Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented

Thursday, September 15, 2016

Albany Marriott

CLE Course Materials and NotePad®

Complete course materials distributed in electronic format online in advance of the program.

Sponsored by the

New York State Bar Association and the Committee on Legal Aid

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New York State Bar Association

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented
Thursday, September 15, 2016 | New York State Bar Association's Committee on Legal Aid, Albany Marriot , Albany, NY

Name:
(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)
Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented

Program Code: THPIMD1

Program Location: Albany Marriott - Albany, NY

Program Date: September 15th, 2016

1. What is your overall evaluation of this program? Please include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments_____

_____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Laura F. Redman	☐	☐	☐	☐	☐	☐	☐	☐
Steven Sacco	☐	☐	☐	☐	☐	☐	☐	☐
Sarika Saxena	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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_____

Additional comments (ABILITY)

_____

_____

3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

_____

_____

NYSBA
NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, NY 12207
Phone: 518-463-3200 | Secure Fax: 518.463.5993

Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented

September 15, 2016 11:45 AM - 1:30 PM
2 MCLE Areas of Professional Practice credits - Transitional

I. Introduction
II. Immigration Terminology
III. Benefits Categories
IV. Historical Background (Welfare Reform and PRUCOL)
minutes
V. P.R.U.C.O.L. Eligibility
VI. Hypo I
VII. Humanitarian Deferred Action
minutes
VIII. Medicaid and Other Healthcare Options
IX. Hypo II
X. Essential Plan
XI. Post-Medicaid Concerns
minutes
XII. Case Examples

N Y L P I

New York Lawyers For The Public Interest, Inc.
www.nylpi.org

Table of Contents

Topic 1 …….. page 1

Biographies …….. page 21

Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented

PowerPoint

Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented

NYLPI
JUSTICE THROUGH COMMUNITY POWER

Healthcare Access

- Approximately 250,000 New Yorkers are undocumented and uninsured
- Reliance on emergency care and Emergency Medicaid

Immigration Statuses

- Citizen (USC)
- Lawful Permanent Resident (LPR/green card holder)
- Nonimmigrant
- Undocumented: visa overstay, entered without inspection (EWI)

Forms of Immigration Relief

- Alien Relative Petition: Do you have a USC parent, child, spouse, brother or sister? Do you have an LPR parent, spouse, or child?
- U- and T-nonimmigrant status: Have you ever been the victim of a crime? Human trafficking?
- DACA: Did you come to the USA before the age of 16 and have resided here since?
- Deferred action: Are you receiving life-saving treatment for a serious illness that you would not be able to access in your home country?
- Temporary Protective Status: Are you from Nepal? Yemen? Syria?
- Asylum: Do you fear returning to your home country for a non-health- related reason?

Classifications: Benefits Laws

- Qualified Aliens
- Lawfully Present
- P.R.U.C.O.L.: Permanently Residing Under the Color of Law

Note: These terms have **no meaning for *immigration* purposes.

Qualified Aliens

- Permanent Resident, including conditional resident
- Refugee, asylee, withholding grantee
- Cuban & Haitian Parolee
- Paroled for at least 1 year
- T visa holder
- VAWA Self-Petitioner

Lawfully Present

- Valid nonimmigrant visa holder
- Deferred action (**excluding* DACA grantee)
- Deferred enforced departure
- TPS
- Parole of less than 1 year
- Stay of removal grantee
- SIJS applicants

Lawfully Present

- Approved immigrant visa and pending adjustment of status
- Order of Supervision with EAD
- Applicants for the following who have EAD:
  - Withholding or cancellation,
  - Asylum,
  - TPS,
  - Registry

The P.R.U.C.O.L. Doctrine (Permanently Residing Under the Color of Law)

Noncitizen is PRUCOL, if a federal immigration agency:

- Has **knowledge** of the person's presence

and

- Gives **Permission *or* acquiescence** of the agency
  - i.e., Agency does not contemplate person's removal

18 N.Y.C.R.R. § 360-3.2(j)(1)(ii).

Where Does the PRUCOL Doctrine Come From?

- First Appearance: 1972 Social Security statute
  - Followed a few years later by Medicaid, AFDC (welfare), unemployment insurance
- First Definition: *Holley v. Lavine* (1977)
  - A number of federal cases use *Holly* criteria to interpret eligibility for these benefits until 1996
- Federal Death of PRUCOL: 1996 Welfare Reform

Welfare Reform

- Professional Responsibility and Work Opportunity Act of 1996 (PRWORA) & N.Y. Welfare Reform Act of 1997

  42 U.S.C. §601, et seq.

  - Block grant cash assistance program
  - Mandatory work requirements
  - Abolished PRUCOL recognition at the federal level – excluding PRUCOL immigrants from federal means-tested benefits (ex: Medicaid, SSI, etc.)
  - Also excluded LPR's from federal benefits for five years from entry as a "qualified alien" 42 U.S.C. §1631(a) and (c)(2)(A)

Medicaid in New York immediately after PRWORA

- Continued coverage for LPRs entered before Aug. 22, 1996
- "Qualified aliens" after the five year bar
- Refugees covered
- PRUCOL before Aug. 4, 1997 and
  - Residents of residential health facilities
  - Those diagnosed with AIDS
- Emergency Medicaid coverage remains for all

Aliessa v. Novello, 96 N.Y.2d 418 (2001)

- N.Y.'s Medicaid exclusion violates:
  - Article XVII of the N.Y. State Constitution provides that:

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature from time to time may determine.

  - Equal Protection Clauses of U.S. and N.Y. Constitution under strict scrutiny

Aliessa v. Novello

- Plaintiffs: "qualified aliens" and PRUCOL "non-qualified aliens"
- "care for the needy is not a matter of 'legislative grace', it is a constitutional mandate" at 428
- "impose[s] on plaintiffs an overly burdensome eligibility condition having nothing to do with need" at 429.
- No compelling interest in denying State Medicaid to otherwise eligible immigrants based on their status as aliens.

The PRUCOL Doctrine Lives on in NY!

- Following *Aliessa*, Medicaid PRUCOL eligibility is reinstated
- NY PRUCOLs* are also eligible for Safety Net Assistance (cash grant).

18 N.Y.C.R.R. § 349.3(b)(1)(iv)

Healthcare Options

- Qualified Aliens: Medicaid, Essential Plan (EP)
- Lawfully Present: Qualified Health Plan, EP
- PRUCOL only: Medicaid
- Undocumented immigrants, not PRUCOL eligible: Emergency Medicaid, HHC Hospitals/Options, Charity Care, community health centers
  - If AIDS/HIV+, AIDS Drug Assistance Program (ADAP)
- Undocumented and under age 19: CHP
  - If pregnant, Medicaid for Pregnant Women

Essential Plan Impact

- **YES EP**:
  - Qualified Aliens in the 5-year bar timeframe
  - Lawfully Present immigrants, except those receiving long term care
- **NO EP**:
  - PRUCOL-only until become lawfully present
    - Including: deferred action and other immigration benefit applicants, individuals with only the first portion of the family petition process completed
  - DACA applicants and recipients

All receive the same benefits as Medicaid – still use Medicaid card for those services.

Health Options for Undocumented

- **Emergency Medicaid:** "Emergency Medical Condition" is defined as a medical condition that manifests itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in
  - Placing the patient's health in serious jeopardy;
  - Serious impairment to bodily function; or
  - Serious dysfunction of any bodily organ or part
- **Health and Hospitals Corporation Options Program:** http://www.nyc.gov/html/hhc/html/patients/ForPatients-Paying-Options.shtml
- **Community Health Centers** with sliding fee scales (available in handout)

Impact of Medicaid – more PRWORA

- **Public Charge**: Regular Medicaid and CHP do not count unless institutional long-term care; only relevant if adjusting status (8 U.S.C. §1182(a)(4))
- **Sponsor Deeming**: New York does not enforce deeming; only relevant for family petition (but also no deeming where a person could not support, 8 U.S.C. §1631(e))
- **Sponsor Liability**: New York State does not enforce sponsor liability (04-ADM-7 at p.4)

Hypo I: Clara

- Clara was diagnosed with ESRD at age 17, which was within weeks of when she first arrived from Guatemala without papers. Clara's parents, also undocumented, feared her return to their home country where Clara would not receive the dialysis that her life depends on.

Can Clara become PRUCOL?

Humanitarian Deferred Action

- A grant of prosecutorial discretion (e.g., DACA, DAPA)
- A written promise that the noncitizen will not be deported for a duration of 1 or 2 years.
- Grantee receives Deferred Action status and then an Order of Supervision
- Grantee is eligible to apply for a work permit

Humanitarian Deferred Action

- 1976: First official Deferred Action case: John Lennon
- 2011: John Morton Memo Length of stay
  - Manner of entry
  - Community, USC/LPR family ties
  - Criminal history
  - Mental/physical illness of applicant or applicant's family
- 2014: Jeh Johnson Memo
  - Repeats Morton factors in less detail/repeals Morton Memo
  - Creates 3 tiered priority system – bottom tier: "non-priority"

When is Humanitarian Deferred Action Appropriate?

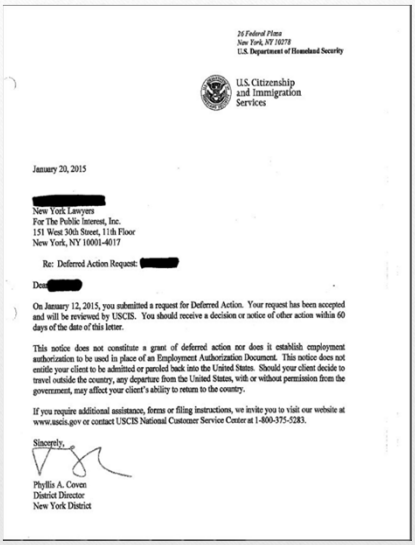
- Absolutely no other relief available
- No material criminal history/material immigration violations
- Possesses favorable equities
  - Serious health condition that cannot be treated or treated well in home country
  - USC and LPR family
  - Compelling Community Ties (Negative Publicity helps!)

Humanitarian Deferred Action Application

- Application can be filed Affirmatively (to U.S.C.I.S.) or Defensively (to U.S.I.C.E.)
- Includes:
  - G-28
  - G-325A Biometric Information Form
  - Applicant's Declaration
  - Letters/Affidavits of Support (includes Dr.'s letter)
  - Country Condition Reports (expert witness letter a plus)
  - Record of Applicant's Equities (e.g., medical records)
  - Letter Brief (argues the equities)

Some Final Deferred Action Practice Tips

- Deferred Action vs. Stay of Removal
  - Essentially the same
  - Stay application has a fee, DA application does not
- Consult Professor Shoba Wadhia's research
  - https://works.bepress.com/shoba_wadhia/
  - See USCIS's "Standard Operating Procedure for Deferred Action"
- FOIA is your friend
  - FOIA before
  - FOIA after (ask for case summary and recommendation memo)



26 Federal Plaza
New York, NY 10278
U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

January 20, 2015

[redacted]
New York Lawyers
For The Public Interest, Inc.
151 West 30th Street, 11th Floor
New York, NY 10001-4017

Re: Deferred Action Request: [redacted]

Dear [redacted]

On January 12, 2015, you submitted a request for Deferred Action. Your request has been accepted and will be reviewed by USCIS. You should receive a decision or notice of other action within 60 days of the date of this letter.

This notice does not constitute a grant of deferred action nor does it establish employment authorization to be used in place of an Employment Authorization Document. This notice does not entitle your client to be admitted or paroled back into the United States. Should your client decide to travel outside the country, any departure from the United States, with or without permission from the government, may affect your client's ability to return to the country.

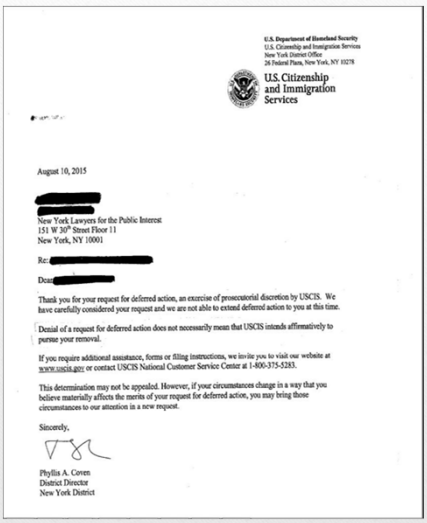
If you require additional assistance, forms or filing instructions, we invite you to visit our website at www.uscis.gov or contact USCIS National Customer Service Center at 1-800-375-5283.

Sincerely,

Phyllis A. Coven
District Director
New York District

Deferred Action triggers PRUCOL Doctrine

- Grant: PRUCOL
- Pending Application/No response within 6 months of mailing: PRUCOL
- Denial/"not granting": PRUCOL, in practice*
  - Explicit language in deferred action denial letters supports PRUCOL



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
New York District Office
26 Federal Plaza, New York, NY 10278

U.S. Citizenship and Immigration Services

August 10, 2015

[redacted]
New York Lawyers for the Public Interest
151 W 30th Street Floor 11
New York, NY 10001

Re: [redacted]

Dear [redacted]

Thank you for your request for deferred action, an exercise of prosecutorial discretion by USCIS. We have carefully considered your request and we are not able to extend deferred action to you at this time.

Denial of a request for deferred action does not necessarily mean that USCIS intends affirmatively to pursue your removal.

If you require additional assistance, forms or filing instructions, we invite you to visit our website at www.uscis.gov or contact USCIS National Customer Service Center at 1-800-375-5283.

This determination may not be appealed. However, if your circumstances change in a way that you believe materially affects the merits of your request for deferred action, you may bring those circumstances to our attention in a new request.

Sincerely,

Phyllis A. Coven
District Director
New York District

Hypo II: Mohamed

- An undocumented, 43 year old, Ghanaian national, Mohamed, was diagnosed with liver cancer on June 29. Through his USC sister, Mohamed filed an I-130 application on August 21.

At what point does Mohamed become PRUCOL?

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-797C, Notice of Action

THIS NOTICE DOES NOT GRANT ANY IMMIGRATION STATUS OR BENEFIT.

NOTICE TYPE		NOTICE DATE
Receipt		May 28, 2014
CASE TYPE		USCIS ALIEN NUMBER
I-130, Petition for Alien Relative		
RECEIPT NUMBER	RECEIVED DATE	PAGE
[redacted]	May 27, 2014	1 of 1
PRIORITY DATE	PREFERENCE CLASSIFICATION	DATE OF BIRTH
May 27, 2014	203 A4 INA SIBLING OF USC	[redacted]

[redacted]
151 W 30TH STREET FL 11
NEW YORK, NY 10001

APPLICANT/PETITIONER NAME AND MAILING ADDRESS

PAYMENT INFORMATION:

Application/Petition Fee:	$420.00
Biometrics Fee:	$0.00
Total Amount Received:	$420.00
Total Balance Due:	$0.00

The I-130, Petition for Alien Relative has been received by our office for the following beneficiaries and is in process:

Name	Date of Birth	Country of Birth	Class (If Applicable)
[redacted]	[redacted]	[redacted]	

Please verify your personal information listed above and immediately notify the USCIS National Customer Service Center at the phone number listed below if there are any changes.

Please note that if a priority date is printed on this notice, the priority does not reflect earlier retained priority dates.

If you have questions about possible immigration benefits and services, filing information, or USCIS forms, please call the USCIS National Customer Service Center (NCSC) at **1-800-375-5283**. If you are hearing impaired, please call the NCSC TDD at **1-800-767-1833**. Please also refer to the USCIS website: www.uscis.gov.

If you have any questions or comments regarding this notice or the status of your case, please contact our customer service number.

You will be notified separately about any other case you may have filed.

USCIS Office Address:
USCIS
California Service Center
P.O. Box 30111
Laguna Niguel, CA 92607-0111

USCIS Customer Service Number:
(800)375-5283
ATTORNEY COPY

Other Medicaid Eligibility Criteria

- Residency
- Financial eligibility: income and household size
  - Federal Poverty Guidelines

Questions?

Steve Sacco
Staff Attorney, African Services Committee

Laura Redman
Director, Health Justice Program
lredman@nylpi.org

Sarika Saxena
Staff Attorney, Health Justice Program
ssaxena@nylpi.org

Healthcare Access for Immigrant New Yorkers & Strategies for the Undocumented

Biographies

Laura F. Redman

Laura F. Redman is the Director of the Health Justice Program at New York Lawyers for the Public Interest (NYLPI), where she leads NYLPI's program challenging health disparities and systemic and institutional barriers to accessing quality health care. Before joining NYLPI, Laura worked at the National Center for Law and Economic Justice first as an Equal Justice Works fellow focused on access to Medicaid, and later as a Senior Attorney litigating federal and state class action cases seeking systemic reform in the public benefits system. Prior to NCLEJ, Laura was a Senior Legal Officer at the Commission for Racial Equality in the United Kingdom and clerked for the U.S. Court of Appeals for the Second Circuit, Staff Attorneys' Office. Laura has a J.D. from Northeastern University School of Law and an M.A. in Gender Studies from Birkbeck College at the University of London.

Steven Sacco

Steven Sacco is a staff attorney with the African Services Committee, a non-profit organization based in Harlem, New York that provides a variety of support services to immigrants living in New York City, including legal representation in several areas of practice. Mr. Sacco represents ASC clients in their claims for immigration relief as well is in their claims to appeal the denial or change of various public assistance benefits. Much of Mr. Sacco's area of practice centers around the intersection between immigration and public assistance.

Sarika Saxena

Sarika Saxena is a Staff Attorney in the Health Justice Program at NYLPI. Sarika's practice focuses primarily on issues relating to access to healthcare for undocumented immigrants and language access campaigns. A graduate of City University of New York School of Law, Sarika defended detainees who were imprisoned without charge at the U.S. Naval Base at Guantanamo Bay, Cuba as a law student. There, Sarika also worked on an interdisciplinary team to design a community lawyering model to assist undocumented survivors of domestic violence. Prior to joining NYLPI, Sarika worked extensively with immigrant New Yorkers at a boutique immigration law firm.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

8 U.S.C.A. § 1151

§ 1151. Worldwide level of immigration

Effective: October 28, 2009

Currentness

(b) Aliens not subject to direct numerical limitations

Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a) of this section, are as follows:

(2)(A)(i) Immediate relatives.--For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 1154(a)(1)(A) of this title remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 1, § 201, 66 Stat. 175; Oct. 3, 1965, Pub.L. 89-236, § 1, 79 Stat. 911; Oct. 20, 1976, Pub.L. 94-571, § 2, 90 Stat. 2703; Oct. 5, 1978, Pub.L. 95-412, § 1, 92 Stat. 907; Mar. 17, 1980, Pub.L. 96-212, Title II, § 203(a), 94 Stat. 106; Dec. 29, 1981, Pub.L. 97-116, § 20[(a)], 95 Stat. 1621; Nov. 29, 1990, Pub.L. 101-649, Title I, § 101(a), 104 Stat. 4980; Dec. 12, 1991, Pub.L. 102-232, Title III, § 302(a)(1), 105 Stat. 1742; Sept. 13, 1994, Pub.L. 103-322, Title IV, § 40701(b)(2), 108 Stat. 1954; Oct. 25, 1994, Pub.L. 103-416, Title II, § 219(b)(1), 108 Stat. 4316; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, § 308(e)(5), (g)(8)(A)(i), Title VI, §§ 603, 671(d)(1)(A), 110 Stat. 3009-620, 3009-624, 3009-690, 3009-723; Oct. 28, 2000, Pub.L. 106-386, Div. B, Title V, § 1507(a)(3), 114 Stat. 1530; Aug. 6, 2002, Pub.L. 107-208, § 2, 116 Stat. 927; Jan. 5, 2006, Pub.L. 109-162, Title VIII, § 805(b)(1), 119 Stat. 3056; Oct. 28, 2009, Pub.L. 111-83, Title V, § 568(c)(1), 123 Stat. 2186.)

Notes of Decisions (62)

8 U.S.C.A. § 1151, 8 USCA § 1151
Current through P.L. 114-49 approved 8-7-2015

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

8 U.S.C.A. § 1153

§ 1153. Allocation of immigrant visas

Effective: January 5, 2006

Currentness

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants--

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

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CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 1, § 203, 66 Stat. 178; Sept. 11, 1957, Pub.L. 85-316, § 3, 71 Stat. 639; Sept. 22, 1959, Pub.L. 86-363, §§ 1-3, 73 Stat. 644; Oct. 3, 1965, Pub.L. 89-236, § 3, 79 Stat. 912; Oct. 20, 1976, Pub.L. 94-571, § 4, 90 Stat. 2705; Oct. 5, 1978, Pub.L. 95-412, § 3, 92 Stat. 907; Oct. 5, 1978, Pub.L. 95-417, § 1, 92 Stat. 917; Mar. 17, 1980, Pub.L. 96-212, Title II, § 203(c), (i), 94 Stat. 107, 108; Nov. 29, 1990, Pub.L. 101-649, Title I, §§ 111, 121(a), 131, 162(a)(1), Title VI, § 603(a)(3), 104 Stat. 4986, 4987, 4997, 5009, 5082; Oct. 1, 1991, Pub.L. 102-110, § 2(b), 105 Stat. 555; Dec. 12, 1991, Pub.L. 102-232, Title III, § 302(b)(2), (e)(3), 105 Stat. 1743, 1745; Oct. 25, 1994, Pub.L. 103-416, Title II, §§ 212(b), 219(c), 108 Stat. 4314, 4316; Nov. 12, 1999, Pub.L. 106-95, § 5, 113 Stat. 1318; Nov. 29, 1999, Pub.L. 106-113, Div. B, § 1000(a)(1) [Title I, § 117], 113 Stat. 1535, 1501A-21; Nov. 22, 2000, Pub.L. 106-536, § 1(b)(1), 114 Stat. 2560; Aug. 6, 2002, Pub.L. 107-208, § 3, 116 Stat. 928; Nov. 2, 2002, Pub.L. 107-273, Div. C, Title I, §§ 11035, 11036(a), 116 Stat. 1846; Jan. 5, 2006, Pub.L. 109-162, Title VIII, § 805(b)(2), 119 Stat. 3056.)

Notes of Decisions (373)

8 U.S.C.A. § 1153, 8 USCA § 1153
Current through P.L. 114-49 approved 8-7-2015

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Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the

above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted**Prior Version Recognized as Repealed by Implication** Tineo v. Ashcroft, 3rd Cir.(N.J.), Dec. 04, 2003
KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

8 U.S.C.A. § 1101

§ 1101. Definitions

Effective: January 17, 2014

Currentness

(a) As used in this chapter--

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22;

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien[2] would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of

retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(iii) Repealed. Pub.L. 110-457, Title II, § 201(a)(3), Dec. 23, 2008, 122 Stat. 5053

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

8 U.S.C.A. § 1101, 8 USCA § 1101
Current through P.L. 114-49 approved 8-7-2015

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8 U.S.C.A. § 1101

§ 1101. Definitions

Effective: January 17, 2014

Currentness

(a) As used in this chapter--

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C.A. § 1101, 8 USCA § 1101
Current through P.L. 114-49 approved 8-7-2015

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 14. Restricting Welfare and Public Benefits for Aliens
Subchapter IV. General Provisions

8 U.S.C.A. § 1641

§ 1641. Definitions

Effective: December 23, 2008

Currentness

(a) In general

Except as otherwise provided in this chapter, the terms used in this chapter have the same meaning given such terms in section 101(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)].

(b) Qualified alien

For purposes of this chapter, the term "qualified alien" means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is--

(1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.],

(2) an alien who is granted asylum under section 208 of such Act [8 U.S.C.A. § 1158],

(3) a refugee who is admitted to the United States under section 207 of such Act [8 U.S.C.A. § 1157],

(4) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for a period of at least 1 year,

(5) an alien whose deportation is being withheld under section 243(h) of such Act [8 U.S.C. 1253] (as in effect

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immediately before the effective date of section 307 of division C of Public Law 104-208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104-208),

(6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act [8 U.S.C. 1153(a)(7)] as in effect prior to April 1, 1980;[1] or

(7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980).

(c) Treatment of certain battered aliens as qualified aliens

For purposes of this chapter, the term "qualified alien" includes--

(1) an alien who--

(A) has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) has been approved or has a petition pending which sets forth a prima facie case for--

(i) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) of the Immigration and Nationality Act [8 U.S.C.A. § 1154(a)(1)(A)(ii), (iii) or (iv)],

(ii) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) of the Act [8 U.S.C.A. § 1154(a)(1)(B)(ii) or (iii)],

(iii) suspension of deportation under section 244(a)(3) of the Immigration and Nationality Act [8 U.S.C.A. § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(iv) status as a spouse or child of a United States citizen pursuant to clause (i) of section 204(a)(1)(A) of such Act [8 U.S.C.A. § 1154(a)(1)(A)(i)], or classification pursuant to clause (i) of section 204(a)(1)(B) of such Act [8 U.S.C.A. § 1154(a)(1)(B)(i)];[2]

(v) cancellation of removal pursuant to section 240A(b)(2) of such Act [8 U.S.C. 1229b(b)(2)];

(2) an alien--

(A) whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) who meets the requirement of subparagraph (B) of paragraph (1);

(3) an alien child who--

(A) resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent's spouse or by a member of the spouse's family residing in the same household as the parent and the spouse consented or acquiesced to such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) who meets the requirement of subparagraph (B) of paragraph (1); or

(4) an alien who has been granted nonimmigrant status under section 1101(a)(15)(T) of this title or who has a pending application that sets forth a prima facie case for eligibility for such nonimmigrant status.

This subsection shall not apply to an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual subjected to such battery or cruelty.

After consultation with the Secretaries of Health and Human Services, Agriculture, and Housing and Urban Development, the Commissioner of Social Security, and with the heads of such Federal agencies administering benefits as the Attorney General considers appropriate, the Attorney General shall issue guidance (in the Attorney General's sole and unreviewable discretion) for purposes of this subsection and section 1631(f) of this title, concerning the meaning of the terms "battery" and "extreme cruelty", and the standards and methods to be used for determining whether a substantial connection exists between battery or cruelty suffered and an individual's need for benefits under a specific Federal, State, or local program.

CREDIT(S)

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(Pub.L. 104-193, Title IV, § 431, Aug. 22, 1996, 110 Stat. 2274; Pub.L. 104-208, Div. C, Title III, § 308(g)(8)(E), Title V, § 501, Sept. 30, 1996, 110 Stat. 3009-624, 3009-670; Pub.L. 105-33, Title V, §§ 5302(c)(3), 5562, 5571(a) to (c), 5581(b)(6), (7), Aug. 5, 1997, 111 Stat. 599, 638, 640, 643; Pub.L. 106-386, Div. B, Title V, § 1508, Oct. 28, 2000, 114 Stat. 1530; Pub.L. 110-457, Title II, § 211(a), Dec. 23, 2008, 122 Stat. 5063.)

Notes of Decisions (1)

Footnotes

1 So in original. The semicolon probably should be a comma.

2 So in original. The semicolon probably should be “, or”.

8 U.S.C.A. § 1641, 8 USCA § 1641
Current through P.L. 114-49 approved 8-7-2015

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45 C.F.R. § 152.2

§ 152.2 Definitions.

Effective: August 30, 2012

Currentness

For purposes of this part the following definitions apply:

Creditable coverage means coverage of an individual as defined in section 2701(c)(1) of the Public Health Service Act as of March 23, 2010 and 45 CFR 146.113(a)(1).

Enrollee means an individual receiving coverage from a PCIP established under this section.

