencies clarified that “federal means-tested public benefits” are SSI, food stamps, Medicaid (except for emergency care), TANF, and SCHIP.²⁶ States

can receive federal funding for TANF, Medicaid, and SCHIP to serve immigrants who have completed this “five-year bar.”

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.

Approximately 20 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.²⁷ Some of these programs have been threatened by state budget shortfalls.

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 deem-

²³ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 (May 13, 2002).

²⁴ See *Guide to Immigrant Eligibility for Federal Programs*, National Immigration Law Center (4th ed. 2002), and updated tables at www.nilc.org/pubs/Guide_update.htm.

²⁵ Welfare law § 403 (8 U.S.C. § 1613). 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 ban. Five states (Indiana, Mississippi, South Carolina, Texas, and Wyoming) fail to provide TANF to all qualified immigrants who complete the federal five-year ban.

²⁶ 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 (hereinafter “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).

²⁷ See NILC’s updated tables on state-funded services, at www.nilc.org/pubs/Guide_update.htm. See also “Covering New Americans: A Review of Federal and State Policies Related to Immigrants’ Eligibility and Access to Publicly Funded Health Insurance,” Center on Budget and Policy Priorities (Nov. 2004), available at www.kff.org/medicaid.

ing for approximately 10 years²⁸ or longer for immigrants applying for TANF, food stamps, SSI, Medicaid and SCHIP.²⁹ Domestic violence survivors and immigrants who would go hungry or homeless without assistance (the “indigence” exemption) can get benefits without deeming for at least 12 months.³⁰ The U.S. Dept. of 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.³¹ The 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.³²

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 mistakenly 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 residency if the authorities determine that the immigrant seeking permanent residency 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 began to prevent immigrants from reentering the U.S. or obtaining LPR status, unlawfully demanding that they repay benefits like Medicaid, and denying green cards until the applicants withdrew from programs like WIC.³³

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 INS issued guidance and a proposed regulation on the public charge doctrine.³⁴ 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.³⁵ 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.

²⁸ That is, until the immigrant has credit for 40 quarters of work history.

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

³⁰ 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.

³¹ 7 C.F.R. § 274.3(c); USDA, “Non-Citizen Requirements in the Food Stamp Program” (Jan. 2003) at www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non_CitizenGuidance.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).

³² HHS, “Deeming of Sponsor’s Income and Resources to a Non-Citizen,” TANF-ACF-PI-2003-03 (Apr. 17, 2003), at www.acf.dhhs.gov/programs/ofa/pi2003-3.htm.

³³ Claudia Schlosberg and Dinah Wiley, “The Impact of INS Public Charge Determinations on Immigrant Access to Health Care,” National Health Law Program and National Immigration Law Center (May 22, 1998).

³⁴ 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.

³⁵ The use of all health care programs, except for long-term institutionalization, was declared to be irrelevant to public charge determinations.

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.³⁶ Although the federal benefits for which sponsors may be liable have been named (TANF, SSI, food stamps, nonemergency Medicaid and SCHIP), very few immigrants with enforceable affidavits of support have been eligible for these federal services. Federal agencies have issued little guidance on these provisions. Most states have not designated the programs that would give rise to sponsor liability, and we are 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 and older) speak a language other than English at home.³⁷ Almost 8 percent of the people living in the U.S. speak English less than very well.³⁸ 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 which 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 Dept. of Justice (DOJ) plans to improve language access to federal programs and

activities.³⁹ The 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.⁴⁰ The guidance reviews "reasonable steps" that agencies should include in their plans for providing "meaningful" language access. Several agencies, including the HHS, developed and published guidance for public comment, but many remained delinquent.

The DOJ published final guidance to its recipients on June 18, 2002, after presenting two prior versions for public comment.⁴¹ The final guidance noted the DOJ's unique responsibility for ensuring consistency among federal agencies' guidance. The 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.⁴² The HHS revised its guidance to conform to the DOJ standards and published the revised guidance on Aug. 4, 2003.⁴³ 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.

³⁹ Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," 65 FR 50121 (Aug. 16, 2000).

⁴⁰ DOJ, Civil Rights Division, "Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance," 65 FR 50123 (Aug. 16, 2000).

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

⁴² Letter from Assistant Attorney General Ralph Boyd to Heads of Federal Agencies, General Counsels and Civil Rights Directors, July 8, 2002, available at www.doj.gov/crt/cor/13166.htm.

⁴³ 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).

³⁶ Welfare law § 423, amended by IIRIRA § 551 (8 U.S.C. § 1183a).

³⁷ U.S. Census Bureau, *Profile of Selected Social Characteristics: Census 2000 Supplemental Survey Summary Tables*.

³⁸ *Id.*

VERIFICATION AND REPORTING

Rules that require benefit agencies to verify immigration and citizenship status⁴⁴ have been misinterpreted 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.⁴⁵

Verification. In 1997, the DOJ issued an interim guidance for federal benefit providers to use in verifying immigration status until the DOJ issues final regulations governing verification.⁴⁶ The

guidance provides that benefit agencies already using the 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 states that agencies may seek information only about the person applying for benefits, and not about his or her family members.

Questions on application forms. In Sept. 2000, the HHS and the USDA issued guidance recommending that states delete from benefits application forms questions that are unnecessary and may chill participation by immigrant families.⁴⁷ 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, the 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.⁴⁸

Reporting to the 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.⁴⁹ 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.⁵⁰

⁴⁴ Welfare law § 432, amended by IIRIRA § 504 (8 U.S.C. § 1642).