Lawfully present means

(1) A qualified alien as defined in section 431 of the Personal Responsibility and Work Opportunity Act (PRWORA) (8 U.S.C. 1641);

(2) An alien in nonimmigrant status who has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission;

(3) An alien who has been paroled into the United States pursuant to section 212(d)(5) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(d)(5)) for less than 1 year, except for an alien paroled for prosecution, for deferred inspection or pending removal proceedings;

(4) An alien who belongs to one of the following classes:

(i) Aliens currently in temporary resident status pursuant to section 210 or 245A of the INA (8 U.S.C. 1160 or 1255a, respectively);

(ii) Aliens currently under Temporary Protected Status (TPS) pursuant to section 244 of the INA (8 U.S.C. 1254a), and pending applicants for TPS who have been granted employment authorization;

(iii) Aliens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24);

(iv) Family Unity beneficiaries pursuant to section 301 of Public Law 101–649 as amended;

(v) Aliens currently under Deferred Enforced Departure (DED) pursuant to a decision made by the President;

(vi) Aliens currently in deferred action status;

(vii) Aliens whose visa petitions have been approved and who have a pending application for adjustment of status;

(5) A pending applicant for asylum under section 208(a) of the INA (8 U.S.C. 1158) or for withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231) or under the Convention Against Torture who has been granted employment

authorization, and such an applicant under the age of 14 who has had an application pending for at least 180 days;

(6) An alien who has been granted withholding of removal under the Convention Against Torture; or

(7) A child who has a pending application for Special Immigrant Juvenile status as described in section 101(a)(27)(J) of the INA (8 U.S.C. 1101(a)(27)(J)).

(8) Exception. An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.

Out-of-pocket costs means the sum of the annual deductible and the other annual out-of-pocket expenses, other than for premiums, required to be paid under the program.

Pre–Existing condition exclusion has the meaning given such term in 45 CFR 144.103.

Pre–Existing Condition Insurance Plan (PCIP) means the temporary high risk health insurance pool plan (sometimes referred to as a "qualified high risk pool") that provides coverage in a State, or combination of States, in accordance with the requirements of section 1101 of the Affordable Care Act and this part. The term "PCIP program" is generally used to describe the national program the Secretary is charged with carrying out, under which States or non-profit entities operate individual PCIPs.

Resident means an individual who has been legally domiciled in a State.

Service Area refers to the geographic area encompassing an entire State or States in which PCIP furnishes benefits.

State refers each of the 50 States and the District of Columbia.

Credits

[77 FR 52616, Aug. 30, 2012]

SOURCE: 62 FR 16955, 17005, April 8, 1997; 62 FR 31669, June 10, 1997; 75 FR 45029, July 30, 2010, unless otherwise noted.

AUTHORITY: Sec. 1101 of the Patient Protection and Affordable Care Act (Pub.L. 111–148).

Current through Oct. 01, 2015; 80 FR 59513.

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Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 14. Restricting Welfare and Public Benefits for Aliens
Subchapter I. Eligibility for Federal Benefits

8 U.S.C.A. § 1613

§ 1613. Five-year limited eligibility of qualified aliens for Federal means-tested public benefit

Effective: July 1, 2015

Currentness

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b), (c), and (d) of this section, an alien who is a qualified alien (as defined in section 1641 of this title) and who enters the United States on or after August 22, 1996, is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien's entry into the United States with a status within the meaning of the term "qualified alien".

(b) Exceptions

The limitation under subsection (a) of this section shall not apply to the following aliens:

(1) Exception for refugees and asylees

(A) An alien who is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act [8 U.S.C. 1157].

(B) An alien who is granted asylum under section 208 of such Act [8 U.S.C. 1158].

(C) An alien whose deportation is being withheld under section 243(h)[1] of such Act [8 U.S.C. 1253] (as in effect immediately before the effective date of section 307 of division C of Public Law 104-208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104-208).

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(D) An alien who is a Cuban and Haitian entrant as defined in section 501(e) of the Refugee Education Assistance Act of 1980.

(E) An alien admitted to the United States as an Amerasian immigrant as described in section 1612(a)(2)(A)(i)(V) of this title.

(2) Veteran and active duty exception

An alien who is lawfully residing in any State and is--

(A) a veteran (as defined in section 101, 1101, or 1301, or as described in section 107 of Title 38) with a discharge characterized as an honorable discharge and not on account of alienage and who fulfills the minimum active-duty service requirements of section 5303A(d) of Title 38,

(B) on active duty (other than active duty for training) in the Armed Forces of the United States, or

(C) the spouse or unmarried dependent child of an individual described in subparagraph (A) or (B) or the unremarried surviving spouse of an individual described in clause (i) or (ii)[2] who is deceased if the marriage fulfills the requirements of section 1304 of Title 38.

(c) Application of term Federal means-tested public benefit

(1) The limitation under subsection (a) of this section shall not apply to assistance or benefits under paragraph (2).

(2) Assistance and benefits under this paragraph are as follows:

(A) Medical assistance described in section 1611(b)(1)(A) of this title.

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Assistance or benefits under the Richard B. Russell National School Lunch Act [42 U.S.C.A. § 1751 et seq.].

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(D) Assistance or benefits under the Child Nutrition Act of 1966 [42 U.S.C.A. § 1771 et seq.].

(E) Public health assistance (not including any assistance under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.]) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(F) Payments for foster care and adoption assistance under parts B and E of title IV of the Social Security Act [42 U.S.C.A. §§ 620 et seq., 670 et seq.] for a parent or a child who would, in the absence of subsection (a) of this section, be eligible to have such payments made on the child's behalf under such part, but only if the foster or adoptive parent (or parents) of such child is a qualified alien (as defined in section 1641 of this title).

(G) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(H) Programs of student assistance under titles IV, V, IX, and X of the Higher Education Act of 1965 [20 U.S.C.A. §§ 1070 et seq., 1101 et seq., 1134 et seq., 1135 et seq., and 42 U.S.C.A § 2751 et seq.], and titles III, VII, and VIII of the Public Health Service Act [42 U.S.C.A. §§ 241 et seq., 292 et seq., 296 et seq.].

(I) Means-tested programs under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.].

(J) Benefits under the Head Start Act [42 U.S.C.A. § 9831 et seq.].

(K) Benefits under title I of the Workforce Innovation and Opportunity Act.

(L) Assistance or benefits provided to individuals under the age of 18 under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.).

(d) Benefits for certain groups

Notwithstanding any other provision of law, the limitations under section 1611(a) of this title and subsection (a) of this section shall not apply to--

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(1) an individual described in section 1612(a)(2)(G) of this title, but only with respect to the programs specified in subsections (a)(3) and (b)(3)(C) of section 1612 of this title; or

(2) an individual, spouse, or dependent described in section 1612(a)(2)(K) of this title, but only with respect to the specified Federal program described in section 1612(a)(3)(B) of this title.

CREDIT(S)

(Pub.L. 104-193, Title IV, § 403, Aug. 22, 1996, 110 Stat. 2265; Pub.L. 105-33, Title V, §§ 5302(c)(1), 5303(c), 5306(c), 5562, 5563(a), (b), Aug. 5, 1997, 111 Stat. 638, 639, 599, 600, 602; Pub.L. 105-185, Title V, § 509, June 23, 1998, 112 Stat. 580; Pub.L. 105-277, Div. A, § 101(f) [Title VIII, § 405(d)(3)(A), (f)(3)(A)], Oct. 21, 1998, 112 Stat. 2681-419, 2681-429; Pub.L. 106-78, Title VII, § 752(b)(6), Oct. 22, 1999, 113 Stat. 1169; Pub.L. 107-171, Title IV, § 4401(b)(2)(A), May 13, 2002, 116 Stat. 333; Pub.L. 113-128, Title V, § 512(x), July 22, 2014, 128 Stat. 1716.)

Footnotes

1 So in original. Section 1612(a)(2)(A)(i)(V) of this section, was redesignated 8 U.S.C.A. § 1612(a)(2)(A)(v) by Pub.L. 105-185, Title V, § 503(2), (3), June 23, 1998, 112 Stat. 578.

2 So in original. Probably should be “subparagraph (A) or (B)”.

8 U.S.C.A. § 1613, 8 USCA § 1613
Current through P.L. 114-49 approved 8-7-2015

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 14. Restricting Welfare and Public Benefits for Aliens
Subchapter I. Eligibility for Federal Benefits

8 U.S.C.A. § 1611

§ 1611. Aliens who are not qualified aliens ineligible for Federal public benefits

Effective: October 28, 1998

Currentness

(a) In general

Notwithstanding any other provision of law and except as provided in subsection (b) of this section, an alien who is not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit (as defined in subsection (c) of this section).

(b) Exceptions

(1) Subsection (a) of this section shall not apply with respect to the following Federal public benefits:

(A) Medical assistance under title XIX of the Social Security Act [42 U.S.C.A § 1396 et seq.] (or any successor program to such title) for care and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of such Act [42 U.S.C.A. § 1396b(v)(3)]) of the alien involved and are not related to an organ transplant procedure, if the alien involved otherwise meets the eligibility requirements for medical assistance under the State plan approved under such title (other than the requirement of the receipt of aid or assistance under title IV of such Act [42 U.S.C.A § 601 et seq.], supplemental security income benefits under title XVI of such Act [42 U.S.C.A. § 1381 et seq.], or a State supplementary payment).

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Public health assistance (not including any assistance under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.]) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

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(D) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(E) Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development, any program under Title V of the Housing Act of 1949 [42 U.S.C.A. § 1471 et seq.], or any assistance under section 1926c of Title 7, to the extent that the alien is receiving such a benefit on August 22, 1996.

(2) Subsection (a) of this section shall not apply to any benefit payable under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General, to any benefit if nonpayment of such benefit would contravene an international agreement described in section 233 of the Social Security Act [42 U.S.C.A. § 433], to any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act [42 U.S.C.A. § 402(t)], or to any benefit payable under title II of the Social Security Act to which entitlement is based on an application filed in or before August 1996.

(3) Subsection (a) of this section shall not apply to any benefit payable under title XVIII of the Social Security Act (relating to the medicare program) [42 U.S.C.A. § 1395 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General and, with respect to benefits payable under part A of such title [42 U.S.C.A. § 1395c et seq.], who was authorized to be employed with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits.

(4) Subsection (a) of this section shall not apply to any benefit payable under the Railroad Retirement Act of 1974 [45 U.S.C.A. § 231 et seq.] or the Railroad Unemployment Insurance Act [45 U.S.C.A. § 351 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General or to an alien residing outside the United States.

(5) Subsection (a) of this section shall not apply to eligibility for benefits for the program defined in section 1612(a)(3)(A) of this title (relating to the supplemental security income program), or to eligibility for benefits under any other program that is based on eligibility for benefits under the program so defined, for an alien who was receiving such benefits on August 22, 1996.

(c) "Federal public benefit" defined

(1) Except as provided in paragraph (2), for purposes of this chapter the term "Federal public benefit" means--

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

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(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

(2) Such term shall not apply--

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

CREDIT(S)

(Pub.L. 104-193, Title IV, § 401, Aug. 22, 1996, 110 Stat. 2261; Pub.L. 105-33, Title V, §§ 5561, 5565, Aug. 5, 1997, 111 Stat. 638, 639; Pub.L. 105-306, §§ 2, 5(a), Oct. 28, 1998, 112 Stat. 2926, 2927.)

Notes of Decisions (2)

8 U.S.C.A. § 1611, 8 USCA § 1611
Current through P.L. 114-49 approved 8-7-2015

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by Soskin v. Reinertson, 10th Cir.(Colo.), January 12, 2004

96 N.Y.2d 418
Court of Appeals of New York.

In the Matter of Mohamed **ALIESSA**, by His Guardian ad Litem, Sumaya Al FAYAD, et al., Appellants,
v.
Antonia **NOVELLO**, as Commissioner of the New York State Department of Health, Respondent.

June 5, 2001.

Aliens who were lawfully present in the United States brought class action challenging constitutionality of statute terminating state Medicaid benefits for non-qualified aliens, including lawfully admitted permanent residents, and aliens permanently residing in the United States under color of law (PRUCOLs). After initially granting in part and denying in part aliens' motion for summary judgment, 181 Misc.2d 334, 694 N.Y.S.2d 308, the Supreme Court, New York County, Sheila Abdus Salaam, J., granted reargument, and vacated that portion of its decision which found the statute violative of equal protection. State appealed, and the Supreme Court, Appellate Division, 274 A.D.2d 347, 712 N.Y.S.2d 96, affirmed in part and reversed in part, and found statute to be constitutional. Aliens appealed. The Court of Appeals, Rosenblatt, J., held that: (1) statute violated provision of State Constitution which guarantees that aid for the needy be provided by imposing an overly burdensome condition on eligibility that had nothing to do with need, and (2) statute did not meet strict scrutiny standard, and violated equal protection guarantees of Federal and State Constitutions.

Appellate Division reversed, and case remitted.

West Headnotes (23)

[1] **Aliens, Immigration, and Citizenship**
Removal or Deportation; Grounds

Aliens permanently residing in the United States under color of law (PRUCOLs) are aliens of whom the Immigration and Naturalization Service (INS) is aware, but has no plans to deport, and are distinguished from illegal aliens subject to deportation.

Cases that cite this headnote

[2] **Health**
Reimbursement

Under Medicaid system, the federal government and the states share the cost of providing Medicaid to certain federally specified categories of needy individuals, and if a state wants to extend Medicaid benefits to others, it is free to proceed at its own expense. Social Security Act, § 1902(a), as amended, 42 U.S.C.A. § 1396a(a).

Cases that cite this headnote

[3] **Public Assistance**
Aliens

In enacting provisions of Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) which deal with aliens, goals of Congress were to promote self-sufficiency, which is an enduring principle of United States immigration law, and to discourage aliens from immigrating just to avail themselves of welfare or other public resources. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 400(1, 2), 8 U.S.C.A. § 1601(1, 2).

2 Cases that cite this headnote

[4] **Health**
Aliens

While provisions of Personal Responsibility and Work Opportunity Reconciliation Act of 1996

(PRWORA) which deal with aliens make aliens who are permanently residing in the United States under color of law (PRUCOLs) ineligible for both federal and state Medicaid, it authorizes states to provide Medicaid to PRUCOLs—and indeed even to illegal aliens—by enacting a new law after PRWORA's effective date which affirmatively provides for such relief. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 411(a), (c)(1)(B), (d), 8 U.S.C.A. § 1621(a), (c)(1)(B), (d).

7 Cases that cite this headnote

[5] **Public Assistance**
Obligation of public authorities

Care for the needy is not a matter of legislative grace, but rather, is a mandate under State Constitution. McKinney's Const. Art. 17, § 1.

Cases that cite this headnote

[6] **Public Assistance**
Obligation of public authorities
Public Assistance
Eligibility in General

While State Constitution mandates that aid, care, and support for the needy be provided, State is not required to meet every legitimate need of every needy person; rather, the Legislature may determine who is "needy" and allocate the public dollar accordingly. McKinney's Const. Art. 17, § 1.

1 Cases that cite this headnote

[7] **Public Assistance**
Obligation of public authorities

Provision of State Constitution mandating that aid, care, and support for the needy be provided prohibits the Legislature from refusing to aid those whom it has classified as needy. McKinney's Const. Art. 17, § 1.

Cases that cite this headnote

[8] **Health**
Aliens

Statute terminating state Medicaid benefits for non-qualified aliens, including lawfully admitted permanent residents, and aliens permanently residing in the United States under color of law (PRUCOLs), imposed an overly burdensome condition on eligibility for public assistance that had nothing to do with need, and thus violated provision of State Constitution mandating that aid, care, and support for the needy be provided. McKinney's Const. Art. 17, § 1; McKinney's Social Services Law § 122.

5 Cases that cite this headnote

[9] **Public Assistance**
Eligibility in General
Public Assistance
Amount of assistance

Provision of State Constitution mandating that aid, care, and support for the needy be provided affords the State wide discretion in defining who is needy and in setting benefit levels. McKinney's Const. Art. 17, § 1.

Cases that cite this headnote

[10] **Aliens, Immigration, and Citizenship**
Preemption
States
International relations; aliens

Federal law in the area of immigration is preemptive.

1 Cases that cite this headnote

[11] **Constitutional Law**
Aliens and alien business entities

Aliens are "persons" entitled to equal protection under Federal and State Constitutions. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11.

Cases that cite this headnote

[12] **Constitutional Law**
Levels of Scrutiny

In determining whether a state statute violates equal protection clause of Federal Constitution, courts apply different levels of scrutiny to different types of classifications. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[13] **Constitutional Law**
Social security, welfare, and other public payments

Statute terminating state Medicaid benefits for non-qualified aliens, including lawfully admitted permanent residents, and aliens permanently residing in the United States under color of law (PRUCOLs), created classifications based on alienage, which were not expressly authorized by federal statute establishing uniform immigration policy, and thus was subject to strict scrutiny for purposes of challenge under equal protection clause of Federal Constitution. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11; McKinney's Social Services Law § 122.

11 Cases that cite this headnote

[14] **Constitutional Law**
Strict scrutiny and compelling interest in general

Under strict scrutiny standard, a state statute will withstand an equal protection challenge under Federal Constitution only when the state can show that the law furthers a compelling state interest by the least restrictive means practically available. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[15] **Constitutional Law**
Perfect, exact, or complete equality or uniformity
Constitutional Law
Economic or social regulation in general

For purposes of review under equal protection clause of Federal Constitution, courts generally accord states broad discretion to create classifications in implementing economic and social welfare policy; in such instances, the court leaves it to the political process to bring about repeal of undesirable legislation, and if a statute has some reasonable basis, the Court will sustain it even if the classification is not made with mathematical nicety or results in some inequality. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[16] **Constitutional Law**
Encroachment on Judiciary

Under system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria.

Cases that cite this headnote

[17] **Constitutional Law**
Adjudication of rights in general
Public Assistance
Validity

Section of Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) which provides that a state choosing to follow the federal classification in determining the eligibility of qualified aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving compelling governmental interest of assuring that aliens be self-reliant cannot be relied on to establish that such a state statute meets strict scrutiny standard under equal protection clause of Federal Constitution, as a lawmaking body may not legislatively declare that a statute meets constitutional criteria. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

[18] **Aliens, Immigration, and Citizenship**
Power to deny admission or remove in general

Congress has power to exclude aliens, and may order the deportation of aliens whose presence in the country it deems hurtful; however, the states have no like power.

Cases that cite this headnote

[19] **Aliens, Immigration, and Citizenship**
Power to regulate in general
Aliens, Immigration, and Citizenship
Power to naturalize

Congress has considerable latitude in enacting immigration and naturalization statutes, and over no conceivable subject is the legislative power of Congress more complete. U.S.C.A. Const. Art. 1, § 8, cl. 4.

Cases that cite this headnote

[20] **Public Assistance**
Aliens

Federal Constitution does not prohibit Congress from distinguishing between aliens and citizens when allocating federal welfare benefits.

5 Cases that cite this headnote

[21] **Public Assistance**
State Plans and Conformity to Federal Standards in General
Public Assistance
Aliens

When federal welfare programs are jointly administered with the states, Congress may direct the states to implement national immigration objectives as long as the federal government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass.

1 Cases that cite this headnote

[22] **Public Assistance**
State Plans and Conformity to Federal Standards in General
Public Assistance
Aliens

State regulation of a welfare program jointly administered with the federal government that is not congressionally sanctioned, and that discriminates against aliens lawfully admitted to the country, is impermissible if it imposes additional burdens not contemplated by Congress.

1 Cases that cite this headnote

[23] **Constitutional Law**
Social security, welfare, and other public payments
Health
Validity

Statute which discriminated on the basis of alien status by terminating state Medicaid benefits for otherwise eligible non-qualified aliens, including lawfully admitted permanent residents, and aliens permanently residing in the United States under color of law (PRUCOLs), did not further a compelling interest by the least restrictive means available, and thus violated equal protection guarantees of Federal and State Constitutions. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1. § 11; McKinney's Social Services Law § 122.

7 Cases that cite this headnote

West Codenotes

Held Unconstitutional
Social Services Law § 122

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OPINION OF THE COURT

ROSENBLATT, J.

On this appeal, we must decide whether Social Services Law § 122 violates the United States and New York Constitutions ***422** by denying State Medicaid benefits to plaintiffs based on their status as legal aliens. We conclude that it does.

I.

[1] Plaintiffs are 12 aliens who lawfully reside in New York State. They immigrated to the United States from various countries, including Bangladesh, Belorussia, Ecuador, Greece, Guyana, Haiti, Italy, Malaysia, the Philippines, Syria and Turkey. As legal aliens, they fall into two groups. Some are lawfully admitted permanent residents of the United States under the Immigration and Nationality Act (i.e., green card holders) (*see*, 8 USC § 1101 *et seq.*);[1] the rest are permanently residing in the United States under color of law (PRUCOLs).[2] All suffer from potentially life-threatening illnesses and, but *****5** for the exclusion under Social Services Law § 122, would allegedly qualify for Medicaid benefits funded solely by the State.

Plaintiffs brought a class action in Supreme Court seeking a declaration that Social Services Law § 122 violates article XVII, sections 1 and 3 of the New York State Constitution and the Equal Protection Clauses of the United States and New ****1089** York State Constitutions. The putative class consists of " [a]ll Lawful Permanent Residents who entered the United States on or after September 22, 1996 and all [PRUCOLs] who, but for the operation of New York Social Services Law § 122, would be eligible for Medicaid coverage in New York State." The State moved to dismiss or, in the alternative, for summary judgment, for which plaintiffs cross-moved. Deferring its decision on class certification, Supreme Court denied the State's motion and granted in part plaintiff's motion for summary judgment, declaring that section 122 of the Social Services Law violates ***423** article XVII, § 1 of the New York State Constitution and the Equal Protection Clauses of the United States and New York Constitutions. (***Aliessa*** *v. Whalen*, 181 Misc.2d 334, 694 N.Y.S.2d 308.)

Three days later, the Appellate Division decided *Alvarino v. Wing* (261 A.D.2d 255, 690 N.Y.S.2d 262). In that case, resident aliens argued that Social Services Law § 95 unconstitutionally denied them food assistance. The court held that because the State enacted the statute in direct response to a Federal supplemental appropriations bill (Pub L 105–18), the challenged classification should be evaluated, for equal protection purposes, under a rational basis standard rather than the strict scrutiny standard Supreme Court had employed.

Supreme Court granted reargument in light of *Alvarino* and vacated the portion of its decision that declared section 122 violative of the Equal Protection Clauses of the United States and New York State Constitutions. The court left undisturbed, however, so much of its decision as held section 122 of the Social Services Law violative of article XVII, § 1 of the New York State Constitution. The Appellate Division reversed in part and affirmed in part, holding that section 122 did not violate equal protection or article XVII, § 1. Plaintiffs appeal to this Court as of right (*see*, CPLR 5601[b]).

II.

A.

The Medicaid System

[2] The Legislature established New York's Medicaid system in 1966 (L. 1966, ch. 256), the year after Congress created the federally funded Medicaid program (*see*, Pub. L. 89–97, 79 U.S. Stat 344). Under this complex scheme, the Federal government and States share the cost of providing Medicaid to certain categories of needy individuals. The shared program provides benefits to the disabled, the blind, the elderly, children, pregnant women, single-parent families and parents of children where there is a deprivation factor in the household (*see*, 42 USC § 1396a [a]). To remain eligible for Federal matching funds, New York must conform its Medicaid program to evolving Federal standards (*see*, 42 USC § 1396a [b]; Social Services Law § 363–a).

If a State wants to extend Medicaid benefits to others, it is free to proceed at its own expense. New York has done so. It has provided non-federally subsidized Medicaid benefits to ***424** certain categories of individuals, including residents between the ages of 21 and 65 whose income and resources fall below a statutory "standard of need" and who are not otherwise entitled to federally subsidized Medicaid (*see*, Social Services Law § 366[1]; 18 NYCRR 360–3.3[b]). Thus, New York State's *****6** Medicaid system has two components: one that is federally subsidized and one that the State funds entirely on its own.[3]

New York had long provided State Medicaid to needy recipients without distinguishing ****1090** between legal aliens and citizens. It ceased to do so, however, after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193, 110 U.S. Stat. 2105 [codified in scattered sections of 8 and 42 USC]) (PRWORA). Asserting that they have been unlawfully deprived of State Medicaid for which they would otherwise qualify, plaintiffs have brought this challenge.

B.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

After extensive debate, Congress enacted PRWORA as a comprehensive reform initiative designed to "end welfare as we know it."[4] PRWORA touches on virtually all aspects of welfare. In this case, however, we are concerned only with title IV of PRWORA, which deals with aliens.[5]

[3] ***425** In its preamble to title IV, Congress stressed that its goals were to promote self-sufficiency—an enduring principle of United States immigration law—and to discourage aliens from immigrating here just to avail themselves of welfare or other public resources (*see*, 8 USC § 1601[1]-[2]). The lawmakers stated that meeting these goals was a "compelling government interest" (*see*, 8 USC § 1601[5]-[6]).

By enacting title IV, Congress restricted alien eligibility for federally funded public assistance benefits (including Medicaid) and authorized States to follow suit with their own programs. Its restrictions govern eligibility for Federal and State retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance and unemployment *****7** benefits, among others (*see*, 8 USC § 1611[c]; § 1621[c]). For purposes of this decision, however, we address solely its effect on

Medicaid eligibility.

Under title IV, aliens are divided into two categories: qualified aliens and non-qualified aliens (*see*, 8 USC § 1641). Broadly speaking, qualified aliens include ****1091** aliens who are lawfully admitted for permanent residence (generally green card holders), granted asylum, designated refugees, paroled into the United States for at least one year, having their deportation withheld, granted conditional entry, Cuban and Haitian entrants or victims of battering or extreme cruelty by a spouse or other family member (*see*, 8 USC § 1641[b]-[c]). All other aliens, including PRUCOLs, are non-qualified aliens.[6] Plaintiffs in this case fall into both categories. The lawfully admitted permanent resident plaintiffs are qualified aliens and the PRUCOL plaintiffs non-qualified aliens. These classifications carry significant Medicaid consequences.

***426 1.**

PRWORA's Treatment of Aliens' Entitlement to Medicaid

Title IV renders non-qualified aliens ineligible for Federal Medicaid (8 USC § 1611[a]). Qualified aliens are divided into two subcategories. The first subcategory includes those who were lawfully residing in the United States before August 22, 1996. Section 1612(b)(2) requires States to provide Federal Medicaid to some, but not all, of this group.[7] The second subcategory includes those who entered the country on or after August 22, 1996. This latter group is largely ineligible for Federal Medicaid for five years (*see*, 8 USC § 1613[a]).[8] Moreover, title IV authorizes States to extend the ineligibility period beyond the initial five years (*see*, 8 USC § 1612[b][1]).

[4] In addition to rendering PRUCOLs ineligible for Federal Medicaid, title IV renders them ineligible for State Medicaid as well (*see*, 8 USC § 1621 [a], [c][1][B]). Section 1621(d), however, authorizes States to provide State Medicaid to PRUCOLs—and indeed even to illegal aliens—by enacting a new law (after August 22, 1996) "which affirmatively provides for such eligibility" (*see*, 8 USC § 1621[d]).[9] As for qualified aliens, title IV does not require, but instead allows States to grant or deny them State Medicaid, subject to certain exceptions (*see*, 8 USC § 1622[a]).[10]

*****8** Finally, notwithstanding all of these restrictions, both non-qualified aliens and qualified aliens (during their periods of ineligibility) may receive State and federally funded emergency ***427** medical treatment (*see*, 8 USC § 1611[b][1][A]; § 1613[c][2] [A]; § 1621[b][1]).

2.

New York's Response to PRWORA

In response to PRWORA, New York enacted Social Services Law § 122, terminating ****1092** Medicaid for non-qualified aliens—including PRUCOL plaintiffs (*see*, Social Services Law § 122[1][c]). New York did, however, maintain Medicaid for otherwise eligible PRUCOLs who, as of August 4, 1997, were receiving Medicaid and were diagnosed with AIDS or residing in certain licensed residential health care facilities (*see*, Social Services Law § 122 [1][c]).

As for qualified aliens, section 122 provides Medicaid to all otherwise eligible qualified aliens who entered the United States before August 22, 1996 and continuously resided in the United States until attaining qualified status (Social Services Law § 122[1][b] [i]). Those entering on or after August 22, 1996, however, are no longer immediately eligible for State Medicaid, but must now wait five years for coverage (*see*, Social Services Law § 122[1][b] [ii]).[11] This group includes the lawfully admitted permanent resident plaintiffs. Finally, all plaintiffs (both PRUCOLs and qualified aliens) may receive safety net assistance and emergency medical treatment (*see*, Social Services Law § 122[c][i]-[ii]).

III.

Plaintiffs argue that section 122 violates article XVII of the New York State Constitution and denies them equal protection under the United States and New York State Constitutions.

A.

New York State Constitution, Article XVII

[5] [6] Plaintiffs contend that section 122 violates article XVII, § 1 of the State Constitution, which provides:

> "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and ***428** by such means, as the legislature may from time to time determine" (N.Y. Const., art. XVII, § 1 [emphasis added]).

As this provision demonstrates, care for the needy is not a matter of "legislative grace", it is a constitutional mandate (*Tucker v. Toia,* 43 N.Y.2d 1, 7, 400 N.Y.S.2d 728, 371 N.E.2d 449; *see also, Lovelace v. Gross,* 80 N.Y.2d 419, 424, 590 N.Y.S.2d 852, 605 N.E.2d 339; *Jiggetts v. Grinker,* 75 N.Y.2d 411, 416, 554 N.Y.S.2d 92, 553 N.E.2d 570). Of course, New York is not required to meet every legitimate need of every needy person (*see, Matter of Bernstein v. Toia,* 43 N.Y.2d 437, 448–449, 402 N.Y.S.2d 342, 373 N.E.2d 238). Rather, the Legislature may determine who is "needy" and allocate the public dollar accordingly.

[7] [8] This Court, however, has interpreted article XVII, § 1 as prohibiting the Legislature from "refusing to aid those whom it has classified as needy" (*Tucker v. Toia,* 43 N.Y.2d, at 8, 400 N.Y.S.2d 728, 371 N.E.2d 449, *supra*). In *Tucker,* the State required minors to obtain final orders of disposition in support proceedings *****9** against their parents before they could become eligible for home relief. We found this requirement so onerous as to constitute a practical deprivation of benefits. Needy minors, we recognized, may not know the whereabouts of their parents, or even if their parents are located in this State. In some cases, it could take a minor as long as a year to obtain a disposition in an often futile support proceeding. While waiting, needy minors were effectively denied home relief. Because the requirement imposed an overly burdensome ****1093** eligibility condition on recipients—one unrelated to need—we held that the requirement contravened the "letter and spirit" of section 1 of article XVII (*see,* 43 N.Y.2d, at 9, 400 N.Y.S.2d 728, 371 N.E.2d 449, *supra*).

[9] The State argues that the allocation scheme here does not contravene *Tucker.* It contends that the Constitution affords it discretion to set levels of benefits for the needy and, in the exercise of that discretion, it has provided plaintiffs full safety net assistance and emergency medical treatment. We agree that article XVII, § 1 affords the State wide discretion in defining who is needy and in setting benefit levels. Indeed, in *Matter of Barie v. Lavine,* 40 N.Y.2d 565, 566, 388 N.Y.S.2d 878, 357 N.E.2d 349, this Court upheld a regulation that required welfare recipients to participate in a work referral program and denied them benefits for 30 days if they failed to comply.

Plaintiffs argue that section 122 does not merely set levels of benefits for the needy, but deprives them of all otherwise available ongoing medical care—a species of aid distinct from safety net assistance and emergency medical treatment. They contend that ongoing medical care covers a full spectrum of ailments, ***429** whereas emergency medical treatment becomes necessary when their medical conditions reach crisis or catastrophic levels. Plaintiffs and *amici* point out that diabetics, for example, often require daily insulin doses and blood glucose monitoring in order to stay alive, and that with such care they can lead healthy, productive lives. They are, however, denied this coverage. Treatment is unavailable until the condition reaches emergency proportions, involving insulin shock, renal failure and possibly amputation. Similarly, asthmatics receive no coverage for inhalers and medications to control their conditions. They receive no medical care until they experience severe attacks that can lead to suffocation and death. Contrasting it with emergency treatment, the Supreme Court has characterized ongoing medical care as a "basic necessity of life" (*see, Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 259–261, 94 S.Ct. 1076, 39 L.Ed.2d 306). "To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health" (*id.* at 261, 94 S.Ct. 1076).

In this context, plaintiffs and *amici* argue that when such patients are treated in emergency settings, the hospitals are not permitted to release them without a discharge plan for necessary continuing health care services, citing Public Health Law § 2803(1)(g). Because they cannot be readily discharged, many remain in hospital facilities. Those who are discharged experience a cycle of emergency, recovery, stabilization, deterioration and the onset of another emergency. All of this, plaintiffs and *amici* contend, could be avoided through ongoing medical treatment.

[10] In *Barie* the work incentive requirement was an appropriate mechanism for identifying need. Here, however, the concept of need plays no part in the operation of section 122. Indeed, the statute suffers from an infirmity comparable to *****10** the one in *Tucker* and cannot be justified on the basis of a distinction between qualified aliens and PRUCOLs on the one hand, and citizens on the other. We conclude that section 122 violates the letter and spirit of article XVII, § 1 by imposing on plaintiffs an overly burdensome eligibility

condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits.[12]

***430 **1094 B.**

Equal Protection

[11] Plaintiffs argue that section 122 denies them equal protection under the United States and New York State Constitutions. The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const., 14th Amend., § 1). The New York State Constitution contains its own equal protection requirement (N.Y. Const., art. I, § 11). It is axiomatic that aliens are "persons" entitled to equal protection (*see*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 ["The fourteenth amendment to the constitution is not confined to the protection of citizens"]; *see also*, *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478; *Takahashi v. Fish & Game Commn.*, 334 U.S. 410, 419–420, 68 S.Ct. 1138, 92 L.Ed. 1478).

[12] [13] In considering whether a State statute violates the Equal Protection Clause, the Supreme Court applies different levels of scrutiny to different types of classifications (*see*, *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465). The parties disagree as to the level of scrutiny section 122 must withstand. Plaintiffs urge this Court to apply strict scrutiny because section 122 creates classifications based on alienage. The State argues that section 122 implements Federal immigration policy and therefore must merely withstand rational basis scrutiny. We agree with plaintiffs.

[14] As a general rule, the Supreme Court has strictly scrutinized State laws that create alienage classifications when distributing economic benefits or regulating economic activity (*see*, *e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 227–228, 104 S.Ct. 2312, 81 L.Ed.2d 175 [invalidating a Texas statute that required citizenship for notaries public]; *Nyquist v. Mauclet*, 432 U.S. 1, 7–12, 97 S.Ct. 2120, 53 L.Ed.2d 63 [striking down a New York statute that restricted eligibility for Regents college scholarships based on alienage]; *In re Griffiths*, 413 U.S. 717, 718–722, 93 S.Ct. 2851, 37 L.Ed.2d 910 [invalidating a Connecticut statute that allowed only citizens to qualify for the bar examination]; *Graham v. Richardson*, 403 U.S., at 370–376, 91 S.Ct. 1848, *supra* [invalidating statutes in Arizona and Pennsylvania that limited welfare benefits based on citizenship]; *Takahashi v. Fish & Game Commn.*, 334 U.S., at 414, 418–422, 68 S.Ct. 1138, *supra* [striking down a California statute that granted commercial fishing ***431** licenses to citizens but denied them to aliens who were ineligible for citizenship]; *see generally*, *****11** 3 Rotunda & Nowak, Constitutional Law: Substance and Procedure § 18.12, at 469 [3d ed. 1999]). Under strict scrutiny, a State statute will withstand an equal protection challenge only when the State can show that the law "furthers a compelling state interest by the least restrictive means practically available" (*see*, *Bernal v. Fainter*, 467 U.S., at 227, 104 S.Ct. 2312,*supra*).[13]

****1095** [15] Heightened scrutiny is premised on the Supreme Court's view of the political process. The Court generally accords States broad discretion to create classifications in implementing economic and social welfare policy (*see*, *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491). In these instances, the Court leaves it to the political process to "bring about repeal of undesirable legislation" (*see*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–153 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234). If a statute has "some 'reasonable basis,' " the Court will sustain it even if the classification " 'is not made with mathematical nicety [or] results in some inequality' " (*Dandridge v. Williams*, 397 U.S., at 485, 90 S.Ct. 1153,*supra* [quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337]). Recognizing, however, that "discrete and insular minorities" can be shut out of the political process, the Court has applied a more searching inquiry to statutes that draw classifications aimed at these groups (*see*, *United States v. Carolene Prods. Co.*, 304 U.S., at 152–153 n. 4, 58 S.Ct. 778, *supra*).

In *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534, *supra*, the Supreme Court held that as a class, aliens are a "prime example of a 'discrete and insular' minority * * * for whom such heightened judicial solicitude is appropriate." Lawful resident aliens benefit our country in a great many ways. Like citizens, they contribute to our economy, serve in the Armed Forces and pay taxes (*see*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 n. 30, 96 S.Ct. 1895, 48 L.Ed.2d 495; *In re Griffiths*, 413 U.S., at 722, 93 S.Ct. 2851, *supra; see generally*, Notes, *Constitutional Limitations on the Naturalization* ***432** *Power*, 80 Yale L. Journal 769, 803 [1971]) including, of course, taxes that fund State Medicaid. Nevertheless, aliens may not vote, which has historically inhibited their ability to protect their interests (*see*, *Nyquist v. Mauclet*, 432 U.S. 1, 12, 97 S.Ct. 2120, 53 L.Ed.2d 63; *Hampton v. Mow Sun Wong*, 426 U.S., at

107, 96 S.Ct. 1895, *supra; see generally,* Chemerinsky, Constitutional Law: Principles and Policies § 9.5.2, at 618–619 [1997]; *Notes and Legislation,* 17 N.Y.U. L.Q. Rev. 242, 242–243 [1940]).

[16] [17] The State does not attempt to justify section 122 under a strict scrutiny standard.[14] Nor has it identified any *****12** "compelling governmental interest" that section 122 promotes. Instead, the State argues that strict scrutiny does not apply here. It contends that section 122 implements title IV's Federal immigration policy and should therefore be evaluated under the less stringent "rational basis" standard. To address this argument, we must compare State and Congressional ****1096** legislative authority in the context of immigration and naturalization.

[18] [19] The Constitution empowers Congress to "establish [a] uniform Rule of Naturalization" (U.S. Const., art. I, § 8, cl. [4]), "regulate Commerce with foreign Nations" (U.S. Const., art. I, § 8, cl. [3]), "declare War" (U.S. Const., art. I, § 8, cl. [11]) approve treaties (U.S. Const., art. II, § 2, cl. [2]), and legislate over foreign affairs (*see, Toll v. Moreno,* 458 U.S. 1, 10, 102 S.Ct. 2977, 73 L.Ed.2d 563, *supra; Mathews v. Diaz,* 426 U.S., at 81 n. 17, 96 S.Ct. 1883, *supra*). In entertaining challenges to Federal immigration and naturalization statutes, the Supreme Court has interpreted these sources of authority to accord Congress—as distinguished from the States—considerable latitude (*see, Fiallo v. Bell,* 430 U.S. 787, 792–797, 97 S.Ct. 1473, 52 L.Ed.2d 50; *Hampton v. Mow Sun Wong,* 426 U.S., at 100–105, 96 S.Ct. 1895, *supra; Kleindienst v. Mandel,* 408 U.S. 753, 765–770, 92 S.Ct. 2576, 33 L.Ed.2d 683; *see generally,* Chemerinsky, Constitutional Law: Principles and Policies § 3.5.1, at 204–208, *supra*). The Court has explained that "over no conceivable subject is ***433** the legislative power of Congress more complete" (*Oceanic Steam Nav. Co. v. Stranahan,* 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013).[15]

[20] [21] [22] When allocating Federal welfare benefits, the Constitution does not prohibit Congress from distinguishing between aliens and citizens. In *Mathews v. Diaz,* 426 U.S. 67, 69, 77–81, 96 S.Ct. 1883, 48 L.Ed.2d 478, *supra* a group of aliens challenged a Federal statute that denied aliens Medicare eligibility unless they had been admitted for permanent residence and resided in the United States for at least five years. The Court held that the "decision to share [our] bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence" (*id.* at 80, 96 S.Ct. 1883). Moreover, when Federal welfare programs are jointly administered with the States, Congress may direct the States to implement national immigration objectives as long as the "Federal Government has by *uniform* rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass" (*see, Plyler v. Doe,* 457 U.S., at 219 n. 19, 102 S.Ct. 2382, *supra* [emphasis added]).[16]

*****13** Relying on these cases, the State argues that section 122 does what title IV has authorized it to do with regard to Federal immigration policy. Plaintiffs contend, however, that the issue is not whether the State has followed the authorization. Rather, it is whether title IV can constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility. Plaintiffs argue that it cannot, and we agree.

Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534, *supra* is at the center of our analysis. There, the State of ****1097** Arizona administered a Federal disability program under Federal guidelines much the same as New York administers Medicaid. Arizona argued that because its 15–year residency period for aliens was impliedly authorized by Federal law, it did not violate the Fourteenth ***434** Amendment (*see, Graham v. Richardson,* 403 U.S., at 382, 91 S.Ct. 1848, *supra*). The Supreme Court rejected this contention, holding that a Federal statute authorizing "discriminatory treatment of aliens *at the option of States* " would present "serious constitutional questions" (403 U.S., at 382, 91 S.Ct. 1848 [emphasis added]). The Court recognized that although the Federal government has broad constitutional power to distinguish among aliens in setting the rules for their admission and naturalization, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause" (*see,* 403 U.S., at 382, 91 S.Ct. 1848,*supra*). Indeed, the Court went on to state that a "congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity" (*see,* 403 U.S., at 382, 91 S.Ct. 1848, *supra*).[17]

Additional Supreme Court decisions reinforce *Graham*'s requirement for uniformity in immigration policy (*see, Plyler v. Doe,* 457 U.S., at 219 n. 19, 102 S.Ct. 2382, *supra* ["(I)f the Federal Government has by *uniform* rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction"] [emphasis added]). Moreover, in *Mathews v. Diaz,* the Court recognized that when it comes to State welfare policy, "there is little, if

any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country" (*see, id.,* 426 U.S., at 85, 96 S.Ct. 1883, *supra*). In distinguishing between Federal and State powers, the Court held that a "division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate *****14** part of its business" (*see, Mathews v. Diaz,* 426 U.S., at 85, 96 S.Ct. 1883, *supra*).

Finally, in *Hampton v. Mow Sun Wong,* 426 U.S. 88, 104, 96 S.Ct. 1895, 48 L.Ed.2d 495, *supra*, the Supreme Court drew limits on the power of entities ***435** other than Congress or the President to make alienage classifications in furtherance of Federal immigration policy. In addressing whether Federal agencies could make such classifications for civil service eligibility, the Court concluded that if Congress or the President had created the classification, it could be justifiable as a valid exercise of immigration authority in the national interest (*see, id.,* 426 U.S., at 104, 96 S.Ct. 1895, *supra*). When, however, it came to Federal agencies that did not deal directly with immigration, the Court was not willing to presume they would deliberately ****1098** foster national immigration interests, which are "so far removed from [their] normal responsibilities" (*see, id.,* 426 U.S., at 105, 96 S.Ct. 1895, *supra*). Surely this is also true of the States.

Title IV does not impose a *uniform* immigration rule for States to follow. Indeed, it expressly authorizes States to enact laws extending "any State or local public benefit" even to those aliens not lawfully present within the United States (8 USC § 1621[d]). The converse is also true and exacerbates the lack of uniformity: Section 1622(a) provides that, subject to certain exceptions, States are authorized to withhold State Medicaid from even those qualified aliens who are eligible for Federal Medicaid under PRWORA. Thus, in administering their own programs, the States are free to discriminate in either direction—producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics. Considering that Congress has conferred upon the States such broad discretionary power to grant or deny aliens State Medicaid, we are unable to conclude that title IV reflects a uniform national policy. If the rule were uniform, each State would carry out the same policy under the mandate of Congress—the only body with authority to set immigration policy.

In exercising its discretion under title IV, New York has chosen to continue Medicaid coverage for any PRUCOL who, as of August 4, 1997, was receiving Medicaid and was either diagnosed with AIDS or residing in certain licensed residential health care facilities. This demonstrates that New York—along with every other State—with Congressional permission is choosing its own policy with respect to health benefits for resident, indigent legal aliens. Thus, we address this case outside the context of a Congressional command for nationwide uniformity in the scope of Medicaid coverage for indigent aliens as a matter of federal immigration policy.

[23] [3] We conclude that section 122 is subject to—and cannot pass—strict scrutiny, notwithstanding title IV's authorization. ***436** Because title IV authorizes each State to extend the ineligibility period for Federal Medicaid beyond the mandatory five years (*see,* 8 USC § 1612)[18] and terminate Federal Medicaid eligibility for certain refugees and asylees after seven years (*see,* 8 USC § 1612[b][1], [2][A][i]), it is directly in the teeth of *Graham* insofar as it allows the States to "adopt divergent laws on the subject of citizenship requirements for *federally* supported welfare programs" (*see,* 403 U.S., at 382, 91 S.Ct. 1848, *supra* [emphasis added]). *****15** Moreover, title IV goes significantly beyond what the *Graham* Court declared constitutionally questionable. In the name of national immigration policy, it impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid.[19] Section 122 is a product of this authorization. In light of *Graham* and its progeny, title IV can give section 122 no special insulation from strict scrutiny review. Thus, section 122 must be evaluated as any other State statute that classifies based on alienage. We hold that section 122 violates the Equal Protection Clauses of the United States and New York State Constitutions insofar as it denies State Medicaid to otherwise eligible PRUCOLs and lawfully admitted ****1099** permanent residents based on their status as aliens.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for further proceedings in accordance with this Opinion.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY and GRAFFEO concur.

Order reversed, etc.

All Citations N.Y. Slip Op. 04791

96 N.Y.2d 418, 754 N.E.2d 1085, 730 N.Y.S.2d 1, 2001

Footnotes

1 Federal law requires the Immigration and Naturalization Service (INS) to issue permanent resident cards (commonly known as green cards) to lawfully admitted permanent residents (*see,* 8 USC § 1304[d]).

2 As distinguished from *illegal* aliens subject to deportation, this designation is used to classify aliens of whom the INS is aware, but has no plans to deport (*see generally,* Polen, *Salvaging a Safety Net: Modifying the Bar to Supplemental Security Income for Legal Aliens,* 76 Wash. U. L.Q. 1455, 1455 n. 3 [1998]). The classification appears in numerous statutes and regulations (*see, e.g.,* 8 USC § 1254a [f]; 26 USC § 3304[a][14][A]; 20 CFR §§ 416.1618, 416.1619; 42 CFR § 435.408). When and whether a particular alien meets a given provision's definition has generated considerable litigation (*compare Holley v. Lavine,* 553 F.2d 845, 849 [2d Cir.], *cert. denied sub nom. Shang v. Holley,* 435 U.S. 947, 98 S.Ct. 1532, 55 L.Ed.2d 545, *with Sudomir v. McMahon,* 767 F.2d 1456, 1461 [9th Cir.]).

3 For purposes of this decision, we refer to federally subsidized Medicaid as "Federal Medicaid" and Medicaid entirely funded by the State and its localities as "State Medicaid." This litigation, and our holding, relate only to the latter category (*compare, Lewis v. Thompson,* 252 F.3d 567 [2d Cir.] [dealing with claims by illegal aliens for prenatal care under Federal Medicaid]).

4 *See generally, Recent Legislation: Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs,* 110 Harv. L. Rev. 1191 (1997); Hoke, *Symposium, State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism–Based Constitutional Challenge,* 9 Stan. L. & Pol'y Rev. 115 (1998); *Development in Policy: Welfare Reform,* 16 Yale L. & Pol'y Rev. 221 (1997).

5 Title IV is codified beginning at section 1601, title 8, of the United States Code. Title I of PRWORA provides block grants to States for temporary assistance to needy families. Congress designed these grants to reduce out-of-wedlock pregnancies and promote job preparation, work, marriage and two-parent families. Title II modifies eligibility requirements for Supplemental Security Income benefits for, among others, fugitive felons, probation and parole violators, prisoners and persons found to have fraudulently misrepresented their residences. Title III streamlines child support collection procedures, requiring uniformity throughout the States. Title V mandates a national study of children at risk of abuse or neglect. Title VI provides block grants to States to develop localized child care programs that promote parental choice and independence from public assistance. Titles VII and VIII make changes to the National School Lunch Act and the Food Stamp Act. Finally, title IX implements a variety of initiatives that, among other provisions, authorize States to test welfare recipients for controlled substances, require public housing agencies to provide certain information to law enforcement agencies and encourage the use of electronic benefit transfer systems.

6 Illegal aliens and certain others—with whom we are not here concerned—are also non-qualified aliens (*see,* 8 USC § 1641).

7 For example, section 1612(b)(2)(A)(i) requires States to provide Federal Medicaid to certain refugees and asylees for seven years. Thereafter, States have authority to determine eligibility (*see,* 8 USC § 1612[b][1]). Title IV also requires States to provide Federal Medicaid to other qualified aliens, including lawfully admitted permanent residents who worked or can be credited with 40 qualifying quarters under the Social Security Act and legally residing veterans and active duty members of the United States Armed Forces (and their dependents) (*see,* 8 USC § 1612[b] [2] [B]-[F]).

8 Refugees, asylees, Cuban and Haitian entrants, veterans and their dependents, active duty soldiers in the United States Armed Forces and their dependents, and certain other qualified aliens are exempt from this restriction (*see,* 8 USC § 1613[b]).

9 Section 1621(d) refers to "State authority to provide for eligibility of illegal aliens." Inasmuch as only PRUCOLs are before us, we need not decide the full scope of this provision. The statute obviously authorizes the State to provide State Medicaid to PRUCOLs.

10 States must, for example, provide State Medicaid to otherwise eligible refugees, asylees, and Cuban and Haitian entrants, among others (*see,* 8 USC § 1622[b]).

11 The five-year waiting period does not apply to, among others, refugees, asylees and veterans (*see,* Social Services Law § 122[1][a]).

12 In light of this determination, we do not address plaintiffs' argument under article XVII, § 3. In addition, we note the State's argument that it enacted section 122 in response to title IV. We recognize that Federal law in the area of immigration is preemptive (*see, Toll v. Moreno,* 458 U.S. 1, 10, 102 S.Ct. 2977, 73 L.Ed.2d 563; *DeCanas v. Bica,* 424 U.S. 351, 354, 96 S.Ct. 933, 47 L.Ed.2d 43; *Graham v. Richardson,* 403 U.S. 365, 378, 91 S.Ct. 1848, 29 L.Ed.2d 534; *cf. Minino v. Perales,* 79 N.Y.2d 883, 885, 581 N.Y.S.2d 162, 589 N.E.2d 385). In view of our holding in part III.B, *infra,* however, we need not reach this issue.

13 In *Plyler v. Doe,* 457 U.S. 202, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786, *supra*, however, the Supreme Court applied an intermediate level of scrutiny to a State statute that denied public education to children who were not lawfully admitted into the United States. In this context, a State must demonstrate that its classification is "reasonably adapted" to further a "substantial goal of the State" (*id.* at 224, 226, 102 S.Ct. 2382). In addition, the Supreme Court has carved out exceptions to strict scrutiny for State laws pertaining to aliens' eligibility for participating in the political process or holding influential public positions (*see, e.g., Foley v. Connelie,* 435 U.S. 291, 297, 98 S.Ct. 1067, 55 L.Ed.2d 287; *Ambach v. Norwick,* 441 U.S. 68, 75–81, 99 S.Ct. 1589, 60 L.Ed.2d 49; *Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, 12 S.Ct. 375, 36 L.Ed. 103; *compare, Sugarman v. Dougall,* 413 U.S. 634, 643, 93 S.Ct. 2842).

14 The State notes only that under title IV, a State choosing "to follow the Federal classification in determining the eligibility of [qualified] aliens for public assistance shall be *considered* to have chosen the *least restrictive means* available for achieving the *compelling governmental interest* of assuring that aliens be self-reliant in accordance with national immigration policy" (*see,* 8 USC § 1601[7] [emphasis added]). Given our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria (*see, Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 365–366, 121 S.Ct. 955, 963, 148 L.Ed.2d 866; *City of Boerne v. Flores,* 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624).

15 Congress has power to exclude aliens (*see, Chae Chan Ping v. United States,* 130 U.S. 581, 603, 9 S.Ct. 623, 32 L.Ed. 1068) and may "order the deportation of aliens whose presence in the country it deems hurtful" (*see, Bugajewitz v. Adams,* 228 U.S. 585, 592, 33 S.Ct. 607, 57 L.Ed. 978). The States have no like power (*see, Plyler v. Doe,* 457 U.S., at 219 n. 19, 102 S.Ct. 2382, *supra*).

16 The Supreme Court has cautioned, however, that State "regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress" (*De Canas v. Bica,* 424 U.S., at 358 n. 6, 96 S.Ct. 933, *supra; see also, Toll v. Moreno,* 458 U.S., at 12–13, 102 S.Ct. 2977, *supra; Plyler v. Doe,* 457 U.S., at 225–226, 102 S.Ct. 2382, *supra*).

17 The Constitution empowers Congress to "establish [a] *uniform* Rule of Naturalization" (U.S. Const., art. I, § 8, cl. [4] [emphasis added]). The framers of the Constitution did not include the word "uniform" by accident. It was an imperative design. James Madison decried the disorder that resulted from the operation of the Privileges and Immunities Clause of the Articles of Confederation when each State had its own criteria for citizenship (*see,* Federalist LXII; *see also,* 2 Story, Commentaries on the Constitution of the United States § 1103, at 41 [1873]). Although we are not dealing with the Privileges and Immunities Clause of the United States Constitution here, the concern for uniformity is similarly present.

18 New York has declined this invitation (*see,* Social Services Law § 122[1][b][ii] [adopting the five-year ineligibility period]).

19 To be sure, title IV provides States with some uniform directives (*see, e.g.,* 8 USC § 1613[a], [b]; § 1621[b]; § 1622 [b]). These directives, however, do not cure the infirmity before us.

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18 NYCRR 360-3.2

Section 360-3.2. Conditions of eligibility

All applicants for and recipients of MA must meet their requirements in this section to be eligible for MA.

(a) Applicants/recipients must assign to the department:

(1) any rights to payment for medical care from a third party; and

(2) rights to support specified by a court or administrative order to be used for medical care.

(b) An individual who has the legal authority to assign the rights of a person eligible for MA to the support and payments listed in subdivision (a) of this section (an assignor), including a legally responsible relative living with such person, must assign those rights to the State and the social services district on behalf of the person.

(c) Applicants for and recipients of MA must cooperate in good faith with the State and social services officials in establishing the paternity of a child born out of wedlock; in efforts to locate any absent parent or putative father; in establishing, modifying, and enforcing orders of support; and in obtaining support payments or any other payments or property due such person and due each child, unless the applicant or recipient is found by the social services district or an appropriate designee to have good cause for refusing to cooperate in accordance with the provisions of subdivision (f) of this section. However, women must not be required as a condition of eligibility for MA to cooperate during pregnancy, during the 60-day period beginning on the last day of the pregnancy, or during the remainder of the calendar month in which such 60th day occurs. The term *cooperate* includes the following:

(1) completing the child support enforcement referral form and, at a minimum, providing verifiable information on the form sufficient to identify and locate the absent parent or putative father, including:

(i) the full name and social security number of the absent parent or putative father; or

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(ii) the full name of the absent parent or putative father and at least two of the following concerning such parent or father:

(*a*) date of birth;

(*b*) residential and, if different, mailing address;

(*c*) telephone number; and

(*d*) name and address of employer; or

(iii) the full name and any additional information equivalent to the information contained in subparagraph (i) or (ii) of this paragraph that leads to the absent parent's or putative father's identity and location;

(2) appearing at the local child support enforcement unit, as necessary, to provide the child support enforcement referral form and such oral or written information or documentary evidence, known to be possessed by or reasonably obtainable by the applicant or recipient, that is relevant to achieving the objectives of this subdivision;

(3) appearing as a witness at court or other hearings or proceedings necessary to achieve the objectives of this subdivision;

(4) providing information or attesting to the lack of information under penalty of perjury;

(5) submitting the child and herself or himself to genetic tests, pursuant to judicial order or administrative direction; and

(6) after an assignment of medical support under this subdivision has been made, paying to the support collection unit any payments received from the absent parent which are covered by that assignment.