⁴⁵ H.R. 3722 (Rohrabacher), defeated resoundingly in Congress, would have required hospitals, as a condition of receiving reimbursement under § 1011 of the 2003 Medicare law, to report undocumented immigrant patients to the DHS. In July 2004, the Centers for Medicare and Medicaid Services (CMS) issued a proposed policy that would require emergency health care providers to question patients about their immigration status in order to receive reimbursement for uncompensated services to undocumented persons. After health care providers and advocates expressed concerns about the proposal’s deterrent effect, the CMS indicated that it would not require providers to ask direct questions about patients’ immigration status. To date, the CMS has not released revised guidance on the reimbursement process.

⁴⁶ 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 which 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 be-

come final, states will have two years to implement a conforming system for the federal programs they administer.

⁴⁷ 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).

⁴⁸ 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).

⁴⁹ Welfare law § 404, amended by BBA §§ 5564 and 5581(a) (42 U.S.C. §§ 608(g), 611a, 1383(e), 1437y).

⁵⁰ *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

In Sept. 2000, federal agencies issued a joint guidance outlining the limited circumstances under which the reporting requirement may be triggered.⁵¹ 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 of unlawful presence must also be supported by a determination by the immigration authorities, “such as a Final Order of Deportation.”⁵² Findings that do not meet this criteria (e.g., a DHS response to a SAVE computer inquiry indicating an immigrant’s status,⁵³ an oral or written admission by applicants, or suspicions of agency workers) are insufficient to trigger the reporting requirement. Finally, 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 the DHS unless they have “knowledge” that meets the above requirements. The USDA has confirmed that this “knowledge” standard is consistent with a preexisting reporting requirement in the Food Stamp Program.⁵⁴

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”).

⁵¹ 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).

⁵² *Id.*

⁵³ 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. The 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).

⁵⁴ USDA, “Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of Public Law 104-193, as

Short-Term Opportunities for Change

In 2005, Congress will consider bills that reauthorize the TANF program. This provides a natural opportunity to revisit the harmful immigrant eligibility restrictions and access barriers imposed by the 1996 welfare law, which created the TANF program. However, federal tax cuts and significant military expenditures have contributed to an exceptionally constrained budget environment, which threatens federal spending on benefits and social services. Therefore, while the TANF debate offers a clear opening to restore benefits for immigrants, proposals with high price tags face an uphill battle. Advocates currently are focusing their efforts on the following federal changes:

EXTENSION OF SSI BENEFITS FOR REFUGEES, ASYLEES, & OTHER HUMANITARIAN IMMIGRANTS

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 immigrants to become citizens within the seven-year period of benefits eligibility allowed for the refugee groups under current law.⁵⁵ President Bush’s fiscal year 2005 and 2006 budget proposals supported a one-year extension of SSI benefits for refugees, asylees, and other humanitarian immigrants. Bipartisan legislation known as “the SSI Extension for Elderly and Disabled Refugees Act,” introduced in the House (H.R. 899) and Senate (S. 453), improves upon the president’s budget proposal by providing a 2-year extension of SSI eligibility. In addition to supporting these “stand-alone” bills, advocates are working to incorporate the SSI extension provisions into the bill reauthorizing TANF.

RESTORATION OF FEDERAL HEALTH COVERAGE FOR LAWFULLY PRESENT 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

Amended by Public Laws 104-208, 105-33 and 105-185,” 65 FR 70166 (Nov. 21, 2000).

⁵⁵ Current law enables refugees, asylees, persons granted withholding of removal/deportation, Amerasian immigrants, and Cuban and Haitian entrants to receive SSI during the seven-year period after they obtain the relevant status. 8 U.S.C. § 1612(a)(2)(A).

to provide federally funded Medicaid and SCHIP to lawfully present 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.

REMOVAL OF BARRIERS TO BENEFITS FOR VICTIMS OF DOMESTIC VIOLENCE, TRAFFICKING & OTHER CRIMES

Access to safety-net benefits is critical in assisting parents and children to escape from domestic violence. A recent study found that more than two-thirds of battered immigrant women trapped in abusive relationships cited lack of money as the biggest obstacle to leaving. However, while immigration relief may be available to victims of domestic violence (under the VAWA), trafficking (T visas), and other crimes (U visas), barriers such as the federal five-year bar, sponsor deeming, sponsor liability, and public charge prevent these vulnerable immigrants from securing benefits. Advocates are working in support of the Women Immigrants' Safe Harbor Act (WISH), which would ensure that immigrants seeking T and U visas or seeking relief under the VAWA have access to benefits to the same extent as other humanitarian immigrants, such as refugees and asylees. Congress's consideration of TANF and the reauthorization of the VAWA in 2005 provide clear opportunities for promoting the adoption of WISH.

Developing a Longer-Term Strategy for Change

To date, the post-1996 restorations of immigrant benefits eligibility have affected primarily those who were present in the U.S. on Aug. 22, 1996. The immigrant population entering after that date has been growing by about 800,000 to 1,000,000 persons per year.⁵⁶ The impact of the successful restorations therefore diminishes with the passage

of time, as more new entrants arrive without access to services. Although the restorations are important victories for an emerging political force, the exclusionary legacy of the 1996 laws remains.

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, 1996.⁵⁷ 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 persons 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.

⁵⁶ Fix and Zimmermann, "The Legacies of Welfare Reform's Immigrant Restrictions," in 75 *Interpreter Releases* 44, Nov. 16, 1998, p. 1581.

⁵⁷ See Haskins, Greenberg, and Fremstad, *Federal Policy for Immigrant Children: Room for Common Ground?* (Brookings Institution Press, Summer 2004).