(d) When an applicant or recipient fails, absent good cause, to provide verifiable information on the child support enforcement referral form sufficient to identify and locate the absent parent or putative father as required by subdivision (c) of this section, the local child support enforcement unit must determine whether the applicant or recipient has cooperated in good faith to establish the paternity of the child and to establish, modify and enforce a support order for the child pursuant to section 347.5 of this Title.

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(e) MA cases must be reported to the local child support enforcement unit within two working days of continuing assistance following the 60 day period which begins on the last day of pregnancy, except in the case of an applicant or recipient found, pursuant to paragraph (f)(1) of this section, to have good cause for refusing to cooperate in establishing the paternity of a child and in establishing, modifying and enforcing a support order for the child. Such cases must be reported to the local child support enforcement unit, as specified in paragraph (f)(3) of this section.

(f) *Good cause for refusing to cooperate.*

(1) Claiming good cause for refusing to cooperate.

(i) Opportunity to claim good cause. An applicant for or recipient of MA will have the opportunity to claim good cause for refusing to cooperate as specified by subdivision (c) of this section.

(ii) Notification to the applicant or recipient. The MA applicant or recipient shall be notified of the right to claim good cause as an exception to the cooperation requirement and of all the requirements applicable to a good cause determination.

(*a*) Such notice shall be in writing in a form prescribed by the Department of Health.

(*b*) The social services district worker or an appropriate designee and the applicant or recipient shall sign and date a copy of the notice. A copy of the notice shall be given to the applicant or recipient, and a signed copy shall be filed in the MA case record.

(iii) Requirements upon applicant or recipient. An applicant for or recipient of MA who refuses to cooperate, and who claims to have good cause for refusing to cooperate, has the burden of establishing the existence of a good cause circumstance and will be required to:

(*a*) specify the circumstances that the applicant or recipient believes provide sufficient good cause for not cooperating;

(*b*) corroborate the good cause circumstances in accordance with subparagraph (vii) of this paragraph; and

(*c*) if requested, provide sufficient information (such as the putative father or absent parent's name and address, if known) to permit an investigation pursuant to clause (vii)(*g*) of this paragraph. If the applicant or recipient does not meet the above requirements, the social services district worker or an appropriate designee shall on that basis determine that good cause does not exist.

(iv) Circumstances under which cooperation is against the best interests of the child. Cooperation in establishing paternity or seeking support shall be deemed to be against the best interests of the child only if:

(*a*) the applicant's or recipient's cooperation in establishing paternity or securing support is reasonably anticipated to result in:

(*1*) physical harm to the child for whom support is to be sought;

(*2*) emotional harm to the child for whom support is to be sought;

(*3*) physical harm to the parent or caretaker relative with whom the child is living which reduces such person's capacity to care for the child adequately;

(*4*) emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces such person's capacity to care for the child adequately; or

(*b*) the child for whom support is sought was conceived as a result of incest or forcible rape; or

(*c*) legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

(*d*) the applicant or recipient is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep the child or relinquish him or her for adoption, and discussions have not gone on for more than three months.

(v) Physical harm and emotional harm defined. Physical harm and emotional harm must be of a serious nature in order to justify a finding of good cause. A finding of good cause for emotional harm may only be based on a demonstration of an emotional impairment that substantially affects the individual's functioning.

(vi) Special considerations related to emotional harm.

(*a*) For every good cause determination which is based in whole or in part on the anticipation of emotional harm to the child, the parent or the caretaker relative, the social services district worker or an appropriate designee shall consider the following:

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(*1*) the present emotional state of the individual subject to emotional harm;

(*2*) the emotional health history of the individual subject to emotional harm;

(*3*) the intensity and probable duration of the emotional upset;

(*4*) the degree of cooperation to be required; and

(*5*) the extent of the involvement of the child in the paternity establishment or support enforcement activity to be undertaken.

(*b*) The findings with respect to the above factors shall be documented in the MA case record.

(vii) Proof of good cause claim.

(*a*) The good cause determination will be based on corroborative evidence supplied by the applicant or recipient only after the social services district worker or an appropriate designee has examined the evidence and found it actually verifies the good cause claim.

(*b*) The applicant or recipient who claims good cause must provide corroborative evidence within 20 days from the day the claim was made. If the social services district worker or an appropriate designee determines that the applicant or recipient requires additional time because of the difficulty of obtaining the corroborative evidence, upon supervisory approval, the worker or designee shall allow a reasonable additional period of time.

(*c*) Good cause may be corroborated with the following types of evidence:

(*1*) birth certificates or medical or law enforcement records which indicate that the child was conceived as the result of incest or forcible rape;

(*2*) court documents or other records which indicate that legal proceedings for adoption are pending before a court of competent jurisdiction;

(*3*) court, medical, criminal, child protective services, social services, psychological, or law enforcement records which indicate that the putative father or absent parent might inflict physical or emotional harm on the child or caretaker relative;

(*4*) medical records which indicate emotional health history and present emotional health status of the caretaker relative or the child for whom support would be sought, or written statements from a mental health professional licensed to practice in New York, indicating a diagnosis or prognosis concerning the emotional health of the caretaker relative or the child for whom support would be sought;

(*5*) a written statement from a public or licensed private social agency that the applicant or recipient is being assisted by the agency to resolve the issue of whether to keep the child or relinquish him or her for adoption; and

(*6*) sworn statements from individuals, other than the applicant or recipient, with knowledge of the circumstances which provide the basis for good cause claim.

(*d*) If after examining the corroborative evidence submitted by the applicant or recipient, the social services district worker or an appropriate designee determines that additional corroborative evidence is needed to permit a good cause determination, the worker or designee will:

(*1*) promptly notify the applicant or recipient that additional corroborative evidence is needed; and

(*2*) specify the type of document needed.

(*e*) Upon request, the social services district worker or an appropriate designee will:

(*1*) advise the applicant or recipient how to obtain the necessary documents; and

(*2*) make a reasonable effort to obtain any specific documents which the applicant or recipient is not reasonably able to obtain without assistance.

(*f*) Where a claim is based on the applicant's or recipient's anticipation of physical harm as specified and defined in subparagraphs (iv) and (v) of this paragraph, and corroborative evidence is not submitted in support of the claim:

(*1*) the social services district worker or an appropriate designee will investigate the good cause claim when the worker or designee believes that the claim is credible without corroborative evidence, and corroborative evidence is not available;

(*2*) good cause will be found if the claimant's sworn statement and the investigation which is conducted satisfy the social services district worker or an appropriate designee that the applicant or recipient has good cause for refusing to cooperate; and

(*3*) a determination that good cause exists will be reviewed and approved or disapproved by supervisory personnel and the findings will be recorded in the MA case record.

(*g*) The good cause claim may be further verified if the applicant's or recipient's statement of the claim required by this subparagraph, together with the corroborative evidence, does not provide sufficient basis for making a determination. When the social services district worker or an appropriate designee determines that it is necessary, the worker or designee may conduct an investigation of good cause claims to determine that good cause does or does not exist.

(*h*) If the social services district worker or an appropriate designee conducts an investigation of a good cause claim, the worker or designee will:

(*1*) contact the absent parent or putative father from whom support would be sought if such contact is determined to be necessary to establish the good cause claim; and

(*2*) prior to making such necessary contact, notify the applicant or recipient to enable the applicant or recipient to:

(*i*) present additional corroborative evidence or information so that contact with the parent or putative father becomes unnecessary; or

(*ii*) withdraw the application for assistance or have the case closed; or

(*iii*) have the good cause claim denied.

(2) Participation by the child support enforcement unit.

(i) Prior to making a final determination of good cause for refusing to cooperate, the social services district worker or an appropriate designee shall:

(*a*) afford the local child support enforcement unit the opportunity to review and comment on the findings and basis for the proposed determination; and

(*b*) consider any recommendation from the child support enforcement unit.

(ii) The worker or designee shall give the local child support enforcement unit the opportunity to participate in any hearing that results from an applicant's or recipient's appeal of any action of the Department of Health under this subdivision.

(3) Notice to the local child support enforcement unit. The social services district worker or an appropriate designee shall promptly report to the local child support enforcement unit:

(i) all cases in which good cause has been claimed and a determination is pending;

(ii) all cases in which there is a good cause for refusal to cooperate and the basis for the determination and whether or not child support enforcement may proceed without the participation of the caretaker relative; and

(iii) all cases in which it has been determined there is not good cause for refusal to cooperate.

(4) Granting or continuation of assistance. MA shall not be denied, delayed or discontinued pending a determination of good cause for refusal to cooperate if the applicant or recipient has complied with the requirement of this subdivision to furnish corroborative evidence and information.

(5) Periodic review of good cause determination. The social services district worker or an appropriate designee shall:

(i) periodically review, not less frequently than at each redetermination of eligibility, those cases in which the agency or an appropriate designee has determined that good cause exists based on a circumstance that is subject to change;

(ii) determine if circumstances have changed to the extent that good cause no longer exists. If so, the worker or designee shall rescind the findings; and

(iii) give prompt notification to the child support enforcement unit of every change in determination of good cause, as required by subparagraphs (i) and (ii) of this paragraph.

(6) Recordkeeping. Social services districts shall maintain records of the activities under this subdivision as prescribed by the Department of Health.

(7) Enforcement without the caretaker's cooperation.

(i) If a determination of good cause is made on the basis of the circumstances specified above, a determination shall also be made of whether or not child support enforcement could proceed without risk to the child or caretaker relative if the enforcement or collection activities did not involve their participation.

(ii) This determination shall be in writing, contain the agency's or its designee's finding and basis for determination, and be entered into the MA case record.

(iii) If the social services district worker or an appropriate designee excuses cooperation but determines that the child support enforcement unit may proceed to establish paternity or enforce support, the worker or designee shall notify the applicant or recipient to enable such individual to withdraw his or her application for assistance or have the case closed.

(iv) In the process of making a determination under this paragraph, the social services district worker or an appropriate designee shall afford the child support enforcement unit the opportunity to review and comment on the findings and basis for the proposed determination, and consider any recommendation from the child support enforcement unit.

(8) Final determination of good cause for refusal to cooperate.

(i) The social services district worker or an appropriate designee will make the final determination that good cause does or does not exist. Such determination shall:

(*a*) be in writing;

(*b*) contain the findings and basis for the determination; and

(*c*) be entered in the MA case record.

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(ii) The determination shall be made within 30 days from the day the good cause claim is made.

(iii) The social services district worker or an appropriate designee may exceed the 30-day period when the case record documents that additional time is needed because the information required to verify the claim cannot be obtained within 30 days or the claimant did not provide corroborative evidence within 20 days.

(iv) If the social services district worker or an appropriate designee determines good cause does not exist:

(*a*) the applicant or recipient will be so notified and afforded the opportunity to cooperate, withdraw the application for assistance, or have the case closed; and

(*b*) continued refusal to cooperate will result in sanctioning the applicant or recipient.

(g) Applicants/recipients must assign to the State and the social services district any rights that they or their dependent family members included in the application have under any health insurance policy or group health plan.

(h) An employed applicant/recipient who is eligible for MA without having to reduce excess income in accordance with section 360-4.8(c) of this Part must enroll in any group health insurance plan offered by the employer where no employee contribution is required. If an employee contribution is required, such an applicant/recipient must enroll only if the social services district decides to pay the premiums pursuant to section 360-7.5(g) of this Part. The MA eligibility of only the employed applicant/recipient will be affected by his/her failure to follow the requirements of this subdivision.

(i) Applicants/recipients must cooperate with the State and the social services district in identifying any third party who may be liable to pay for medical care. The applicant/recipient must provide information to assist the State and the social services district in pursuing any such third party. Exceptions maybe made if the applicant/ recipient has good cause for refusing to cooperate.

(j) *Citizenship and immigration status.*

(1) Definitions.

(i) Qualified immigrants. The term qualified immigrant includes the following categories of aliens:

(*a*) refugees admitted under section 207 of the Immigration and Nationality Act;

(*b*) asylees granted asylum under section 208 of the Immigration and Nationality Act;

(*c*) aliens whose deportation was withheld under section 241(b)(3) or 243(h) of the Immigration and Nationality Act;

(*d*) Cuban and Haitian entrants (as defined in section 501(e) of the Refugee Education Assistance Act of 1980), including all Cuban or Haitian parolees;

(*e*) aliens admitted into the United States as Amerasian immigrants as described in section 402(a)(2)(A)(v) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. Section 1612(a)(2)(A)(v));

(*f*) aliens lawfully admitted for permanent residence in the United States;

(*g*) aliens paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act for a period of at least one year, except Cuban or Haitian parolees;

(*h*) aliens granted conditional entry into the United States under section 203(a)(7) of the Immigration and Nationality Act;

(*i*) battered spouses and dependents meeting the criteria of section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. section 1641(c));

(*j*) aliens on active duty, other than active duty for training, in the United States Armed Forces or who are veterans who have received a discharge characterized as honorable and not on account of alienage, or the spouse, unremarried surviving spouse or unmarried dependent child of any such alien;

(*k*) Canadian born Native Americans;

(*l*) Native Americans belonging to a federally recognized tribe who were born outside the United States; and

(*m*) victims of a severe form of trafficking under section 107(b) of the Trafficking Victims Protection Act of 2000 (P.L. 106-386).

(ii) Permanently Residing Under Color of Law (PRUCOL). The term PRUCOL alien means an alien who is residing in the United States with the knowledge and permission or acquiescence of the Federal Immigration Agency and whose departure from the U.S. such agency does not contemplate enforcing. An alien will be considered as one whose departure the Federal Immigration Agency does not contemplate enforcing if, based on all the facts and circumstances in a particular case, it appears that the Federal Immigration Agency is otherwise permitting the alien to reside in the United States indefinitely or it is the policy or practice of such agency not to enforce the departure of aliens in a particular category. The following categories of aliens are PRUCOL:

(*a*) aliens paroled into the United States pursuant to section 212(d)(5) of the Immigration and Nationality Act for less than one year;

(*b*) aliens residing in the United States pursuant to an order of supervision;

(*c*) deportable aliens residing in the United States pursuant to an indefinite stay of deportation;

(*d*) aliens residing in the United States pursuant to an indefinite voluntary departure;

(*e*) aliens on whose behalf an immediate relative petition has been approved, and members of their families covered by the petition, who are entitled to voluntary departure and whose departure the Federal Immigration Agency does not contemplate enforcing;

(*f*) aliens who have filed an application for adjustment to lawful permanent resident status pursuant to section 245 of the Immigration and Nationality Act, whose application the Federal Immigration Agency has accepted as properly filed or has granted, and whose departure the Federal Immigration Agency does not contemplate enforcing;

(*g*) aliens granted stays of deportation by court order, statute or regulation or by individual determination of the Federal Immigration Agency pursuant to section 243 of the Immigration and Nationality Act, whose departure the

Federal Immigration Agency does not contemplate enforcing;

(*h*) aliens granted voluntary departure status pursuant to section 242(b) of the Immigration and Nationality Act whose departure the Federal Immigration Agency does not contemplate enforcing;

(*i*) aliens granted deferred action status;

(*j*) aliens who entered and have continuously resided in the United States since before January 1, 1972;

(*k*) aliens granted suspension of deportation pursuant to section 244 of the Immigration and Nationality Act whose departure the Federal Immigration Agency does not contemplate enforcing; and

(*l*) any other alien living in the United States with the knowledge and permission or acquiescence of the Federal Immigration Agency and whose departure such agency does not contemplate enforcing.

(iii) Emergency medical condition. The term emergency medical condition means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in:

(*a*) placing the person's health in serious jeopardy;

(*b*) serious impairment to bodily functions; or

(*c*) serious dysfunction of any bodily organ or part.

(2) Eligibility for medical assistance.

(i) The following persons, if otherwise eligible, are eligible for medical assistance:

(*a*) citizens, qualified immigrants and PRUCOL aliens;

(*b*) any alien who, on August 4, 1997, resided in a residential health care facility licensed by the department or in a residential facility licensed, operated or funded by the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities, and was in receipt of a medical assistance authorization based on a finding that such alien was PRUCOL; and

(*c*) any alien who, on August 4, 1997, was diagnosed as having Acquired Immune Deficiency Syndrome, as defined in subdivision one of section 2780 of the Public Health Law, and was in receipt of a medical assistance authorization based on a finding that such alien was PRUCOL.

(ii) Aliens other than those specified in subparagraph (i) of this paragraph, if otherwise eligible, are eligible for medical assistance only for care and services (not including care and services related to an organ transplant procedure) necessary for the treatment of an emergency medical condition. Nothing in this subparagraph shall be interpreted as affecting the eligibility for pre-natal care benefits for aliens otherwise eligible for such benefits.

(3) Other requirements.

(i) Except as provided in subparagraph (ii) of this paragraph, an applicant for, or recipient of, medical assistance must provide:

(*a*) evidence of his or her citizenship or status as a qualified immigrant or PRUCOL alien; and

(*b*) a social security number or documentation that such person has applied for a social security number.

(ii) The requirements of subparagraph (i) of this paragraph do not apply to the following persons:

(*a*) aliens seeking medical assistance for the treatment of an emergency medical condition; and

(*b*) pregnant women for the duration of the pregnancy and the 60-day period that begins on the last day of the pregnancy and including, but not exceeding, the last day of the month in which the 60-day postpartum period ends.

(k) *Applicants/recipients must be residents of New York State.* The applicant's/recipient's state of residence is responsible for providing medical assistance. Residency requirements are listed in this subdivision. Exceptions to the residency requirements are found in section 360-3.6 of this Part.

(1) Placements in institutions by other states.

(i) A person placed in a New York State institution by another state, or by a public or private organization contracting with the other state for such purposes, is a resident of the state arranging or making the placement.

(ii) A person placed in an out-of-state institution by an agency of New York State, or by a public or private organization contracting with New York State for such purposes, is a resident of New York State.

(iii) A competent individual who leaves an institution in which he/she has been placed by another state is a resident of the state where he/she is physically located.

(2) Persons receiving State supplementary payments. Any person receiving a State supplementary payment under the SSI program is a resident of New York State if the payment is made on behalf of New York State.

(3) Persons receiving title IV-E foster care maintenance payments. Any person receiving foster care maintenance payments under title IV-E of the Social Security Act and living in New York State is a resident of the State, regardless of which state is making the payments.

(4) Persons on whose behalf a title IV-E adoption assistance agreement is in effect. Any person on whose behalf an adoption assistance agreement is in effect under title IV-E of the Social Security Act is a resident of New York State if he/she is living in the State. This provision applies regardless of which state has the agreement in effect and regardless of whether adoption assistance payments are provided under the agreement or are being made pursuant to title IV-E.

(5) Persons age 21 and over.

(i) Any person not residing in an institution is a resident of New York State if he/she is living in the State and:

(*a*) intends to remain permanently or indefinitely; or

(*b*) is unable to state intent; or

(*c*) entered the State to take a job or to seek employment.

(ii) An institutionalized person who became unable to state intent before age 21 is a resident of New York State if:

(*a*) the parents reside in separate states, and the parent applying for MA on the person's behalf is a resident of the State or was a resident of the State at the time of placement; or

(*b*) parental rights have been terminated, a legal guardian has been appointed, and the legal guardian applying for MA on the person's behalf is a resident of the State or was a resident of the State at the time of placement; or

(*c*) the parent or legal guardian applying on the person's behalf is a New York State resident and the person is institutionalized in New York State; or

(*d*) the person has been abandoned by his/her parents, has no legal guardian, is institutionalized in New York State, and the party applying on the person's behalf is a State resident.

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(iii) Any person institutionalized in New York State who becomes unable to state intent at or after age 21 is a resident of New York State unless another state made the placement.

(iv) Any other person institutionalized in New York State is a State resident if he/she intends to remain in the State permanently or indefinitely.

(6) Persons under age 21.

(i) Any person who is married or emancipated from his/her parents and who is capable of stating intent, is a State resident if he/she is living in the State and intends to remain permanently or indefinitely.

(ii) Any noninstitutionalized person who is living in the State and whose MA eligibility is based on blindness or disability is a State resident.

(iii) Any other noninstitutionalized person is a State resident if:

(*a*) the person is living in the State on other than a temporary basis; or

(*b*) the person's caretaker, as defined by Federal and State law, is living in the State, is not receiving assistance from another state, and entered this State to take or seek employment.

(iv) Any institutionalized person who is neither married nor emancipated is a State resident if:

(*a*) the parent applying for MA on the person's behalf is a State resident or was a State resident at the time of placement; or

(*b*) parental rights have been terminated, a legal guardian has been appointed, and the legal guardian applying for MA on the person's behalf is a resident of the State or was a State resident at the time of placement; or

(*c*) the person has been abandoned by his/her parents, has no legal guardian, is institutionalized in New York State, and the party applying for MA on the person's behalf is a State resident.

(7) Prohibitions.

(i) A person cannot be denied MA because he/she has not resided in the State for a specified period.

(ii) A person cannot be denied MA because he/she does not reside in a permanent dwelling or does not have a fixed home or mailing address.

(iii) An institutionalized person who meets the residency requirements of this subdivision cannot be denied MA because he/she did not establish residence in the State before entering the institution.

(iv) A person cannot be denied MA or have MA terminated because of a temporary absence from the State if he/she intends to return when the purpose of the absence is accomplished, unless another state has determined the person to be a resident of that state for medical assistance purposes.

(8) Interstate agreements. Notwithstanding any inconsistent provisions of this subdivision, the department may enter into interstate agreements, consistent with Federal law and regulations, to set forth rules and procedures to resolve cases of disputed residence. The application of such rules and procedures cannot result in a person losing residence in both states.

(l) Applicants/recipients whose MA identification cards must contain a photo image, pursuant to the requirements of section 360-6.2(b) of this Part, must submit to a photo imaging process in connection with the creation of such identification cards.

(m) Applicants/recipients whose MA identification cards must contain a photo image, pursuant to the requirements of section 360-6.2(b) of this Part, other than applicants for or recipients of health care services under title 11-D of the Social Services Law, must establish their identities by means of finger images in accordance with the automated finger imaging system described in Part 384 of this Title.

Credits

Sec. filed: Jan. 17, 1989; Feb. 28, 1989; amds. filed: March 13, 1992; June 8, 1993; Sept. 30, 1997; Jan. 25, 1999; July 7, 2000 eff. July 26, 2000; March 16, 2007 eff. April 4, 2007.

Current with amendments included in the New York State Register, Volume XXXVII, Issue 39, dated September 30, 2015.

18 NYCRR 360-3.2, 18 NY ADC 360-3.2

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STATE OF NEW YORK
DEPARTMENT OF HEALTH

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Richard F. Daines, M.D.
Commissioner

Wendy E. Saunders
Chief of Staff

INFORMATIONAL LETTER

TRANSMITTAL: 08 OHIP/INF-4

DIVISION: Office of Health Insurance Programs

TO: Commissioners of Social Services

DATE: August 4, 2008

SUBJECT: Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility

SUGGESTED DISTRIBUTION:
Medical Assistance Directors
Temporary Assistance Directors
Staff Development Coordinators
Fair Hearing Staff

CONTACT PERSON:
Local District Liaison
Upstate: (518) 474-8887
NYC: (212) 417-4500

ATTACHMENTS: None

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc.Ref.
04 OMM/ADM-7 07 OHIP/INF-2 08 GIS MA/009		18 NYCRR §360-3.2(j)			

This Informational Letter (INF) clarifies Department policy regarding Medicaid eligibility for aliens who are permanently residing in the United States under color of law (PRUCOL). It affirms Department policy previously discussed in 04 OMM/ADM-7 and 07 OHIP/INF-2 regarding the PRUCOL status of aliens who have submitted an official application to a federal immigration agency for an immigration status or for other relief. It clarifies the PRUCOL status of aliens who petition a federal immigration agency by letter or other correspondence for relief for which no official application exists. Finally, it provides policy guidelines for local departments of social services to apply when the federal immigration agency fails to respond to such letters or other correspondence within a reasonable period of time after receipt.

The term "*federal immigration agency*" generally refers to the U.S. Department of Homeland Security (DHS), which was created in 2003 and inherited the functions previously performed by the former Immigration and Naturalization Service (INS). The DHS includes two separate entities: United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). The USCIS makes determinations on applications for various immigration statuses or other forms of relief. ICE apprehends and removes (deports) aliens who violate immigration laws but may also grant various forms of relief from removal. The term "federal immigration agency" can also refer to the Executive Office for Immigration Review (EOIR), which is within the U.S. Department of Justice. EOIR immigration judges decide removal cases that ICE decides to prosecute. In certain cases, EOIR also makes determinations on applications seeking relief from removal.

The term "*PRUCOL alien*" refers to an alien who is permanently residing in the United States with the *"knowledge and permission or acquiescence"* of the federal immigration agency and whose departure from the U.S. the agency does not contemplate enforcing. An alien is considered as one whose departure the federal immigration agency does not contemplate enforcing if it is the agency's policy or practice not to enforce the departure of aliens in a particular category, and the alien falls within that category; or, based on all the facts and circumstances of the case, it appears that the federal immigration agency is permitting the alien to reside in the U.S. indefinitely [18 NYCRR §360-3.2(j)(1)(ii)].

The federal immigration agency does not determine whether an alien is PRUCOL and does not grant PRUCOL status. This is because PRUCOL is not a federal immigration status. Rather, PRUCOL is a public benefits eligibility status. An alien whom the federal immigration agency would regard as illegal, and thus subject to removal, may still, under certain circumstances, be PRUCOL for purposes of eligibility for State Medicaid benefits and Family Health Plus (FHPlus).

The Medicaid eligibility worker must determine whether the alien is PRUCOL based upon the documentation that the alien, or the alien's representative, presents. An alien who establishes that he or she is PRUCOL is eligible for State Medicaid and FHPlus benefits if the alien meets the program's financial and other eligibility requirements.

Some aliens are PRUCOL because the federal immigration agency has granted them a particular immigration status or relief. These aliens are permanently residing in the U.S. with the "*knowledge and permission*" of the

federal agency. Examples include, but are not limited to, aliens paroled (admitted)into the U.S. for less than one year, aliens residing in the U.S. under an order of supervision, aliens granted an indefinite stay of deportation and aliens granted voluntary departure, deferred action or temporary protected status. A more complete list is included in the "Documentation Guide to Citizenship and Immigrant Eligibility for Health Coverage in New York State," pages 9-10, issued on March 26, 2008, as part of GIS 08 MA/009. Each of these aliens will have a form of documentation, as listed in this desk guide, issued by the federal immigration agency that shows that the agency has granted the alien a particular status or relief.

Other aliens may be PRUCOL because they have applied for or otherwise requested a particular immigration status or relief from removal and are awaiting the federal immigration agency's decision. The federal agency has received their application or request for relief and has not yet approved or denied the request. Under certain circumstances, and as further explained in this INF, these aliens are PRUCOL pending the federal agency's determination. Until the agency has adjudicated the application or request, these aliens are residing in the U.S. with the "*knowledge and acquiescence*" of the federal immigration agency.

Sections I and II of this INF, which follow, describe the Department's policy regarding the PRUCOL status of aliens who:

(1) have filed official applications with the federal immigration agency, typically USCIS or EOIR, for a particular immigration status or to obtain other relief; or

(2) have submitted letters or other correspondence to the federal immigration agency, typically ICE, for relief, such as deferred action, for which no official application form exists.

I. Applications filed on federal immigration agency forms

There are many types of immigration statuses or relief for which an alien may apply by submitting an official application to the federal immigration agency on its application forms. Examples include applications to USCIS for adjustment of status to that of a lawful permanent resident (Form I-485), asylum and withholding of removal (Form I-589), or temporary protected status (Form I-821). An alien in removal proceedings may also apply to EOIR for suspension of deportation (EOIR-40), cancellation of removal (EOIR-42A) and for certain other forms of relief. It is the Department's understanding that the federal immigration agency generally confirms its receipt of an official application by issuing an I-797 Notice of Action.

It is the Department's policy, as stated in 04 OMM/ADM-7 and 07 OHIP/INF-2, that the alien is PRUCOL during the period of time that the federal agency is determining whether to approve the application by granting the requested immigration status or other relief. Local departments of social services should continue to follow the procedures described in these directives when the alien, or the alien's representative, presents documentation that an application has been submitted to the federal immigration agency on the agency's forms. In particular, the district should attempt to verify whether the application remains pending or whether the federal immigration agency has adjudicated the application by granting or denying the requested status or relief.

There are a few ways that the district can verify the current status of an application. The alien may have an I-797 Notice of Action, employment authorization document or other federal immigration agency document that contains a 13 character receipt number. If so, the district worker can access the USCIS website at www.uscis.gov and follow the instructions for checking the case status online. This on-line search can confirm the accuracy of the information in the document as well as whether the agency has approved the request.

However, if the alien does not have a document with a receipt number, or the district worker does not have access to the USCIS website, the worker should send a Document Verification Request, Form G-845, (also known as a Systematic Alien Verification for Entitlements (SAVE) request) to USCIS. The worker should include copies of all documentation that the alien has submitted to, or received from, the federal immigration agency, and request that it verify the alien's current status. As a general rule, the district worker should also send a G-845 Document Verification Request when the documentation does not clearly indicate a particular immigration status, the alien has presented expired documents or the worker has reason to believe that the documentation may be questionable in any respect.

The Medicaid worker should find the alien to be PRUCOL if the alien's application remains pending with the federal immigration agency, not having yet been approved or denied, unless contradictory evidence indicates that the federal immigration agency is contemplating enforcing the alien's departure from the U.S.

The alien would be PRUCOL from the date that the federal immigration agency received the application. The I-797 Notice of Action indicates the date of receipt. If the alien does not have an I-797 Notice of Action, the date of receipt can be verified from a U.S. Postal Service return receipt, a "signature confirmation" or a "delivery confirmation."

If the federal immigration agency denies the application or otherwise indicates that it is not permitting the alien to remain in the U.S., the alien is *not* PRUCOL. The alien would be eligible only for Medicaid coverage for the treatment of an emergency medical condition, if financially and otherwise eligible.

II. Other letters or requests for relief from removal

There are various forms of relief from removal or deportation for which no formal application form or process exists. Two examples are deferred action and voluntary departure.

Deferred action is a form of relief that the Department of Homeland Security, in its discretion, may afford to an otherwise removable alien whom DHS has decided not to prosecute for removal before the immigration courts, whether for humanitarian or administrative reasons. According to DHS estimates, the vast majority of cases in which deferred action is granted involve medical grounds. The former INS had operating instructions for making deferred action determinations under which the INS would consider the age or physical condition affecting an alien's ability to travel as well as the presence of sympathetic factors. Although the INS withdrew these operating instructions in 1997, deferred action continues to be available, according to DHS.

Voluntary departure permits an otherwise removable alien to depart the U.S. at his or her own expense, thus avoiding the stigma of being subjected to a removal proceeding. It is available both during and prior to removal proceedings. An alien may request voluntary departure to return to his or her home country or another country, if he or she can secure entry there.

Because no formal application process exists for these types of relief, the federal immigration agency might not timely respond to, or even acknowledge receipt of, the alien's letter requesting relief. Several months may pass before the agency responds to the informal request, if it responds at all. It is also more difficult for local departments of social services to verify the current status of the federal immigration agency's review of a request for deferred action or other relief made by letter rather than the current status of a formal application filed on official USCIS or EOIR application forms.

However, an alien who has made a letter request for deferred action or other relief from removal may still be PRUCOL under certain circumstances.

Sections II, A through C of this INF, which follow, present guidelines for local departments of social services to apply when determining the PRUCOL status of an otherwise removable alien who has requested, by informal letter, the federal immigration agency to grant relief from removal including, but not limited to, deferred action, voluntary departure or any other relief that may reasonably be construed as humanitarian relief.

A. Initial contact with the federal immigration agency

The letter or other correspondence to the federal immigration agency must clearly state the type of relief sought, which must be a recognized form of relief from removal or a recognized immigration status. The letter should summarize pertinent facts and circumstances of the alien's case that would support the granting of the relief. For example, if the alien is requesting deferred action or other humanitarian relief from removal based on the alien's medical condition, this information would include such factors as the following: date of birth and nationality; address in the U.S.; family ties in the U.S., if any; immigration history; criminal history, if any; and, in particular, the alien's current medical condition with a rationale for why the federal immigration agency should grant deferred action relief based on the alien's medical condition. If the alien is requesting voluntary departure, the alien must be capable of departing the U.S. if the federal immigration agency grants voluntary departure under the applicable federal regulations at 8 C.F.R. § 240.25 or § 1240.26. If the alien is represented by an attorney, the attorney should include an executed copy of the "Notice of Appearance as Attorney or Representative."

The alien, or the alien's representative, must present documentation sufficient to show that the letter was mailed to, and received by, the federal immigration agency. There is more than one way to establish mailing and receipt. A letter sent via the U.S. Postal Service by certified mail proves that the letter was mailed on a certain date. A certified letter, return receipt requested, is proof not only of mailing but also of receipt. A U.S. Postal Service "signature confirmation" or "delivery confirmation" also verifies receipt. In addition, a letter that is properly addressed, stamped and mailed by regular first-class mail is presumed to have been received, although this presumption can be rebutted.

B. Affording the federal immigration agency a "reasonable period of time" to adjudicate the request for relief

The alien is not considered PRUCOL immediately upon mailing of the initial letter requesting relief. Before the alien may be considered PRUCOL, the federal immigration agency must be afforded a "reasonable period of time" to consider and act upon the request. This is consistent with 04 OMM/ADM-7, in which the Department stated that an alien may be PRUCOL when the federal immigration agency, despite having been notified of the alien's presence in the U.S., fails after "*a reasonable period of time*" to respond to the alien's letter requesting relief or fails to take any action to enforce the alien's departure from the U.S.

Under federal law, the federal immigration agency is required to conclude matters presented to it "within a reasonable time" (5 U.S.C. § 555). There is no hard and fast rule that defines a "reasonable time." What is "reasonable" depends on all the facts and circumstances of a case. However, local departments of social services may consider that a "reasonable period of time" is *six months*. This six-month period is measured from the date that the alien, or the alien's representative, mailed to the federal immigration agency the initial letter requesting relief.

C. Subsequent contacts with the federal immigration agency within the six-month period

A single letter or other piece of correspondence requesting relief from the federal immigration agency does not establish PRUCOL status. (An exception applies to applications to USCIS or EOIR that are filed on official application forms, as previously discussed.) It is reasonable to expect that any alien who has submitted a good faith request for relief to a federal immigration agency would take steps to follow-up on the status of the original request. The same principle applies here. The Medicaid applicant, or the applicant's representative, must make reasonable efforts to follow-up with the federal immigration agency on the status of the request for deferred action or other relief. These efforts to monitor the status of the initial request must occur during the six-month period that begins with the date that the alien, or the alien's representative, mailed to the federal immigration agency the initial letter requesting relief. If the applicant, or the applicant's representative, fails to make *any* effort to follow-up on the request within this period, this indicates that the request was not a "good faith" effort to seek relief.

This policy is consistent with court cases that have found otherwise removable aliens to be PRUCOL when the federal immigration agency was made aware on numerous occasions of the alien's presence in the U.S. but neither responded to the alien's letters nor took any action to enforce the alien's departure.

Applying these guidelines, local departments of social services should determine that the alien is PRUCOL when, based on all the facts and circumstances of the particular case, it appears that the federal immigration agency is acquiescing, at least for now, to the alien's presence in the U.S.

Three examples of circumstances in which the local department of social services should conclude that federal acquiescence to the alien's presence exists, and the alien is thus PRUCOL, are illustrated below:

1. The federal immigration agency does not respond to the alien's initial or subsequent letters within six months after mailing and made no effort within that six-month period to enforce the alien's departure from the U.S.

In this example, the alien would be PRUCOL effective on the date that is six months *after* the alien, or the alien's representative, mailed the initial letter requesting relief provided that the alien, or the alien's representative, made reasonable and good faith efforts to follow-up on the status of the initial request during this six-month period. An exception applies if other evidence indicates that the federal immigration agency contemplates enforcing the alien's departure from the U.S.

2. The federal immigration agency responded to the alien's initial letter within six months after mailing by referring the matter to another entity and the entity to which the letter was referred did not respond within that same initial six-month period.

For example, ICE responded to the alien's initial letter within six months of the date it was mailed by referring the matter to another wing of the Department of Homeland Security, namely USCIS, and USCIS did not respond within that same initial six-month period.

In this example, the alien would be PRUCOL effective on the date that is six months *after* the alien, or the alien's representative, mailed the initial request that was then referred to another entity. This presumes, however, that the alien, or the alien's representative, made reasonable and good faith efforts to follow-up on the status of the request for relief during this six month period. Again, an exception applies if other evidence indicates that the federal immigration agency is contemplating enforcing the alien's departure from the U.S.

3. The federal immigration agency responds to the alien's initial letter within six months of mailing and the agency's response can be reasonably interpreted as indicating that the agency does not contemplate enforcing the alien's departure from the U.S. at this time.

In this example, the federal immigration agency *has* responded within six months after the alien, or the alien's representative, mailed the initial letter. If the agency had granted the alien's request for relief, the alien would be PRUCOL effective on the date of the agency's response.

However, the alien may still be PRUCOL if the agency's response, although not granting the requested relief, also does not show that the agency intends to enforce the alien's departure from the U.S. For example, the federal immigration agency may have responded that the alien is not in any form of formal expulsion proceedings or is not under a final order of removal and that the agency is returning the request for deferred action or other relief without adjudicating the request; that is, without determining whether to grant or deny the requested relief. In that example, the alien would be PRUCOL effective on the date of the federal immigration agency's response.

NOTE: As a general rule, the Medicaid worker should determine that an alien is ***not*** PRUCOL when the federal immigration agency denies the alien's request for relief from removal or indicates that it is not permitting or acquiescing to the alien's continued presence in the U.S. or, from all the facts and circumstances of the particular case, it appears that the agency is contemplating enforcing the alien's departure from the U.S.

For example, the federal agency might respond to an alien's letter seeking deferred action or other relief by stating that the alien has been placed in formal removal proceedings or is under a final order of removal. In that case, the alien is ***not*** PRUCOL and is eligible ***only*** for Medicaid coverage for the treatment of an emergency medical condition, if financially and otherwise eligible.

Also as a general rule, Medicaid applicants are responsible for providing information and documentation necessary to establish their eligibility for Medicaid. This obligation includes providing information and documentation necessary to establish eligibility for Medicaid as a PRUCOL alien. Among other factors, an applicant who asserts that the federal immigration agency has a policy or practice of not enforcing the departure of aliens in a particular category, and that he or she falls within that category, is responsible for establishing that the federal immigration agency has such a policy or practice.

Questions regarding this INF and the Medicaid eligibility of aliens in general may be directed to the Office of Health Insurance Programs at (518) 474-8887.

Deborah Bachrach

Deborah Bachrach
Deputy Commissioner

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
New York District Office
26 Federal Plaza, New York, NY 10278

U.S. Citizenship and Immigration Services

August 10, 2015

[redacted]
New York Lawyers for the Public Interest
151 W 30th Street Floor 11
New York, NY 10001

Re: [redacted]

Dear [redacted]

Thank you for your request for deferred action, an exercise of prosecutorial discretion by USCIS. We have carefully considered your request and we are not able to extend deferred action to you at this time.

Denial of a request for deferred action does not necessarily mean that USCIS intends affirmatively to pursue your removal.

If you require additional assistance, forms or filing instructions, we invite you to visit our website at www.uscis.gov or contact USCIS National Customer Service Center at 1-800-375-5283.

This determination may not be appealed. However, if your circumstances change in a way that you believe materially affects the merits of your request for deferred action, you may bring those circumstances to our attention in a new request.

Sincerely,

Phyllis A. Coven
District Director
New York District

26 Federal Plaza
New York, NY 10278
U.S. Department of Homeland Security

U.S. Citizenship
and Immigration
Services

January 20, 2015

[redacted]
New York Lawyers
For The Public Interest, Inc.
151 West 30th Street, 11th Floor
New York, NY 10001-4017

Re: Deferred Action Request: [redacted]

Dear [redacted]

On January 12, 2015, you submitted a request for Deferred Action. Your request has been accepted and will be reviewed by USCIS. You should receive a decision or notice of other action within 60 days of the date of this letter.

This notice does not constitute a grant of deferred action nor does it establish employment authorization to be used in place of an Employment Authorization Document. This notice does not entitle your client to be admitted or paroled back into the United States. Should your client decide to travel outside the country, any departure from the United States, with or without permission from the government, may affect your client's ability to return to the country.

If you require additional assistance, forms or filing instructions, we invite you to visit our website at www.uscis.gov or contact USCIS National Customer Service Center at 1-800-375-5283.

Sincerely,

Phyllis A. Coven
District Director
New York District

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-797C, Notice of Action

THIS NOTICE DOES NOT GRANT ANY IMMIGRATION STATUS OR BENEFIT.

NOTICE TYPE		NOTICE DATE
Receipt		May 28, 2014
CASE TYPE		USCIS ALIEN NUMBER
I-130, Petition for Alien Relative		
RECEIPT NUMBER	RECEIVED DATE	PAGE
[redacted]	May 27, 2014	1 of 1
PRIORITY DATE	PREFERENCE CLASSIFICATION	DATE OF BIRTH
May 27, 2014	203 A4 INA SIBLING OF USC	[redacted]

[redacted]
151 W 30TH STREET FL 11
NEW YORK, NY 10001

APPLICANT/PETITIONER NAME AND MAILING ADDRESS

PAYMENT INFORMATION:

Application/Petition Fee:	$420.00
Biometrics Fee:	$0.00
Total Amount Received:	$420.00
Total Balance Due:	$0.00

The I-130, Petition for Alien Relative has been received by our office for the following beneficiaries and is in process:

Name	Date of Birth	Country of Birth	Class (If Applicable)
[redacted]	[redacted]	[redacted]	

Please verify your personal information listed above and immediately notify the USCIS National Customer Service Center at the phone number listed below if there are any changes.

Please note that if a priority date is printed on this notice, the priority does not reflect earlier retained priority dates.

If you have questions about possible immigration benefits and services, filing information, or USCIS forms, please call the USCIS National Customer Service Center (NCSC) at **1-800-375-5283**. If you are hearing impaired, please call the NCSC TDD at **1-800-767-1833**. Please also refer to the USCIS website: www.uscis.gov.

If you have any questions or comments regarding this notice or the status of your case, please contact our customer service number.

You will be notified separately about any other case you may have filed.

USCIS Office Address:

USCIS
California Service Center
P.O. Box 30111
Laguna Niguel, CA 92607-0111

USCIS Customer Service Number:

(800)375-5283
ATTORNEY COPY

8 U.S.C.A. § 1182

§ 1182. Inadmissible aliens

Effective: March 7, 2013

Currentness

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds

(A) In general

Any alien--

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)--

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

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(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(C) Exception from immunization requirement for adopted children 10 years of age or younger

Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in subparagraph (F) or (G) of section 1101(b)(1) of this title; and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of Title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have

known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in--

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who--

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of--

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization--

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a

terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) “Representative” defined

As used in this paragraph, the term “representative” includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) “Terrorist organization” defined

As used in this section, the term “terrorist organization” means an organization--

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that--

(I) the membership or affiliation terminated at least--

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of Title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of--

(I) any act of torture, as defined in section 2340 of Title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18, is inadmissible.

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who--

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule

For purposes of clause (i)(I), an alien described in this clause is an alien who--

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) Professional athletes

(I) In general

A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) “Professional athlete” defined

For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by--

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) Long delayed adjustment applicants

A certification made under clause (i) with respect to an individual whose petition is covered by section 1154(j) of this title shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) Unqualified physicians

An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) Uncertified foreign health-care workers

Subject to subsection (r) of this section, any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that--

(i) the alien's education, training, license, and experience--

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) Application of grounds

The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(b) of this title.

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children

Clause (i) shall not apply to an alien who demonstrates that--

(I) the alien is a VAWA self-petitioner;

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) Failure to attend removal proceeding

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

(ii) Falsely claiming citizenship

(I) In general

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 chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

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(II) Exception

In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

(D) Stowaways

Any alien who is a stowaway is inadmissible.

(E) Smugglers

(i) In general

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

(F) Subject of civil penalty

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(12) of this section.

(G) Student visa abusers

An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission--

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(B) Nonimmigrants

(i) In general

Any nonimmigrant who--

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam and Northern Mariana Islands visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (l) of this section.

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

(8) Ineligible for citizenship

(A) In general

Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) Draft evaders

Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who--

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years

of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who--

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e)[1] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees

No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered women and children

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) Victims of a severe form of trafficking in persons

Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 7102 of Title 22) was at least one central reason for the alien's unlawful presence in the United States.

(iv) Tolling for good cause

In the case of an alien who--

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who--

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

(10) Miscellaneous

(A) Practicing polygamists

Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) Guardian required to accompany helpless alien

Any alien--

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 1222(c) of this title, and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i),

is inadmissible.

(C) International child abduction

(i) In general

Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

(ii) Aliens supporting abductors and relatives of abductors

Any alien who--

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) Exceptions

Clauses (i) and (ii) shall not apply--

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) Unlawful voters

(i) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or

regulation is inadmissible.

(ii) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former citizens who renounced citizenship to avoid taxation

Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that--

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment[2] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

(c) Repealed. Pub.L. 104-208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597

(d) Temporary admission of nonimmigrants

(1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(S) of this title, if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 1101(a)(15)(S) of this title for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 1101(a)(15)(S) of this title.

(2) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(3)(A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may determine in such Secretary's sole unreviewable discretion that subsection (a)(3)(B) of this section shall not apply with respect to an alien within the scope of that subsection or that subsection (a)(3)(B)(vi)(III) of this section shall not apply to a group within the scope of that subsection, except that no such waiver may be extended to an alien who is within the scope of subsection (a)(3)(B)(i)(II) of this section, no such waiver may be extended to an alien who is a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization that is described in subclause (I) or (II) of subsection (a)(3)(B)(vi) of this section, and no such waiver may be extended to a group that has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians. Such a determination shall neither prejudice the ability of the United States Government to commence criminal or civil proceedings involving a beneficiary of such a determination or any other person, nor create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of Title 28, no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in section 1252(a)(2)(D) of this title. The Secretary of State may not exercise the discretion provided in this clause with respect to an alien at any time during which the alien is the subject of pending removal proceedings under section 1229a of this title.

(ii) Not later than 90 days after the end of each fiscal year, the Secretary of State and the Secretary of Homeland Security shall each provide to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on International Relations of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Homeland Security of the House of Representatives a report on the aliens to whom such Secretary has applied clause (i). Within one week of applying clause (i) to a group, the Secretary of State or the Secretary of Homeland Security shall provide a report to such Committees.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 1223(c) of this title.

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

(6) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(7) The provisions of subsection (a) of this section (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso.[3] Any alien described in this paragraph, who is denied admission to the United States, shall be immediately removed in the manner provided by section 1231(c) of this title.

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

(9), (10) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F) of this section--

(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title, and

(B) in the case of an alien seeking admission or adjustment of status under section 1151(b)(2)(A) of this title or under section 1153(a) of this title,

if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.

(13)(A) The Secretary of Homeland Security shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(T) of this title, except that the ground for inadmissibility described in subsection (a)(4) of this section shall not apply with respect to such a nonimmigrant.

(B) In addition to any other waiver that may be available under this section, in the case of a nonimmigrant described in section 1101(a)(15)(T) of this title, if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's[4] discretion, may waive the application of--

(i) subsection (a)(1) of this section; and

(ii) any other provision of subsection (a) of this section (excluding paragraphs (3), (4), (10)(C), and (10(E))[5] if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 1101(a)(15)(T)(i)(I) of this title.

(14) The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(U) of this title. The Secretary of Homeland Security, in the Attorney General's[4] discretion, may waive the application of subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(U) of this title, if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

(e) Educational visitor status; foreign residence requirement; waiver

No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 1101(a)(15)(J) of this title was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 1184(l) of this title: *And provided further*, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

(g) Bond and conditions for admission of alien inadmissible on health-related grounds

The Attorney General may waive the application of--

(1) subsection (a)(1)(A)(i) in the case of any alien who--

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; or

(C) is a VAWA self-petitioner,

in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe;

(2) subsection (a)(1)(A)(ii) of this section in the case of any alien--

(A) who receives vaccination against the vaccine-preventable disease or diseases for which the alien has failed to present documentation of previous vaccination,

(B) for whom a civil surgeon, medical officer, or panel physician (as those terms are defined by section 34.2 of title 42 of the Code of Federal Regulations) certifies, according to such regulations as the Secretary of Health and Human Services may prescribe, that such vaccination would not be medically appropriate, or

(C) under such circumstances as the Attorney General provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions; or

(3) subsection (a)(1)(A)(iii) of this section in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(i) Admission of immigrant inadmissible for fraud or willful misrepresentation of material fact

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

(j) Limitation on immigration of foreign medical graduates

(1) The additional requirements referred to in section 1101(a)(15)(J) of this title for an alien who is coming to the United States under a program under which he will receive graduate medical education or training are as follows:

(A) A school of medicine or of one of the other health professions, which is accredited by a body or bodies approved for the purpose by the Secretary of Education, has agreed in writing to provide the graduate medical education or training under the program for which the alien is coming to the United States or to assume responsibility for arranging for the provision thereof by an appropriate public or nonprofit private institution or agency, except that, in the case of such an agreement by a school of medicine, any one or more of its affiliated hospitals which are to participate in the provision of the graduate medical education or training must join in the agreement.

(B) Before making such agreement, the accredited school has been satisfied that the alien (i) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States); or (ii)(I) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), (II) has competency in oral and written English, (III) will be able to adapt to the educational and cultural environment in which he will be receiving his education or training, and (IV) has adequate prior education and training to participate satisfactorily in the program for which he is coming to the United States. For the purposes of this subparagraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) The alien has made a commitment to return to the country of his nationality or last residence upon completion of the education or training for which he is coming to the United States, and the government of the country of his nationality or last residence has provided a written assurance, satisfactory to the Secretary of Health and Human Services, that there is a need in that country for persons with the skills the alien will acquire in such education or training.

(D) The duration of the alien's participation in the program of graduate medical education or training for which the alien is coming to the United States is limited to the time typically required to complete such program, as determined by the

Director of the United States Information Agency at the time of the alien's admission into the United States, based on criteria which are established in coordination with the Secretary of Health and Human Services and which take into consideration the published requirements of the medical specialty board which administers such education or training program; except that--

(i) such duration is further limited to seven years unless the alien has demonstrated to the satisfaction of the Director that the country to which the alien will return at the end of such specialty education or training has an exceptional need for an individual trained in such specialty, and

(ii) the alien may, once and not later than two years after the date the alien is admitted to the United States as an exchange visitor or acquires exchange visitor status, change the alien's designated program of graduate medical education or training if the Director approves the change and if a commitment and written assurance with respect to the alien's new program have been provided in accordance with subparagraph (C).

(E) The alien furnishes the Attorney General each year with an affidavit (in such form as the Attorney General shall prescribe) that attests that the alien (i) is in good standing in the program of graduate medical education or training in which the alien is participating, and (ii) will return to the country of his nationality or last residence upon completion of the education or training for which he came to the United States.

(2) An alien who is a graduate of a medical school and who is coming to the United States to perform services as a member of the medical profession may not be admitted as a nonimmigrant under section 1101(a)(15)(H)(i)(b) of this title unless--

(A) the alien is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency, or

(B)(i) the alien has passed the Federation licensing examination (administered by the Federation of State Medical Boards of the United States) or an equivalent examination as determined by the Secretary of Health and Human Services, and

(ii) (I) has competency in oral and written English or (II) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States).

(3) Omitted

(k) Attorney General's discretion to admit otherwise inadmissible aliens who possess immigrant visas

Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a) of this section, who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

(l) Guam and Northern Mariana Islands visa waiver program

(1) In general

The requirement of subsection (a)(7)(B)(i) may be waived by the Secretary of Homeland Security, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay in Guam or the Commonwealth of the Northern Mariana Islands for a period not to exceed 45 days, if the Secretary of Homeland Security, after consultation with the Secretary of the Interior, the Secretary of State, the Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands, determines that--

(A) an adequate arrival and departure control system has been developed in Guam and the Commonwealth of the Northern Mariana Islands; and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) Alien waiver of rights

An alien may not be provided a waiver under this subsection unless the alien has waived any right--

(A) to review or appeal under this chapter an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam or the Commonwealth of the Northern Mariana Islands; or

(B) to contest, other than on the basis of an application for withholding of removal under section 1231(b)(3) of this title or under the Convention Against Torture, or an application for asylum if permitted under section 1158 of this title, any action for removal of the alien.

(3) Regulations

All necessary regulations to implement this subsection shall be promulgated by the Secretary of Homeland Security, in

consultation with the Secretary of the Interior and the Secretary of State, on or before the 180th day after May 8, 2008. The promulgation of such regulations shall be considered a foreign affairs function for purposes of section 553(a) of Title 5. At a minimum, such regulations should include, but not necessarily be limited to--

(A) a listing of all countries whose nationals may obtain the waiver also provided by this subsection, except that such regulations shall provide for a listing of any country from which the Commonwealth has received a significant economic benefit from the number of visitors for pleasure within the one-year period preceding May 8, 2008, unless the Secretary of Homeland Security determines that such country's inclusion on such list would represent a threat to the welfare, safety, or security of the United States or its territories; and

(B) any bonding requirements for nationals of some or all of those countries who may present an increased risk of overstays or other potential problems, if different from such requirements otherwise provided by law for nonimmigrant visitors.

(4) Factors

In determining whether to grant or continue providing the waiver under this subsection to nationals of any country, the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, shall consider all factors that the Secretary deems relevant, including electronic travel authorizations, procedures for reporting lost and stolen passports, repatriation of aliens, rates of refusal for nonimmigrant visitor visas, overstays, exit systems, and information exchange.

(5) Suspension

The Secretary of Homeland Security shall monitor the admission of nonimmigrant visitors to Guam and the Commonwealth of the Northern Mariana Islands under this subsection. If the Secretary determines that such admissions have resulted in an unacceptable number of visitors from a country remaining unlawfully in Guam or the Commonwealth of the Northern Mariana Islands, unlawfully obtaining entry to other parts of the United States, or seeking withholding of removal or asylum, or that visitors from a country pose a risk to law enforcement or security interests of Guam or the Commonwealth of the Northern Mariana Islands or of the United States (including the interest in the enforcement of the immigration laws of the United States), the Secretary shall suspend the admission of nationals of such country under this subsection. The Secretary of Homeland Security may in the Secretary's discretion suspend the Guam and Northern Mariana Islands visa waiver program at any time, on a country-by-country basis, for other good cause.

(6) Addition of countries

The Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands may request the Secretary of the Interior and the Secretary of Homeland Security to add a particular country to the list of countries whose nationals may obtain the waiver provided by this subsection, and the Secretary of Homeland Security may grant such request after consultation with the Secretary of the Interior and the Secretary of State, and may promulgate regulations with respect to the inclusion of that country and any special requirements the Secretary of Homeland Security, in the Secretary's sole discretion, may impose prior to allowing nationals of that country to obtain the waiver provided by this subsection.

(m) Requirements for admission of nonimmigrant nurses

(1) The qualifications referred to in section 1101(a)(15)(H)(i)(c) of this title, with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien--

(A) has obtained a full and unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States;

(B) has passed an appropriate examination (recognized in regulations promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

(2)(A) The attestation referred to in section 1101(a)(15)(H)(i)(c) of this title, with respect to a facility for which an alien will perform services, is an attestation as to the following:

(i) The facility meets all the requirements of paragraph (6).

(ii) The employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.

(iii) The alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(iv) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.

(v) There is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a

registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(vi) At the time of the filing of the petition for registered nurses under section 1101(a)(15)(H)(i)(c) of this title, notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to the registered nurses employed at the facility through posting in conspicuous locations.

(vii) The facility will not, at any time, employ a number of aliens issued visas or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(c) of this title that exceeds 33 percent of the total number of registered nurses employed by the facility.

(viii) The facility will not, with respect to any alien issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(c) of this title--

(I) authorize the alien to perform nursing services at any worksite other than a worksite controlled by the facility; or

(II) transfer the place of employment of the alien from one worksite to another. Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before November 12, 1999. A copy of the attestation shall be provided, within 30 days of the date of filing, to registered nurses employed at the facility on the date of filing.

(B) For purposes of subparagraph (A)(iv), each of the following shall be considered a significant step reasonably designed to recruit and retain registered nurses:

(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses.

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The steps described in this subparagraph shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of subparagraph (A)(iv). Nothing in this subparagraph shall require a facility to take more than one step if the facility can demonstrate that taking a second step is not reasonable.

(C) Subject to subparagraph (E), an attestation under subparagraph (A)--

(i) shall expire on the date that is the later of--

(I) the end of the one-year period beginning on the date of its filing with the Secretary of Labor; or

(II) the end of the period of admission under section 1101(a)(15)(H)(i)(c) of this title of the last alien with respect to whose admission it was applied (in accordance with clause (ii)); and

(ii) shall apply to petitions filed during the one-year period beginning on the date of its filing with the Secretary of Labor if the facility states in each such petition that it continues to comply with the conditions in the attestation.

(D) A facility may meet the requirements under this paragraph with respect to more than one registered nurse in a single petition.

(E)(i) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying facilities which have filed petitions for nonimmigrants under section 1101(a)(15)(H)(i)(c)of this title and, for each such facility, a copy of the facility's attestation under subparagraph (A) (and accompanying documentation) and each such petition filed by the facility.

(ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. Subject to the time limits established under this clause, this subparagraph shall apply regardless of whether an attestation is expired or unexpired at the time a complaint is filed.

(iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for

a hearing on the complaint within 60 days of the date of the determination.

(iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per nurse per violation, with the total penalty not to exceed $10,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least one year for nurses to be employed by the facility.

(v) In addition to the sanctions provided for under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

(F)(i) The Secretary of Labor shall impose on a facility filing an attestation under subparagraph (A) a filing fee, in an amount prescribed by the Secretary based on the costs of carrying out the Secretary's duties under this subsection, but not exceeding $250.

(ii) Fees collected under this subparagraph shall be deposited in a fund established for this purpose in the Treasury of the United States.

(iii) The collected fees in the fund shall be available to the Secretary of Labor, to the extent and in such amounts as may be provided in appropriations Acts, to cover the costs described in clause (i), in addition to any other funds that are available to the Secretary to cover such costs.

(3) The period of admission of an alien under section 1101(a)(15)(H)(i)(c) of this title shall be 3 years.

(4) The total number of nonimmigrant visas issued pursuant to petitions granted under section 1101(a)(15)(H)(i)(c) of this title in each fiscal year shall not exceed 500. The number of such visas issued for employment in each State in each fiscal year shall not exceed the following:

(A) For States with populations of less than 9,000,000, based upon the 1990 decennial census of population, 25 visas.

(B) For States with populations of 9,000,000 or more, based upon the 1990 decennial census of population, 50 visas.

(C) If the total number of visas available under this paragraph for a fiscal year quarter exceeds the number of qualified nonimmigrants who may be issued such visas during those quarters, the visas made available under this paragraph shall be issued without regard to the numerical limitation under subparagraph (A) or (B) of this paragraph during the last fiscal year quarter.

(5) A facility that has filed a petition under section 1101(a)(15)(H)(i)(c) of this title to employ a nonimmigrant to perform nursing services for the facility--

(A) shall provide the nonimmigrant a wage rate and working conditions commensurate with those of nurses similarly employed by the facility;

(B) shall require the nonimmigrant to work hours commensurate with those of nurses similarly employed by the facility; and

(C) shall not interfere with the right of the nonimmigrant to join or organize a union.

(6) For purposes of this subsection and section 1101(a)(15)(H)(i)(c) of this title, the term "facility" means a subsection (d) hospital (as defined in section 1886(d)(1)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(1)(B))) that meets the following requirements:

(A) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 254e of Title 42).

(B) Based on its settled cost report filed under title XVIII of the Social Security Act [42 U.S.C.A. § 1395 et seq.] for its cost reporting period beginning during fiscal year 1994--

(i) the hospital has not less than 190 licensed acute care beds;

(ii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of such title [42 U.S.C.A. § 1395c et seq.] is not less than 35 percent of the total number of such hospital's acute care inpatient days for such period; and

(iii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], is not less than 28 percent of the total number of such hospital's acute care inpatient days for such period.

(7) For purposes of paragraph (2)(A)(v), the term “lay off”, with respect to a worker--

(A) means to cause the worker’s loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(B) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

Nothing in this paragraph is intended to limit an employee’s or an employer’s rights under a collective bargaining agreement or other employment contract.

(n) Labor condition application

(1) No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the application--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

(D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(E)(i) In the case of an application described in clause (ii), the employer did not displace and will not displace a United States worker (as defined in paragraph (4)) employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.

(ii) An application described in this clause is an application filed on or after the date final regulations are first promulgated to carry out this subparagraph, and before[6] by an H-1B-dependent employer (as defined in paragraph (3)) or by an employer that has been found, on or after October 21, 1998, under paragraph (2)(C) or (5) to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application. An application is not described in this clause if the only H-1B nonimmigrants sought in the application are exempt H-1B nonimmigrants.

(F) In the case of an application described in subparagraph (E)(ii), the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where--

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer;

unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other

employer.

(G)(i) In the case of an application described in subparagraph (E)(ii), subject to clause (ii), the employer, prior to filing the application--

(I) has taken good faith steps to recruit, in the United States using procedures that meet industry wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and

(II) has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.

(ii) The conditions described in clause (i) shall not apply to an application filed with respect to the employment of an H-1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 1153(b)(1) of this title.

The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). The Secretary shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of intended employment, and date of need. The Secretary shall make such list available for public examination in Washington, D.C. The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 1101(a)(15)(H)(i)(b) of this title within 7 days of the date of the filing of the application. The application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer described in such subparagraph displaces a United States worker as described in such subparagraph. Nothing in subparagraph (G) shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.

(2)(A) Subject to paragraph (5)(A), the Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under such process, the Secretary shall provide, within 30 days after the date such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of Title 5, within 60 days after the

date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary may consolidate the hearings under this subparagraph on such complaints.

(C)(i) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), (1)(E), or (1)(F), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(G)(i)(I), or a misrepresentation of material fact in an application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Attorney General shall devise a process under which an H-1B nonimmigrant who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi)(I) It is a violation of this clause for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 1184(c)(1) of this title, for which a fee is imposed under section 1184(c)(9) of this title, to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien.

(III) If the Secretary finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a full-time employee on the petition filed under section 1184(c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a part-time employee on the petition filed under section 1184(c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on such petition consistent with the rate of pay identified on such petition.

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(III) In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection, and a petition under section 1184(c)(1) of this title, with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).

(IV) This clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to an H-1B nonimmigrant an established salary practice of the employer, under which the employer pays to H-1B nonimmigrants and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this chapter to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) If an H-1B-dependent employer places a nonexempt H-1B nonimmigrant with another employer as provided under

paragraph (1)(F) and the other employer has displaced or displaces a United States worker employed by such other employer during the period described in such paragraph, such displacement shall be considered for purposes of this paragraph a failure, by the placing employer, to meet a condition specified in an application submitted under paragraph (1); except that the Attorney General may impose a sanction described in subclause (II) of subparagraph (C)(i), (C)(ii), or (C)(iii) only if the Secretary of Labor found that such placing employer--

(i) knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer; or

(ii) has been subject to a sanction under this subparagraph based upon a previous placement of an H-1B nonimmigrant with the same other employer.

(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date (on or after October 21, 1998) on which the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) (or has been found under paragraph (5) to have committed a willful failure to meet the condition of paragraph (1)(G)(i)(II)) or to have made a willful misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether or not the employer is an H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(G)(i) The Secretary of Labor may initiate an investigation of any employer that employs nonimmigrants described in section 1101(a)(15)(H)(i)(b) of this title if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this subsection. In the case of an investigation under this clause, the Secretary of Labor (or the acting Secretary in the case of the absence of[7] disability of the Secretary of Labor) shall personally certify that reasonable cause exists and shall approve commencement of the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer in complying with this subsection.

(ii) If the Secretary of Labor receives specific credible information from a source who is likely to have knowledge of an employer's practices or employment conditions, or an employer's compliance with the employer's labor condition application under paragraph (1), and whose identity is known to the Secretary of Labor, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor may conduct an investigation into the alleged failure or failures. The Secretary of Labor may withhold the identity of the source from the employer, and the source's identity shall not be subject to disclosure under section 552 of Title 5.

(iii) The Secretary of Labor shall establish a procedure for any person desiring to provide to the Secretary of Labor information described in clause (ii) that may be used, in whole or in part, as the basis for the commencement of an investigation described in such clause, to provide the information in writing on a form developed and provided by the Secretary of Labor and completed by or on behalf of the person. The person may not be an officer or employee of the Department of Labor, unless the information satisfies the requirement of clause (iv)(II) (although an officer or employee of the Department of Labor may complete the form on behalf of the person).

(iv) Any investigation initiated or approved by the Secretary of Labor under clause (ii) shall be based on information that satisfies the requirements of such clause and that

(I) originates from a source other than an officer or employee of the Department of Labor; or

(II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this chapter of[7] any other Act.

(v) The receipt by the Secretary of Labor of information submitted by an employer to the Attorney General or the Secretary of Labor for purposes of securing the employment of a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title shall not be considered a receipt of information for purposes of clause (ii).

(vi) No investigation described in clause (ii) (or hearing described in clause (viii) based on such investigation) may be conducted with respect to information about a failure to meet a condition described in clause (ii), unless the Secretary of Labor receives the information not later than 12 months after the date of the alleged failure.

(vii) The Secretary of Labor shall provide notice to an employer with respect to whom there is reasonable cause to initiate an investigation described in clauses[8] (i) or (ii), prior to the commencement of an investigation under such clauses, of the intent to conduct an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced. The Secretary of Labor is not required to comply with this clause if the Secretary of Labor determines that to do so would interfere with an effort by the Secretary of Labor to secure compliance by the employer with the requirements of this subsection. There shall be no judicial review of a determination by the Secretary of Labor under this clause.

(viii) An investigation under clauses (i) or (ii) may be conducted for a period of up to 60 days. If the Secretary of Labor determines after such an investigation that a reasonable basis exists to make a finding that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing in accordance with section 556 of Title 5 within 120 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 120 days after the date of the hearing.

(H)(i) Except as provided in clauses (ii) and (iii), a person or entity is considered to have complied with the requirements of this subsection, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith attempt to comply with the requirements.

(ii) Clause (i) shall not apply if--

(I) the Department of Labor (or another enforcement agency) has explained to the person or entity the basis for the failure;

(II) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure; and

(III) the person or entity has not corrected the failure voluntarily within such period.

(iii) A person or entity that, in the course of an investigation, is found to have violated the prevailing wage requirements set forth in paragraph (1)(A), shall not be assessed fines or other penalties for such violation if the person or entity can establish that the manner in which the prevailing wage was calculated was consistent with recognized industry standards and practices.

(iv) Clauses (i) and (iii) shall not apply to a person or entity that has engaged in or is engaging in a pattern or practice of willful violations of this subsection.

(I) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this chapter (such as the authorities under section 1324b of this title), or any other Act.

(3)(A) For purposes of this subsection, the term "H-1B-dependent employer" means an employer that

(i)(I) has 25 or fewer full-time equivalent employees who are employed in the United States; and (II) employs more than 7 H-1B nonimmigrants;

(ii)(I) has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States; and (II) employs more than 12 H-1B nonimmigrants; or

(iii)(I) has at least 51 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(B) For purposes of this subsection

(i) the term "exempt H-1B nonimmigrant" means an H-1B nonimmigrant who--

(I) receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; or

(II) has attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment; and

(ii) the term "nonexempt H-1B nonimmigrant" means an H-1B nonimmigrant who is not an exempt H-1B nonimmigrant.

(C) For purposes of subparagraph (A)

(i) in computing the number of full-time equivalent employees and the number of H-1B nonimmigrants, exempt H-1B nonimmigrants shall not be taken into account during the longer of--

(I) the 6-month period beginning on October 21, 1998; or

(II) the period beginning on October 21, 1998 and ending on the date final regulations are issued to carry out this paragraph; and

(ii) any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of Title 26 shall be treated as a single employer.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an application with respect to one or more H-1B nonimmigrants by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C) The term "H-1B nonimmigrant" means an alien admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title.

(D)(i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in subparagraph (E) or (F) of paragraph (1)); but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer (or, in the case of a placement of a worker with another employer under paragraph (1)(F), with either employer described in such paragraph) at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(E) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 1157 of this title, is granted asylum under section 1158 of this title, or is an immigrant otherwise authorized, by this chapter or by the Attorney General, to be employed.

(5)(A) This paragraph shall apply instead of subparagraphs (A) through (E) of paragraph (2) in the case of a violation described in subparagraph (B), but shall not be construed to limit or affect the authority of the Secretary or the Attorney General with respect to any other violation.

(B) The Attorney General shall establish a process for the receipt, initial review, and disposition in accordance with this paragraph of complaints respecting an employer's failure to meet the condition of paragraph (1)(G)(i)(II) or a petitioner's misrepresentation of material facts with respect to such condition. Complaints may be filed by an aggrieved individual who

has submitted a resume or otherwise applied in a reasonable manner for the job that is the subject of the condition. No proceeding shall be conducted under this paragraph on a complaint concerning such a failure or misrepresentation unless the Attorney General determines that the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

(C) If the Attorney General finds that a complaint has been filed in accordance with subparagraph (B) and there is reasonable cause to believe that such a failure or misrepresentation described in such complaint has occurred, the Attorney General shall initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of such Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings. The Attorney General shall pay the fee and expenses of the arbitrator.

(D)(i) The arbitrator shall make findings respecting whether a failure or misrepresentation described in subparagraph (B) occurred. If the arbitrator concludes that failure or misrepresentation was willful, the arbitrator shall make a finding to that effect. The arbitrator may not find such a failure or misrepresentation (or that such a failure or misrepresentation was willful) unless the complainant demonstrates such a failure or misrepresentation (or its willful character) by clear and convincing evidence. The arbitrator shall transmit the findings in the form of a written opinion to the parties to the arbitration and the Attorney General. Such findings shall be final and conclusive, and, except as provided in this subparagraph, no official or court of the United States shall have power or jurisdiction to review any such findings.

(ii) The Attorney General may review and reverse or modify the findings of an arbitrator only on the same bases as an award of an arbitrator may be vacated or modified under section 10 or 11 of Title 9.

(iii) With respect to the findings of an arbitrator, a court may review only the actions of the Attorney General under clause (ii) and may set aside such actions only on the grounds described in subparagraph (A), (B), or (C) of section 706(a)(2) of Title 5. Notwithstanding any other provision of law, such judicial review may only be brought in an appropriate United States court of appeals.

(E) If the Attorney General receives a finding of an arbitrator under this paragraph that an employer has failed to meet the condition of paragraph (1)(G)(i)(II) or has misrepresented a material fact with respect to such condition, unless the Attorney General reverses or modifies the finding under subparagraph (d)(ii)

(i) the Attorney General may impose administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation or $5,000 per violation in the case of a willful failure or misrepresentation) as the Attorney General determines to be appropriate; and

(ii) the Attorney General is authorized to not approve petitions filed, with respect to that employer and for aliens to be employed by the employer, under section 1154 or 1184(c) of this title--

(I) during a period of not more than 1 year; or

(II) in the case of a willful failure or willful misrepresentation, during a period of not more than 2 years.

(F) The Attorney General shall not delegate, to any other employee or official of the Department of Justice, any function of the Attorney General under this paragraph, until 60 days after the Attorney General has submitted a plan for such delegation to the Committees on the Judiciary of the United States House of Representatives and the Senate.

(o) Omitted

(p) Computation of prevailing wage level

(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) of this section in the case of an employee of--

(A) an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization,

the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment

(2) With respect to a professional athlete (as defined in subsection (a)(5)(A)(iii)(II) of this section) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.

(3) The prevailing wage required to be paid pursuant to subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) of this section shall be 100 percent of the wage determined pursuant to those sections.

(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient

from the second level.

(q) Academic honoraria

Any alien admitted under section 1101(a)(15)(B) of this title may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities (lasting not longer than 9 days at any single institution), as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) of this section and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment or expenses from more than 5 institutions or organizations in the previous 6-month period.

(r) Exception for certain alien nurses

Subsection (a)(5)(C) of this section shall not apply to an alien who seeks to enter the United States for the purpose of performing labor as a nurse who presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certified Statement from the Commission on Graduates of Foreign Nursing Schools (or an equivalent independent credentialing organization approved for the certification of nurses under subsection (a)(5)(C) of this section by the Attorney General in consultation with the Secretary of Health and Human Services) that--

(1) the alien has a valid and unrestricted license as a nurse in a State where the alien intends to be employed and such State verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(2) the alien has passed the National Council Licensure Examination (NCLEX);

(3) the alien is a graduate of a nursing program--

(A) in which the language of instruction was English;

(B) located in a country--

(i) designated by such commission not later than 30 days after November 12, 1999, based on such commission's assessment that the quality of nursing education in that country, and the English language proficiency of those who complete such programs in that country, justify the country's designation; or

(ii) designated on the basis of such an assessment by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) of this section for the certification

of nurses under this subsection; and

(C)(i) which was in operation on or before November 12, 1999; or

(ii) has been approved by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) of this section for the certification of nurses under this subsection.

(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge

In determining whether an alien described in subsection (a)(4)(C)(i) of this section is inadmissible under subsection (a)(4) of this section or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4) of this section, the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.

(t)[9] Nonimmigrant professionals; labor attestations

(1) No alien may be admitted or provided status as a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title in an occupational classification unless the employer has filed with the Secretary of Labor an attestation stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the attestation; and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of

workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the attestation--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought; or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title are sought.

(D) A specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(2)(A) The employer shall make available for public examination, within one working day after the date on which an attestation under this subsection is filed, at the employer's principal place of business or worksite, a copy of each such attestation (and such accompanying documents as are necessary).

(B)(i) The Secretary of Labor shall compile, on a current basis, a list (by employer and by occupational classification) of the attestations filed under this subsection. Such list shall include, with respect to each attestation, the wage rate, number of aliens sought, period of intended employment, and date of need.

(ii) The Secretary of Labor shall make such list available for public examination in Washington, D.C.

(C) The Secretary of Labor shall review an attestation filed under this subsection only for completeness and obvious inaccuracies. Unless the Secretary of Labor finds that an attestation is incomplete or obviously inaccurate, the Secretary of Labor shall provide the certification described in section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title within 7 days of the date of the filing of the attestation.

(3)(A) The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting the failure of an employer to meet a condition specified in an attestation submitted under this subsection or misrepresentation by the employer of material facts in such an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary of Labor shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under the process described in subparagraph (A), the Secretary of Labor shall provide, within 30 days after the date a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary of Labor determines that such a reasonable basis exists, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of Title 5, within 60 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary of Labor may consolidate the hearings under this subparagraph on such complaints.

(C)(i) If the Secretary of Labor finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraph (1)(C) or (1)(D), or a misrepresentation of material fact in an attestation--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 1154, 1184(c), 1101(a)(15)(H)(i)(b1), or 1101(a)(15)(E)(iii) of this title during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an attestation, or a violation of clause (iv)--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 1154, 1184(c), 1101(a)(15)(H)(i)(b1) of this title, or 1101(a)(15)(E)(iii) of this title during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an attestation, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition or application supported by the attestation--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 1154, 1184(c), 1101(a)(15)(H)(i)(b1) of this title, or 1101(a)(15)(E)(iii) of this title during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an attestation under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Secretary of Homeland Security shall devise a process under which a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi)(I) It is a violation of this clause for an employer who has filed an attestation under this subsection to require a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary of Labor shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary of Labor may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title designated as a full-time employee in the attestation, after the nonimmigrant has entered into employment with the

employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title designated as a part-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on the attestation consistent with the rate of pay identified on the attestation.

(III) In the case of a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title who has not yet entered into employment with an employer who has had approved an attestation under this subsection with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States, or 60 days after the date the nonimmigrant becomes eligible to work for the employer in the case of a nonimmigrant who is present in the United States on the date of the approval of the attestation filed with the Secretary of Labor.

(IV) This clause does not apply to a failure to pay wages to a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title an established salary practice of the employer, under which the employer pays to nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this chapter to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection to fail to offer to a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the

same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified in the attestation and required under paragraph (1), the Secretary of Labor shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) The Secretary of Labor may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date on which the employer is found by the Secretary of Labor to have committed a willful failure to meet a condition of paragraph (1) or to have made a willful misrepresentation of material fact in an attestation. The authority of the Secretary of Labor under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(F) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this chapter (such as the authorities under section 1324b of this title), or any other Act.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an attestation with respect to one or more nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C)(i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar

employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(D) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 1157 of this title, is granted asylum under section 1158 of this title, or is an immigrant otherwise authorized, by this chapter or by the Secretary of Homeland Security, to be employed.

(t)[9]Foreign residence requirement

(1) Except as provided in paragraph (2), no person admitted under section 1101(a)(15)(Q)(ii)(I) of this title, or acquiring such status after admission, shall be eligible to apply for nonimmigrant status, an immigrant visa, or permanent residence under this chapter until it is established that such person has resided and been physically present in the person's country of nationality or last residence for an aggregate of at least 2 years following departure from the United States.

(2) The Secretary of Homeland Security may waive the requirement of such 2-year foreign residence abroad if the Secretary determines that--

(A) departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or an alien lawfully admitted for permanent residence); or

(B) the admission of the alien is in the public interest or the national interest of the United States.

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L. 99-653, § 7(d)(2), as added Oct. 24, 1988, Pub.L. 100-525, § 8(f), 102 Stat. 2617; Dec. 22, 1987, Pub.L. 100-204, Title VIII, § 806(c), 101 Stat. 1399; Oct. 24, 1988, Pub.L. 100-525, §§ 3(1)(A), 7(c)(1), (3), 8(f), 9(i), 102 Stat. 2614, 2616, 2617, 2620; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7349(a), 102 Stat. 4473; Dec. 18, 1989, Pub.L. 101-238, § 3(b), 103 Stat. 2100; Feb. 16, 1990, Pub.L. 101-246, Title I, § 131(a), (c), 104 Stat. 31; Nov. 29, 1990, Pub.L. 101-649, Title I, § 162(e)(1), (f)(2)(B), Title II, §§ 202(b), 205(c)(3), Title V, §§ 511(a), 514(a), Title VI, § 601(a), (b), (d), 104 Stat. 5011, 5012, 5014, 5020, 5052, 5053, 5067, 5075 to 5077; Dec. 12, 1991, Pub.L. 102-232, Title III, §§ 302(e)(6), (9), 303(a)(5)(B), (6), (7)(B), 306(a)(10), (12), 307(a) to (g), 309(b)(7), 105 Stat. 1746 to 1748, 1751, 1753 to 1755, 1759; June 10, 1993, Pub.L. 103-43, Title XX, § 2007(a), 107 Stat. 210; Aug. 26, 1994, Pub.L. 103-317, Title V, § 506(a), (c), 108 Stat. 1765, 1766; Sept. 13, 1994, Pub.L. 103-322, Title XIII, § 130003(b)(1), 108 Stat. 2024; Oct. 25, 1994, Pub.L. 103-416, Title II, §§ 203(a), 219(e), (z)(1), (5), 220(a), 108 Stat. 4311, 4316, 4318, 4319; Apr. 24, 1996, Pub.L. 104-132, Title IV, §§ 411, 412, 440(d), 110 Stat. 1268, 1269, 1277; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title I, § 124(b)(1), Title III, §§ 301(b)(1), (c)(1), 304(b), 305(c), 306(d), 308(c)(2)(B), (d)(1), (e)(1)(B), (C), (2)(A), (6), (f)(1)(C) to (F), (3)(A), (g)(1), (4)(B), (10)(A), (H), 322(a)(2)(B), 341(a), (b), 342(a), 343, 344(a), 345(a), 346(a), 347(a), 348(a), 349, 351(a), 352(a), 355, Title V, § 531(a), Title VI, §§ 602(a), 622(b), 624(a), 671(e)(3), 110 Stat. 3009-562, 3009-576, 3009-578, 3009-597, 3009-607, 3009-612, 3009-616, 3009-619, 3009-620, 3009-621, 3009-622, 3009-625, 3009-629, 3009-635, 6009-636, 3009-637, 3009-638, 3009-639, 3009-640, 3009-641, 3009-644, 3009-674, 3009-689, 3009-695, 3009-698, 3009-723; Nov. 12, 1997, Pub.L. 105-73, 111 Stat. 1459; Oct. 21, 1998, Pub.L. 105-277, Div. C, Title IV, §§ 412, 413, 415(a), 431(a), Div. G, Title XXII, § 2226, 112 Stat. 2681-642, 2681-643, 2681-645, 2681-648, 2681-649, 2681-650, 2681-651, 2681-654, 2681-658, 2681-820; Oct. 27, 1998, Pub.L. 105-292, Title VI, § 604(a), 112 Stat. 2814; amended Nov. 12, 1999, Pub.L. 106-95, §§ 2(b), 4(a), 113 Stat. 1312, 1317; Dec. 3, 1999, Pub.L. 106-120, Title VIII, § 809, 113 Stat. 1632; Oct. 17, 2000, Pub.L. 106-313, Title I, §§ 106(c)(2), 107(a), 114 Stat. 1254, 1255; Oct. 28, 2000, Pub.L. 106-386, Div. A, §§ 107(e)(3), 111(d), Div. B, Title V, §§ 1505(a), (c)(1), (d), (e), (f), 1513(e), 114 Stat. 1478, 1485, 1525, 1526, 1536; Oct. 30, 2000, Pub.L. 106-395, Title II, § 201(b)(1), (2), 114 Stat. 1633, 1634; Oct. 30, 2000, Pub.L. 106-396, Title I, § 101(b)(1), 114 Stat. 1638; Oct. 26, 2001, Pub.L. 107-56, Title IV, § 411(a), Title X, § 1006(a), 115 Stat. 345, 394; Mar. 13, 2002, Pub.L. 107-150, § 2(a)(2), 116 Stat. 74; Nov. 2, 2002, Pub.L. 107-273, Div. C, Title I, § 11018(c), 116 Stat. 1825; Sept. 3, 2003, Pub.L. 108-77, Title IV, § 402(b), (c), 117 Stat. 940, 946; Pub.L. 108-193, §§ 4(b)(4), 8(a)(2), Dec. 19, 2003, 117 Stat. 2879; Dec. 8, 2004, Pub.L. 108-447, Div. J, Title IV, §§ 422(a), 423, 424(a)(1), (b), 118 Stat. 3353, 3354, 3355; Dec. 10, 2004, Pub.L. 108-449, § 1(b)(2), 118 Stat. 3470; Dec. 17, 2004, Pub.L. 108-458, Title V, §§ 5501(a), 5502(a), 5503, 118 Stat. 3740; May 11, 2005, Pub.L. 109-13, Div. B, Title I, §§ 103(a) to (c), 104, Title V, § 501(d), 119 Stat. 306 to 309, 322; Jan. 5, 2006, Pub.L. 109-162, Title VIII, § 802, 119 Stat. 3054; Aug. 12, 2006, Pub.L. 109-271, § 6(b), 120 Stat. 762; Dec. 26, 2007, Pub.L. 110-161, Div. J, Title VI, § 691(a), (c), 121 Stat. 2364, 2365; May 8, 2008, Pub.L. 110-229, Title VII, §§ 702(b)(2), (3), (d), 122 Stat. 860, 862; July 30, 2008, Pub.L. 110-293, Title III, § 305, 122 Stat. 2963; Oct. 3, 2008, Pub.L. 110-340, § 2(b), 122 Stat. 3736; Dec. 23, 2008, Pub.L. 110-457, Title II, §§ 222(f)(1), 234, 122 Stat. 5071, 5074; Dec. 22, 2009, Pub.L. 111-122, § 3(b), 123 Stat. 3481; Nov. 30, 2010, Pub.L. 111-287, § 2, 124 Stat. 3058; Pub.L. 113-4, Title VIII, § 804, Mar. 7, 2013, 127 Stat. 111.)

TERMINATION OF AMENDMENT

<For termination of amendment by Pub.L. 108-77, § 107(c), see Effective and Applicability Provisions note set out under this section.>

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12324

Ex. Ord. No. 12324, Sept. 29, 1981, 46 F.R. 48109, relating to high seas interdiction of illegal aliens, was revoked by Ex. Ord. No. 12807, May 24, 1992, 57 F.R. 23133, set out as a note under this section.

EXECUTIVE ORDER NO. 12807

<May 24, 1992, 57 F.R. 23133, as amended Ex. Ord. No. 13286, Sec. 30, Feb. 28, 2003, 68 F.R. 10625>

INTERDICTION OF ILLEGAL ALIENS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)) [subsec. (f) of this section and section 1185(a)(1) of this title] and whereas:

(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

(3) Proclamation No. 4865 [set out as a note under this section] suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;

I, GEORGE BUSH, President of the United States of America, hereby order as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented or numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Secretary of Homeland Security, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act [section 551 et seq. of Title 5, Government Organization and Employees]), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

Sec. 4. Executive Order No. 12324 [formerly set out as a note under this section] is hereby revoked and replaced by this order.

Sec. 5. This order shall be effective immediately.

GEORGE BUSH

EXECUTIVE ORDER NO. 13276

<Nov. 15, 2002, 67 F.R. 69985, as amended Ex. Ord. No. 13286, Sec. 1, Feb. 28, 2003, 68 F.R. 10619>

DELEGATION OF RESPONSIBILITIES CONCERNING UNDOCUMENTED ALIENS INTERDICTED OR INTERCEPTED IN THE CARIBBEAN REGION

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) (1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)) [subsecs. (f) and (a)(1) of this section], and section 301 of title 3, United States Code, and in order to delegate appropriate responsibilities to Federal agencies for responding to migration of undocumented aliens in the Caribbean region, it is hereby ordered:

Section 1. Duties and Authorities of Agency Heads. Consistent with applicable law,

(a)(i) The Secretary of Homeland Security may maintain custody, at any location he deems appropriate, of any undocumented aliens he has reason to believe are seeking to enter the United States and who are interdicted or intercepted in the Caribbean region. In this regard, the Secretary of Homeland Security shall provide and operate a facility, or facilities, to house and provide for the needs of any such aliens. Such a facility may be located at Guantanamo Bay Naval Base or any other appropriate location.

(ii) The Secretary of Homeland Security may conduct any screening of such aliens that he deems appropriate, including screening to determine whether such aliens should be returned to their country of origin or transit, or whether they are persons in need of protection who should not be returned without their consent. If the Secretary of Homeland Security institutes such screening, then until a determination is made, the Secretary of Homeland Security shall provide for the custody, care, safety, transportation, and other needs of the aliens. The Secretary of Homeland Security shall continue to provide for the custody, care, safety, transportation, and other needs of aliens who are determined not to be persons in need of protection until such time as they are returned to their country of origin or transit.

(b) The Secretary of State shall provide for the custody, care, safety, transportation, and other needs of undocumented aliens interdicted or intercepted in the Caribbean region whom the Secretary of Homeland Security has identified as persons in need of protection. The Secretary of State shall provide for and execute a process for resettling such persons in need of protection, as appropriate, in countries other than their country of origin, and shall also undertake such diplomatic efforts as may be necessary to address the problem of illegal migration of aliens in the Caribbean region and to facilitate the return of those aliens who are determined not to be persons in need of protection.

(c)(i) The Secretary of Defense shall make available to the Secretary of Homeland Security and the Secretary of State, for the housing and care of any undocumented aliens interdicted or intercepted in the Caribbean region and taken into their custody, any facilities at Guantanamo Bay Naval Base that are excess to current military needs and the provision of which does not interfere with the operation and security of the base. The Secretary of Defense shall be responsible for providing access to such facilities and perimeter security. The Secretary of Homeland Security and the Secretary of State, respectively, shall be responsible for reimbursement for necessary supporting utilities.

(ii) In the event of a mass migration in the Caribbean region, the Secretary of Defense shall provide support to the Secretary of Homeland Security and the Secretary of State in carrying out the duties described in paragraphs (a) and (b) of this section regarding the custody, care, safety, transportation, and other needs of the aliens, and shall assume primary responsibility for

these duties on a nonreimbursable basis as necessary to contain the threat to national security posed by the migration. The Secretary of Defense shall also provide support to the Coast Guard in carrying out the duties described in Executive Order 12807 of May 24, 1992 [set out under this section], regarding interdiction of migrants.

Sec. 2. Definitions. For purposes of this order, the term "mass migration" means a migration of undocumented aliens that is of such magnitude and duration that it poses a threat to the national security of the United States, as determined by the President.

Sec. 3. Scope.

(a) Nothing in this order shall be construed to impair or otherwise affect the authorities and responsibilities set forth in Executive Order 12807 of May 24, 1992.

(b) Nothing in this order shall be construed to make reviewable in any judicial or administrative proceeding, or otherwise, any action, omission, or matter that otherwise would not be reviewable.

(c) This order is intended only to improve the management of the executive branch. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity or otherwise against the United States, its departments, agencies, entities, instrumentalities, officers, employees, or any other person.

(d) Any agency assigned any duties by this order may use the provisions of the Economy Act, 31 U.S.C. 1535 and 1536, to carry out such duties, to the extent permitted by such Act.

(e) This order shall not be construed to require any procedure to determine whether a person is a refugee or otherwise in need of protection.

GEORGE W. BUSH

PROCLAMATIONS

PROCLAMATION NO. 4865

<Sept. 29, 1981, 46 F.R. 48107>

HIGH SEAS INTERDICTION OF ILLEGAL ALIENS

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)) [subsec. (f) of this section and section 1185(a)(1) of this title], in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

RONALD REAGAN

PROCLAMATION NO. 7359

Proc. No. 7359, Oct. 10, 2000, 65 F.R. 60831, related to the suspension of entry as immigrants and nonimmigrants of persons impeding the peace process in Sierra Leone.

PROCLAMATION NO. 7750

<Jan. 12, 2004, 69 F.R. 2287>

TO SUSPEND ENTRY AS IMMIGRANTS OR NONIMMIGRANTS OF PERSONS ENGAGED IN OR BENEFITING FROM CORRUPTION

By the President of the United States of America

A Proclamation

In light of the importance of legitimate and transparent public institutions to world stability, peace, and development, and the serious negative effects that corruption of public institutions has on the United States efforts to promote security and to strengthen democratic institutions and free market systems, and in light of the importance to the United States and the international community of fighting corruption, as evidenced by the Third Global Forum on Fighting Corruption and Safeguarding Integrity and other intergovernmental efforts, I have determined that it is in the interests of the United States to take action to restrict the international travel and to suspend the entry into the United States, as immigrants or nonimmigrants,

of certain persons who have committed, participated in, or are beneficiaries of corruption in the performance of public functions where that corruption has serious adverse effects on international activity of U.S. businesses, U.S. foreign assistance goals, the security of the United States against transnational crime and terrorism, or the stability of democratic institutions and nations.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States, including section 212(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(f) [subsec. (f) of this section], and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided in sections 2 and 3 of this proclamation, be detrimental to the interests of the United States.

I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Public officials or former public officials whose solicitation or acceptance of any article of monetary value, or other benefit, in exchange for any act or omission in the performance of their public functions has or had serious adverse effects on the national interests of the United States.

(b) Persons whose provision of or offer to provide any article of monetary value or other benefit to any public official in exchange for any act or omission in the performance of such official's public functions has or had serious adverse effects on the national interests of the United States.

(c) Public officials or former public officials whose misappropriation of public funds or interference with the judicial, electoral, or other public processes has or had serious adverse effects on the national interests of the United States.

(d) The spouses, children, and dependent household members of persons described in paragraphs (a), (b), and (c) above, who are beneficiaries of any articles of monetary value or other benefits obtained by such persons.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where entry of the person into the United States would not be contrary to the interests of the United States.

Sec. 3. Persons covered by sections 1 and 2 of this proclamation shall be identified by the Secretary of State or the Secretary's designee, in his or her sole discretion, pursuant to such standards and procedures as the Secretary may establish.

Sec. 4. For purposes of this proclamation, "serious adverse effects on the national interests of the United States" means serious adverse effects on the international economic activity of U.S. businesses, U.S. foreign assistance goals, the security of the United States against transnational crime and terrorism, or the stability of democratic institutions and nations.

Sec. 5. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements.

Sec. 6. The Secretary of State shall have responsibility for implementing this proclamation pursuant to such procedures as the Secretary may, in the Secretary's discretion, establish.

Sec. 7. This proclamation is effective immediately.

Sec. 8. This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of January, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.

GEORGE W. BUSH

PROCLAMATION NO. 8342

<Jan. 16, 2009, 74 F.R. 4093>

TO SUSPEND ENTRY AS IMMIGRANTS AND NONIMMIGRANTS OF FOREIGN GOVERNMENT OFFICIALS RESPONSIBLE FOR FAILING TO COMBAT TRAFFICKING IN PERSONS

By the President of the United States of America

A Proclamation

In order to foster greater resolve to address trafficking in persons (TIP), specifically in punishing acts of trafficking and providing protections to the victims of these crimes, consistent with the Trafficking Victims Protection Act of 2000, as amended (the "Act") (22 U.S.C. 7101et seq.), it is in the interests of the United States to restrict the international travel and to suspend entry into the United States, as immigrants or nonimmigrants, of certain senior government officials responsible for domestic law enforcement, justice, or labor affairs who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies, or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons, and whose governments have been ranked more than once as Tier 3 countries, which represent the worst anti-TIP performers, in the Department of State's annual Trafficking in Persons Report, and for which I have made a determination pursuant to section 110(d)(1)-(2) or (4) of the Act. The Act reflects international antitrafficking standards that guide efforts to eradicate this modern-day form of slavery around the world.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, including section 212(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(f), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided for in sections 2 and 3 of this proclamation, be detrimental to the interests of the United States.

I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following aliens is hereby suspended:

(a) Senior government officials--defined as the heads of ministries or agencies and officials occupying positions within the two bureaucratic levels below those top positions--responsible for domestic law enforcement, justice, or labor affairs who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies, or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons, and who are members of governments for which I have made a determination pursuant to section 110(d)(1)-(2) or (4) of the Act, in the current year and at least once in the preceding 3 years;

(b) The spouses of persons described in subsection (a) of this section.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where entry of such person would not be contrary to the interest of the United States.

Sec. 3. Persons covered by sections 1 or 2 of this proclamation shall be identified by the Secretary of State or the Secretary's designee, in his or her sole discretion, pursuant to such procedures as the Secretary may establish under section 5 of this proclamation.

Sec. 4. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements.

Sec. 5. The Secretary of State shall implement this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of Homeland Security, may establish.

Sec. 6. This proclamation is effective immediately. It shall remain in effect until such time as the Secretary of State determines that it is no longer necessary and should be terminated, either in whole or in part. Any such determination by the Secretary of State shall be published in the **Federal Register**.

Sec. 7. This proclamation is not intended to, and does not, create any right, benefit, or privilege, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of January, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-third.

GEORGE W. BUSH

PROCLAMATION NO. 8693

<July 24, 2011, 76 F.R. 44751>

SUSPENSION OF ENTRY OF ALIENS SUBJECT TO UNITED NATIONS SECURITY COUNCIL TRAVEL BANS AND INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT SANCTIONS

By the President of the United States of America

A Proclamation

In light of the firm commitment of the United States to the preservation of international peace and security and our obligations under the United Nations Charter to carry out the decisions of the United Nations Security Council imposed under Chapter VII, I have determined that it is in the interests of the United States to suspend the entry into the United States, as immigrants or nonimmigrants, of aliens who are subject to United Nations Security Council travel bans as of the date of this proclamation. I have further determined that the interests of the United States are served by suspending the entry into the United States, as immigrants or nonimmigrants, of aliens whose property and interests in property have been blocked by an Executive Order issued in whole or in part pursuant to the President's authority under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would be detrimental to the interests of the United States. I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Any alien who meets one or more of the specific criteria for the imposition of a travel ban provided for in a United Nations Security Council resolution referenced in Annex A to this proclamation.

(b) Any alien who meets one or more of the specific criteria contained in an Executive Order referenced in Annex B to this proclamation [not set out in the Code].

Sec. 2. Persons covered by section 1 of this proclamation shall be identified by the Secretary of State or the Secretary's designee, in his or her sole discretion, pursuant to such standards and procedures as the Secretary may establish.

Sec. 3. The Secretary of State shall have responsibility for implementing this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of the Treasury and Secretary of Homeland Security, may establish.

Sec. 4. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where entry of the person into the United States would not be contrary to the interests of the United States, as determined by the Secretary of State. In exercising the functions and authorities in the previous sentence, the Secretary of State shall consult the Secretary of Homeland Security on matters related to admissibility or inadmissibility within the authority of the Secretary of Homeland Security.

Sec. 5. Nothing in this proclamation shall be construed to require actions that would be inconsistent with the United States obligations under applicable international agreements.

Sec. 6. This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 7. This proclamation is effective immediately and shall remain in effect until such time as the Secretary of State determines that it is no longer necessary and should be terminated, either in whole or in part. Any such termination shall become effective upon publication in the Federal Register.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of July, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

BARACK OBAMA

PROCLAMATION NO. 8697

<Aug. 4, 2011, 76 F.R. 49277>

SUSPENSION OF ENTRY AS IMMIGRANTS AND NONIMMIGRANTS OF PERSONS WHO PARTICIPATE IN SERIOUS HUMAN RIGHTS AND HUMANITARIAN LAW VIOLATIONS AND OTHER ABUSES

By the President of the United States

A Proclamation

The United States enduring commitment to respect for human rights and humanitarian law requires that its Government be able to ensure that the United States does not become a safe haven for serious violators of human rights and humanitarian law and those who engage in other related abuses. Universal respect for human rights and humanitarian law and the prevention of atrocities internationally promotes U.S. values and fundamental U.S. interests in helping secure peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises around the globe. I therefore have determined that it is in the interests of the United States to take action to restrict the international travel and to suspend the entry into the United States, as immigrants or nonimmigrants, of certain persons who have engaged in the acts outlined in section 1 of this proclamation.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would be detrimental to the interests of the United States. I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.

(b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where the entry of such person would not harm the foreign relations interests of the United States.

Sec. 3. The Secretary of State, or the Secretary's designee, in his or her sole discretion, shall identify persons covered by section 1 of this proclamation, pursuant to such standards and procedures as the Secretary may establish.

Sec. 4. The Secretary of State shall have responsibility for implementing this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of Homeland Security, may establish.

Sec. 5. For any person whose entry is otherwise suspended under this proclamation entry will be denied, unless the Secretary of State determines that the particular entry of such person would be in the interests of the United States. In exercising such authority, the Secretary of State shall consult the Secretary of Homeland Security on matters related to admissibility or inadmissibility within the authority of the Secretary of Homeland Security.

Sec. 6. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements, or to suspend entry based solely on an alien's ideology, opinions, or beliefs, or based solely on expression that would be considered protected under U.S. interpretations of international agreements to which the United States is a party. Nothing in this proclamation shall be construed to limit the authority of the United States to admit or to suspend entry of particular individuals into the United States under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) or under any other provision of U.S. law.

Sec. 7. This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 8. This proclamation is effective immediately and shall remain in effect until such time as the Secretary of State determines that it is no longer necessary and should be terminated, either in whole or in part. Any such termination shall become effective upon publication in the Federal Register.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of August, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

BARACK OBAMA

MEMORANDA OF PRESIDENT

DELEGATION OF AUTHORITY UNDER SECTIONS 212(f) AND 215(a)(1) OF THE IMMIGRATION AND NATIONALITY ACT

<Sept. 24, 1999, 64 F.R. 55809>

Memorandum for the Attorney General

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), and in light of Proclamation 4865 of September 29, 1981 [set out as a note under this section], I hereby delegate to the Attorney General the authority to:

(a) Maintain custody, at any location she deems appropriate, and conduct any screening she deems appropriate in her unreviewable discretion, of any undocumented person she has reason to believe is seeking to enter the United States and who is encountered in a vessel interdicted on the high seas through December 31, 2000; and

(b) Undertake any other appropriate actions with respect to such aliens permitted by law.

With respect to the functions delegated by this order, all actions taken after April 16, 1999, for or on behalf of the President that would have been valid if taken pursuant to this memorandum are ratified.

This memorandum is not intended to create, and should not be construed to create, any right or benefit, substantive or procedural, legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person, or to require any procedures to determine whether a person is a refugee.

You are authorized and directed to publish this memorandum in the **Federal Register.**

WILLIAM J. CLINTON

Notes of Decisions (2690)

Footnotes

1 So in original. Probably should be a reference to section 1229c of this title.

2 So in original. Probably should be preceded by “ineligible for”.

3 So in original.

4 So in original. Probably should be “Secretary’s”.

5 So in original. Probably should be “(10)(E))”.

6 So in original.

7 So in original. Probably should be “or”.

8 So in original. Probably should be “clause”.

9 So in original. Two subsecs. (t) have been enacted.

8 U.S.C.A. § 1182, 8 USCA § 1182
Current through P.L. 114-49 approved 8-7-2015

End of Document

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8 U.S.C.A. § 1631

§ 1631. Federal attribution of sponsor's income and resources to alien

Effective: October 1, 2003

Currentness

(a) In general

Notwithstanding any other provision of law, in determining the eligibility and the amount of benefits of an alien for any Federal means-tested public benefits program (as provided under section 1613 of this title), the income and resources of the alien shall be deemed to include the following:

(1) The income and resources of any person who executed an affidavit of support pursuant to section 213A of the Immigration and Nationality Act (as added by section 423 and as amended by section 551(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) on behalf of such alien.

(2) The income and resources of the spouse (if any) of the person.

(b) Duration of attribution period

Subsection (a) of this section shall apply with respect to an alien until such time as the alien--

(1) achieves United States citizenship through naturalization pursuant to chapter 2 of title III of the Immigration and Nationality Act [8 U.S.C.A. § 1421 et seq.]; or

(2) (A) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] or can be credited with such qualifying quarters as provided under section 1645 of this title, and (B) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

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(c) Review of income and resources of alien upon reapplication

Whenever an alien is required to reapply for benefits under any Federal means-tested public benefits program, the applicable agency shall review the income and resources attributed to the alien under subsection (a) of this section.

(d) Application

(1) If on August 22, 1996, a Federal means-tested public benefits program attributes a sponsor's income and resources to an alien in determining the alien's eligibility and the amount of benefits for an alien, this section shall apply to any such determination beginning on the day after August 22, 1996.

(2) If on August 22, 1996, a Federal means-tested public benefits program does not attribute a sponsor's income and resources to an alien in determining the alien's eligibility and the amount of benefits for an alien, this section shall apply to any such determination beginning 180 days after August 22, 1996.

(3) This section shall not apply to assistance or benefits under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.) to the extent that a qualified alien is eligible under section 1612(a)(2)(J) of this title.

(e) Indigence exception

(1) In general

For an alien for whom an affidavit of support under section 213A of the Immigration and Nationality Act has been executed, if a determination described in paragraph (2) is made, the amount of income and resources of the sponsor or the sponsor's spouse which shall be attributed to the sponsored alien shall not exceed the amount actually provided for a period beginning on the date of such determination and ending 12 months after such date.

(2) Determination described

A determination described in this paragraph is a determination by an agency that a sponsored alien would, in the absence of the assistance provided by the agency, be unable to obtain food and shelter, taking into account the alien's own income, plus any cash, food, housing, or other assistance provided by other individuals, including the sponsor. The agency shall notify the Attorney General of each such determination, including the names of the sponsor and the sponsored alien involved.

(f) Special rule for battered spouse and child

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(1) In general

Subject to paragraph (2) and notwithstanding any other provision of this section, subsection (a) of this section shall not apply to benefits--

(A) during a 12 month period if the alien demonstrates that (i) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to or acquiesced to such battery or cruelty, (ii) the alien's child has been battered or subjected to extreme cruelty in the United States by the spouse or parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented or acquiesced to and the alien did not actively participate in such battery or cruelty, or (iii) the alien is a child whose parent (who resides in the same household as the alien child) has been battered or subjected to extreme cruelty in the United States by that parent's spouse, or by a member of the spouse's family residing in the same household as the parent and the spouse consented to, or acquiesced in, such battery or cruelty, and the battery or cruelty described in clause (i), (ii), or (iii) (in the opinion of the agency providing such public benefits, which opinion is not subject to review by any court) has a substantial connection to the need for the public benefits applied for; and

(B) after a 12 month period (regarding the batterer's income and resources only) if the alien demonstrates that such battery or cruelty under subparagraph (A) has been recognized in an order of a judge or administrative law judge or a prior determination of the Immigration and Naturalization Service, and that such battery or cruelty (in the opinion of the agency providing such public benefits, which opinion is not subject to review by any court) has a substantial connection to the need for the benefits.

(2) Limitation

The exception under paragraph (1) shall not apply to benefits for an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual who was subjected to such battery or cruelty.

CREDIT(S)

(Pub.L. 104-193, Title IV, § 421, Aug. 22, 1996, 110 Stat. 2270; Pub.L. 104-208, Div. C, Title V, §§ 551(b)(1), 552, Sept. 30, 1996, 110 Stat. 3009-679, 3009-680; Pub.L. 105-33, Title V, § 5571(d), Aug. 5, 1997, 111 Stat. 641; Pub.L. 107-171, Title IV, § 4401(b)(2)(B), May 13, 2002, 116 Stat. 333.)

8 U.S.C.A. § 1631, 8 USCA § 1631
Current through P.L. 114-49 approved 8-7-2015

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Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 04 OMM/ADM-7

TO: Commissioners of Social Services

DIVISION: Office of Medicaid Management

DATE: October 26, 2004

SUBJECT: Citizenship and Alien Status Requirements for the Medicaid Program

SUGGESTED DISTRIBUTION:
Medicaid Staff
Temporary Assistance Staff
Legal Staff
Fair Hearing Staff
Staff Development Coordinators

CONTACT PERSON:
Bureau of Local District Support
Upstate: (518) 474-8216
NYC: (212) 268-6855

ATTACHMENTS: See Appendix I for a listing of attachments

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
			P.L.103-322		
88 OMM/ADM-22		351.2(c)	P.L.104-193		
92 OMM/ADM-10		360-1.2	P.L.104-208		
00 OMM/ADM-9	00 OMM/ADM-9	360-3.2(j)	P.L.105-33		
	GIS 01 MA/015		P.L.106-386		GIS 01 MA/026
	GIS 01 MA/025		SSA 1903(v)(3)		GIS 01 MA/030
	GIS 02 MA/022		SSL 134-a(2), 122		GIS 01 MA/033
	GIS 02 MA/027		Aliessa v. Novello		GIS 02 MA/002
	GIS 03 MA/005		96 NY2d 418 (2001)		GIS 02 MA/016
	GIS 03 MA/011				GIS 03 MA/007
	GIS 03 MA/015				GIS 03 MA/008
	GIS 04 MA/003				GIS 04 MA/002
	GIS 04 MA/016				GIS 04 MA/014

APPENDIX I

Attachment A-1	Agency Letter Request for Social Security Number
Attachment A-2	Social Security Number Attestation Form
Attachment B-1	PRUCOL Narrative
Attachment B-2	Documentation Guide For PRUCOL Alien Categories
Attachment C	Aliens: Qualified/PRUCOL: Alien/Citizenship Codes(ACI Codes)
Attachment D-1	Documentation Guide Immigrant Eligibility for Health Coverage in New York State
Attachment D-2	Secondary Documentation of U.S. Citizenship
Attachment D-3	Key to I-766, I-688B Employment Authorization Documents (EAD)
Attachment D-4	Key to I-94 Arrival Departure Record
Attachment E-1	DSS 3955-Certification of Treatment for Emergency Medical Condition (Upstate) (9/04)

I. PURPOSE

The purpose of this Office of Medicaid Management Administrative Directive (OMM/ADM) is to provide local Departments of Social Services (LDSS) with a comprehensive document that clarifies and defines the various types of immigration statuses. This ADM outlines the citizenship/immigration documentation requirements for individuals in the Medicaid program, and provides specific desk aids that identify the United States Citizenship and Immigration Services (USCIS) codes which are important to the eligibility worker when determining the appropriate Medicaid coverage to be provided. In addition, this directive also defines otherwise eligible immigrants who are "Permanently Residing in the United States Under Color of Law" (PRUCOL) and those immigrants who are in satisfactory immigration status.

II. BACKGROUND

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L.104-193 (PRWORA-Welfare Reform) substantially restricted immigrants' eligibility for means-tested benefits programs, including Medicaid.

Prior to PRWORA, immigrants were eligible for full Medicaid coverage only if they were lawfully admitted for permanent residence or permanently residing in the United States under color of law (PRUCOL immigrants). The PRWORA created new eligibility criteria for immigrants. The previous "PRUCOL" categories were no longer relevant to determining an immigrant's eligibility for benefits. After the enactment of Welfare Reform, states could choose to cover the cost of these benefits with state-only money. New York opted not to do so, with certain exceptions, and enacted a statute conforming to the federal act (Social Services Law (SSL) Section 122).

On June 5, 2001, the New York State Court of Appeals decision, Aliessa v. Novello, held Social Services Law Section 122 unconstitutional to the extent it denied Medicaid to lawful permanent residents and persons "permanently residing under color of law" (PRUCOL). The Aliessa decision restored Medicaid coverage in New York State to both lawful permanent residents who came to the United States on or after August 22, 1996 and PRUCOLs regardless of when they entered the U.S. As a result of the ruling, New York must now provide Medicaid coverage to lawful immigrants who meet the Medicaid program's other eligibility criteria. The Aliessa decision does not cover undocumented immigrants or other temporary nonimmigrants (i.e., short term visa holders; foreign students; tourists) who remain eligible only for the treatment of an emergency medical condition.

Therefore, the local Departments of Social Services were notified that effective June 1, 2001, State and local Medicaid eligibility, for otherwise eligible immigrants, was no longer dependent on whether the immigrant was a qualified or non-qualified immigrant or the date on which the immigrant entered the United States.

As a result of the Aliessa decision, districts must not deny, reduce or discontinue qualified immigrants' and PRUCOL immigrants' eligibility for Medicaid, Family Health Plus or Child Health Plus A based on SSL Section 122.

III. PROGRAM IMPLICATIONS

This ADM explains the categories of immigrant and nonimmigrant statuses that local district eligibility workers need to know and understand in order to determine which Medicaid eligibility coverage is available to the applicant. Specific definitions of common immigration categories/terms and USCIS coding are essential tools that will aid the eligibility worker. Clarification of the Welfare Management System (WMS) process for authorizing Medicaid benefits to non-citizen applicants is important for workers to understand so as to insure proper reimbursement of State and/or federal shares.

Immigrants who are "qualified immigrants" (as defined in the definition section of this directive) and who are otherwise eligible, may receive full Medicaid benefits with Federal Financial Participation (FFP). In addition, otherwise eligible qualified immigrants who entered the United States on or after August 22, 1996 and who, prior to Aliessa, were eligible for Medicaid only after five years, can be eligible for full Medicaid benefits with State and local funds. In addition, otherwise eligible immigrants who are PRUCOL can be eligible for full Medicaid benefits with State and local funds. Temporary nonimmigrants and undocumented immigrants are not PRUCOL and continue to be limited to Medicaid coverage for care and services necessary for the treatment of an emergency medical condition.

Two groups of immigrants, given special exemption under SSL Section 122(1)(c), will continue to receive full Medicaid benefits with State and local funds to the extent they are otherwise eligible: 1.) Immigrants who, on August 4, 1997, were residing in certain residential facilities and receiving Medicaid based on a determination that they were PRUCOL; and 2.) Immigrants who, on August 4,1997, had been diagnosed with AIDS, as defined in Section 2780(1) of the Public Health Law, and were receiving Medicaid based on a determination that they were PRUCOL.

For some immigrants the United States Citizenship and Immigration Services (USCIS) (formerly the Bureau of Immigration and Naturalization Services [INS]) requires an Affidavit of Support (I-864). An Affidavit of Support is a USCIS form signed by an immigrant's sponsor. In the Affidavit of Support, the sponsor promises to financially support the immigrant if the USCIS allows the immigrant into the country. Presently, neither sponsor deeming nor sponsor liability is being used in the New York State Medicaid Program. The sponsor's income is not currently counted toward the immigrant applying for health coverage, nor is New York State requiring sponsors to repay Medicaid for services used by the immigrant. However, NYS Medicaid may implement these provisions at a future date.

NOTE: The provisions of this directive do **not** apply to pregnant women. A woman with a medically verified pregnancy is not required to document citizenship or immigration status for the duration of her pregnancy, through the last day of the month in which the 60-day postpartum period ends.

IV. REQUIRED ACTION

This directive provides the necessary tools a Medicaid eligibility worker needs to properly determine a Medicaid applicant/recipient's immigration status. By becoming familiar with the United States Citizenship and Immigration Services (USCIS) documents and codes, definitions, and the Welfare Management System's(WMS) Alien/Citizenship (ACI) Codes, Coverage Codes and State/Federal Charge Codes, a worker will be able to effectively determine a citizen's or immigrant's eligibility for Medicaid.

All legal immigrants are eligible for Medicaid, Family Health Plus and Child Health Plus A, as long as the applicant meets the other eligibility requirements of the program and have "satisfactory immigration status". The Federal definition of "satisfactory immigration status" is an immigration status that does not make the individual ineligible for benefits under the applicable program.

Examples of individuals who are said to be in "satisfactory immigration status" are:

- U.S. Citizens;
- Nationals;
- Native Americans;
- Immigrants lawfully admitted for permanent residence (LPR) and immigrants known as "qualified immigrants"; and
- Immigrants permanently residing in the United States under color of law (PRUCOL).

Only two groups of immigrants are ineligible for "full" Medicaid. Those are:

- Undocumented immigrants (i.e. persons with no USCIS paperwork)
- Temporary nonimmigrants (i.e. short term visa holders, foreign students, tourists)

However, providing they meet the other eligibility criteria, undocumented immigrants and temporary nonmmigrants may be eligible for the treatment of an emergency medical condition.

Districts must accept and process new and pending Medicaid applications submitted by or on behalf of all persons in satisfactory immigration status, including PRUCOL immigrants and immigrants formerly subject to the five-year rule. These Medicaid applications must be processed within the time frames specified in 18 NYCRR 360-2.4, which requires the social services district to make a Medicaid eligibility determination within 30, 45, or 90 days depending upon the applicant's eligibility category, and Section 365-a (6) of the Social Services Law, which directs the district to provide prenatal care assistance program Medicaid benefits presumptively to eligible pregnant women.

A. DEFINITIONS

This section provides or lists definitions for immigration statuses, immigration-related terms and public benefit terms that appear repeatedly throughout this directive.

ACTIVE MILITARY DUTY: The term "active military duty" applies to individuals in current full-time service in the Army, Navy, Air Force, Marine Corps, or Coast Guard. Members of the National Guard are not included in this definition.

ALIEN: The term "alien" means any person not a citizen or national of the United States. For the purposes of this directive, the term "immigrant" has the same meaning as the term "alien".

BATTERED IMMIGRANT: The term "battered immigrant" applies to certain individuals based on the fact that s/he was battered or subjected to extreme cruelty by a spouse or parent and who have been granted, or found prima facie eligible for relief under the Violence Against Women Act of 1994(P.L. 103-322).

EMERGENCY MEDICAL CONDITION: The term "emergency medical condition" means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in:

- -placing the person's health in serious jeopardy;
- -serious impairment to bodily functions; or
- -serious dysfunction of any bodily organ or part.

Treatment of emergency medical conditions does not include care and services related to an organ transplant procedure.

NATIONAL: A "national" is a person, who is not a U.S. citizen, but who owes permanent allegiance to the United States and may enter and work in the U.S. without restriction. A "national" who is otherwise qualified may, if he becomes a resident of any State, be naturalized upon completing the applicable requirements. Examples of nationals are: (1) persons born in American Samoa and Swain's Island after December 24, 1952; and (2) residents of the Northern Mariana Islands who did not elect to become U.S. citizens.

NATIVE AMERICAN BORN IN CANADA: A Native American born in Canada may freely enter and reside in the United States and is considered to be lawfully admitted for permanent residence if he or she is of at least one-half Native American Indian blood. As such, he or she is a qualified immigrant. This does not include a non-citizen spouse or child of such Native American or a non-citizen whose membership in an Native American Indian tribe or family is created by adoption, unless such person is at least 50 percent Native American Indian blood.

NONIMMIGRANT: A "nonimmigrant" is defined as an individual who has been granted a nonimmigrant status that allows him or her to remain in the U.S. temporarily for a specific purpose. There are more than two dozen nonimmigrant categories, each of which has specific requirements concerning the purpose of the individual's stay in the U.S. Most nonimmigrant categories require as a condition of the status that the individual have the intent of returning to a residence abroad.

PRUCOL (**P**ermanently **R**esiding **U**nder **C**olor **O**f **L**aw): Any immigrant who is permanently residing in the United States with the **knowledge and permission or acquiescence** of the United States Citizenship and Immigration Services (USCIS)(formerly the Immigration and Naturalization Services [INS]) and whose departure from the United States the USCIS does not contemplate enforcing.

QUALIFIED IMMIGRANT: For the purposes of this directive, the term "qualified immigrant" has the same meaning as the term "qualified alien", as used in the federal PRWORA (Welfare Reform). Qualified immigrants are immigrants who usually live and work in the United States with the permission of the United States Citizenship and Immigration Services (USCIS).

SATISFACTORY IMMIGRATION STATUS: The term "satisfactory immigration status" is defined as an immigration status that does not make the individual ineligible for benefits under the applicable program. All qualified immigrants and PRUCOL immigrants are individuals said to be in satisfactory immigration status, as are citizens, Native Americans and nationals. The only groups excluded are undocumented immigrants and temporary nonimmigrants.

SPECIAL NONIMMIGRANT: Some categories of "special" nonimmigrant statuses allow the status (visa) holder to work in the United States and eventually adjust to lawful permanent residence status. These categories allow the individual to apply for adjustment to Lawful Permanent Resident (LPR) status after he or she has had the non-immigrant status for a period of time.

TEMPORARY NONIMMIGRANT: A temporary nonimmigrant is an immigrant who has been allowed to enter the United States for a specific purpose and for a limited period of time. There are more than two dozen nonimmigrant categories, each of which has specific requirements concerning the purpose of the individual's stay in the U.S. Examples include tourists, students, and visitors on business or pleasure.

UNDOCUMENTED IMMIGRANT: Undocumented immigrants are immigrants who do not have the permission or acquiescence of the United States Citizenship and Immigration Services (USCIS) to remain in the United States. They may have entered the United States legally but have violated the terms of their status, e.g., over-stayed a visa, or they may have entered without documents.

UNITED STATES CITIZEN: For the purposes of qualifying as a United States citizen, the United States includes the 50 states, the District of Columbia, Puerto Rico, Guam, U.S. Virgin Islands and the Northern Mariana Islands. Nationals from American Samoa or Swain's Island are also regarded as United States citizens for the purpose of Medicaid eligibility.

VETERAN: The term veteran means a person who served in the active military, naval or air service of the United States who fulfilled the minimum active duty service requirements and was honorably discharged or released, not on account of immigration status.

VICTIMS OF A SEVERE FORM OF TRAFFICKING: A "victim of a severe form of trafficking" is defined as anyone who:

1) has been subjected to a "severe form of trafficking in persons" which is defined as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery; and
2) has not attained the age of 18 years or who is the subject of a certification issued by the federal government pursuant to Section 107(b)(1)(E) of the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386).

B. DOCUMENTATION AND VERIFICATION REQUIREMENTS

This directive will instruct social services district workers regarding the types of documentation that can be used to establish a Medicaid applicant's or recipient's immigration status and the individual's eligibility for Medicaid. This documentation is fully outlined in the "Documentation Guide, Immigrant Eligibility for Health Coverage in New York State", which is Attachment D-1 to this directive. As a general rule, U.S. citizens, nationals, Native Americans, qualified immigrants and PRUCOL applicants for Medicaid must provide appropriate documentation of their citizenship or satisfactory immigration status. In addition to the standard Medicaid eligibility questions regarding income, resources, family composition and living arrangements, the Medicaid program must ask an immigrant to verify his or her satisfactory immigration status. Such individuals must also sign a declaration, under penalty of perjury, that they are U.S. citizens, nationals, Native Americans, qualified or PRUCOL immigrants and must provide, or apply for, a Social Security Number or proof that s/he has applied for one, or tried to apply for a Social Security Number.

NOTE: Immigrant parents applying for Medicaid for citizen children do not have to supply any information about their own immigration status. Parents only have to prove that the child is a U.S. citizen. Pregnant women are not required to document their immigration status, complete the citizenship declaration, or provide a Social Security Number. In the month following the month in which the 60 day postpartum period ends, the women must meet these and all other applicable requirements in order to remain Medicaid eligible.

C. ELIGIBILITY FOR MEDICAID BENEFITS: CITIZENS, NATIONALS AND NATIVE AMERICANS

1. CITIZENS

Natural born citizens and individuals who acquire citizenship through naturalization and who are residents of the State of New York may receive Medicaid benefits, if otherwise eligible. For the purposes of qualifying as a United States citizen, the United States includes the 50 states, the District of Columbia, Puerto Rico, Guam, U.S. Virgin Islands and the Northern Mariana Islands. Nationals from American Samoa or Swain's Island are also regarded as United States citizens for the purpose of Medicaid eligibility.

The following are examples of items which constitute primary documentation of U.S. citizenship (See Attachment D-1 to this directive):

- U.S. Birth Certificate
- U.S. Passport
- Naturalization Papers or Certificate (N-550 or N-570)
- Consulate Report of Birth Abroad (FS-240)
- Certification of Report of Birth (DS-1350)
- U.S. Citizen I.D. Card (I-197 or I-179)
- Information from a primary source Federal agency (such as SSA) verifying U.S. as place of birth
- Religious document such as baptismal record, recorded within 3 months of age showing the ceremony took place in the U.S.

Many elderly individuals born in rural areas of the United States have particular difficulty in documenting their place of birth. Districts must provide assistance to such persons in exploring all possible sources of primary and secondary verification before denying such individuals on the basis of citizenship status.

When primary documentation is not available, secondary documentation must be obtained. At least **two** secondary documents are needed to establish United States citizenship.

The following are examples of items which constitute secondary documentation of U.S. citizenship:

a.) Letter of No Record: This is a letter that indicates an attempt was made to find a birth certificate. It is issued by the State where the individual was born stating the name, date of birth, years searched for a record and that there is no birth certificate on file for the person; **AND,**

b.) One other document showing place of birth in the U.S. such as:

- Census record*
- Certificate of circumcision*
- Early school record*
- Family Bible record*

- Doctor's record of post-natal care*
- A notarized affidavit from a blood relative familiar with the circumstances of the birth, i.e. a parent, aunt, uncle, sibling.
- A delayed birth certificate filed more than one year after birth listing the documentation used to create it. It must be signed by the attending physician or midwife or list an affidavit by the parent(s) or show early public school records.

*Any of this documentation **MUST** be a record showing the date and place of birth and created within the first five years of life.
(Please refer to Attachment D-2 "Secondary Documentation of U.S. Citizenship".)

2. NATIONALS

All U.S. citizens are also called nationals of the United States, but some individuals who are U.S. nationals are not U.S. citizens. When the U.S. acquired certain island territories, Congress provided for the inhabitants of these territories to be citizens of their own islands, and nationals of the United States. Noncitizen nationals owe permanent allegiance to the U.S and may enter and work in the U.S. without restriction. At present, noncitizen nationals include only (1) certain citizens of American Samoa and Swain's Island, and (2) residents of the Northern Mariana Islands who did not elect to become U.S. citizens.

3. NATIVE AMERICANS

Native Americans born in the United States are citizens of the United States, and will have the same types of documentation as do other citizens.

A non-citizen member of a federally recognized tribe or a native-American who is at least fifty percent Native American Indian blood and who was born in Canada may be eligible for Medicaid benefits.

A Native American born in Canada may freely enter and reside in the U.S. and is considered to be lawfully admitted for permanent residence if she/he is of at least one-half Native American Indian blood. As such, she/he is a qualified immigrant. This does not include a non-citizen spouse or child of such Native American or a noncitizen whose membership in a Native American Indian tribe or family is created by adoption unless such person is at least fifty percent Native American Indian blood.

The following items can be used to verify Native American or federally recognized tribal membership:

Native Americans born in Canada:

- Birth or baptismal certificate issued on a reservation;
- Tribal records;
- Letter from the Canadian Department of Indian Affairs; or
- School records.

Non-citizen member of federally recognized tribe:

- Membership card or other tribal document; or
- Confirmed by contact with tribal government.

D. ELIGIBILITY OF IMMIGRANTS FOR MEDICAID BENEFITS: QUALIFIED IMMIGRANTS

As a result of the Aliessa v. Novello court decision, all qualified immigrants regardless of their date of entry into the United States, can be eligible for Medicaid provided they meet all other eligibility requirements. The only difference is that Federal Financial Participation (FFP) should be claimed for some groups but must not be claimed for others until they have resided in the United States as qualified immigrants for five years.

- Qualified immigrants who entered the U.S. prior to August 22, 1996 receive full Medicaid coverage with Federal Financial Participation (FFP);
- Certain qualified immigrants who entered the U.S. on or after August 22, 1996 receive Medicaid coverage with FFP; and
- Certain qualified immigrants who entered the U.S. on or after August 22, 1996, receive Medicaid coverage with State and local funds (FNP) until they have resided in the U.S. as qualified immigrants for five years.

Therefore, to assure proper claiming it is imperative that local department of social service staff determine and enter into the Welfare Management System (WMS) the correct Date of Entry (DOE).

Qualified immigrants include the following: (See Attachment D-1)

- Persons lawfully admitted for permanent residence;
- Persons admitted as refugees;
- Persons granted asylum;
- Persons granted status as Cuban and Haitian entrants;
- Persons admitted as Amerasian immigrants;
- Persons whose deportation has been withheld;
- Persons paroled into the United States for at least one year;
- Persons granted conditional entry;
- Persons determined to be battered or subject to extreme cruelty in the United States by a family member;
- Victims of trafficking; or
- Veterans or persons on active duty in the Armed Forces and their immediate family members.

1. QUALIFIED IMMIGRANTS WHO ENTERED THE U.S. PRIOR TO AUGUST 22, 1996:

A qualified immigrant who entered the United States prior to August 22, 1996, may receive all care and services available under the Medicaid program, provided he or she is determined to be otherwise eligible. This provision includes individuals who attained qualified immigrant status subsequent to August 22, 1996, and who can demonstrate to the district's satisfaction that they continuously resided in the United States until attaining qualified immigrant status. Federal Financial Participation (FFP) should be claimed for Medicaid provided to these qualified immigrants.

2. QUALIFIED IMMIGRANTS WHO ENTERED THE U.S. ON OR AFTER AUGUST 22, 1996 AND ARE IN CERTAIN CATEGORIES EXEMPT FROM THE FEDERAL FIVE YEAR BAN ON MEDICAID:

The following qualified immigrants who entered the United States on or after August 22, 1996, may receive all care and services available under the Medicaid program, provided they are determined to be otherwise eligible.

- Persons who have been granted asylum under Section 208 of the INA;
- Persons for whom deportation has been withheld under Section 243(h) or 241 (b) (3) of the INA;
- Persons who are Cuban and Haitian entrants (as defined in Section 501(e) of the Refugee Education Assistance Act of 1980);
- Qualified immigrants lawfully residing in the State who are on active duty in the armed forces, or who have received an honorable discharge from the armed forces and their spouses and unmarried dependent children, who are also qualified immigrants.

  NOTE: Non-citizen veterans and Active Duty Military personnel and their spouses and children are exempt from most of the immigration status related restrictions under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). For example they are eligible for Supplemental Security Income (SSI) and Food Stamps and are exempt from the five year ban.
- Refugees under Section 207 of the INA (including Amerasian immigrants admitted under the provisions of Public Law 100-202).
- Victims of a severe form of trafficking are qualified immigrants who receive Medicaid to the same extent as refugees. A comprehensive discussion of this group is set forth at Section "D.4." of this directive.

Federal Financial Participation (FFP) should be claimed for Medicaid provided to these qualified immigrants.

3. ALL OTHER QUALIFIED IMMIGRANTS WHO ARE NOT IN THE ABOVE TWO GROUPS:

This group of qualified immigrants may receive all care and services available under the Medicaid program, provided s/he is determined to be otherwise eligible. However, for these individuals their Date of Entry (DOE) will determine whether or not Federal Financial Participation (FFP) is available. During their first five years in the U.S. with a status as qualified immigrant, FFP is not available. The cost of their Medicaid coverage will be born solely by State and local shares (50% State/50% local). Once a qualified immigrant in this group has resided in the United States as a qualified immigrant for a period of five years, FFP will become available. This means the federal government will pay a share of their Medicaid costs. The shares are generally split 50%Federal/25%State/25%local.

Therefore, for these individuals it is critical that the Medicaid eligibility worker make the appropriate WMS system changes to assure the change from FNP to FFP claiming as the five year ban period comes to an end.

Qualified immigrants in this group include the following:

- Persons lawfully admitted for permanent residence (i.e. LPRs- “green card holders”) under the Immigration and Nationality Act (INA);
- Persons paroled into the United States under Section 212(d)(5) of the INA for a period of at least one year;
- Persons granted conditional entry pursuant to Section 203(a)(7)Immigration and Nationality ACT (INA); and
- Persons who have been determined by the social services district to be in need of Medicaid as a result of being battered or subject to extreme cruelty in the United States by a spouse, parent, or by a member of the spouse’s or parent’s family residing in the same household as the alien family member at the time of the battering or extreme cruelty. A comprehensive discussion of this group is set forth at Section “D.5.” of this directive.

4. VICTIMS OF A SEVERE FORM OF TRAFFICKING:

There have been several new visa categories issued by the United States Citizenship and Immigration Services (USCIS) over the past several years. The T Visa Status is one of them, and is issued by USCIS to immigrants who are “victims of a severe form of trafficking”.

For purposes of Medicaid/Family Health Plus/Child Health Plus A eligibility victims of a severe form of trafficking, holders of a T visa/T-1, and holders of T-2, T-3, T-4 and T-5 (“Derivative T-visas”) who are the minor children, spouses and in some cases the parents and siblings of victims of severe forms of trafficking in persons, may receive Medicaid benefits to the same extent as refugees (Trafficking Victims Protection Reauthorization Act of 2003 [TVPRA-P.L. 108-193]).

DERIVATIVE T-VISA

For an individual who is already in the United States on the date the derivative T visa is issued, the date of entry is the notice date on the I-797, Notice of Action of Approval (issued by USCIS) for that individual T visa.

For an individual who enters the United States on the basis of a Derivative T visa, the Date of entry is the date stamped on the individual passport or I-94 Arrival Record.

PRIMARY T-VISA HOLDERS

Under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), adult victims of trafficking who are certified by the U.S. Department of Health and Human Services (HHS) are eligible for benefits to the same extent as refugees. Children who have been subjected to trafficking are also eligible like refugees but do not need to be certified.

For individuals who meet the criteria, the Office of Refugee Resettlement (ORR) will issue certification letters to victims of trafficking who meet certification requirements. ORR will issue similar letters for children who have been subjected to trafficking. To receive a certification, a victim of trafficking must be willing to assist with the investigation and prosecution of trafficking cases and either

1) have made a bona fide application for a T visa; or
2) be an individual whose continued presence the Attorney General is ensuring to effectuate a trafficking prosecution.

When a victim of trafficking applies for Medicaid benefits, the local district of social services worker must:

1) Accept the certification letter or letter for children in place of USCIS documentation. Victims of severe trafficking do not need to provide any other documentation of their immigration status.

2) Call the trafficking verification line at (202) 401-5510 to confirm the validity of the certification letter or similar letter for children.

3) Note the “entry date” for refugee benefits purposes. The individual’s “entry date” for refugee benefits purposes is the certification date, which appears in the body of the certification letter or letter for children. This is the date that must be entered in the WMS system in the Date of Entry (DOE) field.

4) Issue benefits to the same extent as a refugee provided the victim of a severe form of trafficking meets other program eligibility criteria (e.g. income levels).

5) Record the expiration date of the certification letter or letter for children so that re-determinations/renewals of eligibility can be conducted at the appropriate time.

Federal Financial Participation should be claimed for Medicaid provided to these individuals.

5. BATTERED IMMIGRANTS:

Battered immigrants filing self-petitions (USCIS Form 1-360: Petition for Amerasian, Widow(er), or Special immigrant) who can establish a "prima facie" case are considered qualified immigrants for the purpose of eligibility for public benefits (Section 501 of the Illegal Immigrant Responsibility and Immigration Reform Act [IIRIRA]). The USCIS reviews each petition initially to determine whether the self-petitioner has addressed each of the requirements listed below and has provided some supporting evidence. This may be in the form of a statement that addresses each requirement. This is called a prima facie determination. When the USCIS makes a prima facie determination, the self-petitioner will receive a Notice of Prima Facie Determination from USCIS.

In order to be a qualified immigrant based on battery or extreme cruelty, the immigrant must not currently be residing in the same household as the individual responsible for the battery or extreme cruelty and must have a petition approved by or pending with the USCIS that sets forth a prima facie case for one of the following statuses:

- Status as a spouse or child of a United States citizen under Sections 204(a)(1)(A)(i), (ii), (iii), or (iv) of the INA;
- Classification to immigrant status as a spouse or child of a lawful permanent resident under Sections 204(a)(1)(B)(i), (ii), (iii), or (iv) of the INA; or
- Suspension of deportation and adjustment to lawful permanent resident status under Section 244(a)(3) of the INA.

A substantial connection between the battery or extreme cruelty suffered by the immigrant (or the immigrant's child or parent) and the need for Medicaid benefits exists under the following circumstances:

- The benefits are needed to enable the immigrant and/or the immigrant's child to become self-sufficient following the separation from the abuser;
- The benefits are needed due to loss of financial support resulting from the immigrant's and/or his/her child's separation from the abuser;
- The benefits are needed because work absence or lower job performance resulting from the battery or extreme cruelty or from legal proceedings relating thereto cause the immigrant to lose his or her job or require the immigrant to leave his/her job for safety reasons;
- The benefits are needed because the immigrant or his/her child requires medical attention or mental health counseling, or has become disabled as a result of the battery or cruelty;
- The benefits are needed to alleviate nutritional risk or need resulting from the abuse or following separation from the abuser;
- The benefits are needed to provide medical care during an unwanted pregnancy resulting from the abuser's sexual assault or abuse of, or relationship with, the immigrant or his/her child, and to care for the resulting children; or

- Medical coverage and/or health care services are needed to replace medical coverage of health care services the immigrant had when living with the abuser.

The federal immigration agency, USCIS, determines whether an immigrant meets the requirements to be a "battered immigrant", as explained above. The worker should refer to Attachment D-1 "Documentation Guide Immigrant Eligibility for Health Coverage in New York State" for the types of USCIS documents these immigrants will have.

E. VERIFICATION OF QUALIFIED IMMIGRANT STATUS

All applicants for Medicaid (except those applying only for the Prenatal Care Assistance Program (PCAP) or the treatment of an emergency medical condition) must provide proof of citizenship or must demonstrate or document "satisfactory immigration status", and verify that status with a United States Citizenship and Immigration Services (USCIS) document. Satisfactory immigration status is an immigration status that does not make the individual ineligible for benefits under the applicable program. Most qualified immigrants will have a "Green Card" (I-551), or an Arrival/Departure Record (I-94) or an Employment Authorization Document (EAD). The following USCIS documents can be used to verify Qualified Immigrant status:

- **Permanent Resident Card USCIS FORM I-151, I-551-"Green Cards":** "Green Cards" (although no longer green in color) are issued to immigrants who have been granted permanent resident status in the United States. They retain this status while in this country. The green card contains two dates, the "Card Expires" date and the "Resident Since" date. The Card Expires date indicates when the card expires and must be renewed. It does **NOT** indicate that the immigrant's status has expired. The immigrant retains his/her status as Lawful Permanent Resident (LPR) while in this country.

  The Resident Since date is the date on which the immigrant acquired lawful resident status. It is not the "date of entry" required for WMS input. The date of entry is not indicated on the green card.

  NOTE: The Date of Entry (DOE) is of particular importance to the eligibility worker because the date will determine whether federal financial participation is available. The worker should record the date of entry in WMS.

  For the purposes of obtaining Medicaid benefits, an I-151 or I-551 that contains an expired date is acceptable documentation of lawful permanent resident status. Although the USCIS requires that the individual simply renew the I-551, this is not a requirement for the purpose of applying for Medicaid.

  No other form of documentation of U.S. residence status is required if an individual has either of these documents.

- **Arrival/Departure Record USCIS FORM I-94:**
  Every immigrant who has been granted permission to enter the U.S. by an Immigration Inspector at an authorized Port of Entry is issued an Arrival/Departure Record, USCIS Form I-94.

  An Arrival/Departure Record will take one of two forms, it can be either:
  - An I-94 stamp in the immigrant's passport (the "I-94" stamp is annotated with the appropriate code); or
  - A white I-94 card, the bottom of which is stapled to a page in the immigrant's passport.

  This document includes the date of entry, how long the person may remain in the U.S. and the terms or codes of admission.

  NOTE: The Date of Entry (DOE) is of particular importance to the eligibility worker because the date will determine whether federal financial participation is available. The worker should record the date of entry in WMS.

  If the only document presented by the applicant is the I-94, the LDSS worker must refer to the desk guide "Key to I-94 Arrival Departure Record" (Attachment D-4 of this directive) to determine if the I-94 code is one that establishes the immigrant status.

  For example: If an individual presents an I-94 card coded "207 or REFUG", the worker would look on the desk guide entitled "Key to I-94 Arrival Departure Record" under the code column for the code "207 or REFUG". The "meaning" column indicates this individual is a Refugee, as illustrated below:

KEY TO I-94 ARRIVAL DEPARTURE RECORD

PERSONS FLEEING PERSECUTION	
CODE	**MEANING**
203(a)(7)	Conditional entrant
207 or REFUG	**Refugee**
208	Asylum
243(h) or 241(b)(3)	Withholding of deportation or removal
AM 1, 2, 3	Amerasian

Next, the worker must refer to the desk guide "Documentation Guide, Immigrant Eligibility for Health Coverage in New York State" (Attachment D-1 of this directive) to determine further the immigrant's status and appropriate Alien/Citizenship Indicator Code (ACI), as illustrated below:

DOCUMENTATION GUIDE: IMMIGRANT ELIGIBILITY FOR HEALTH COVERAGE IN NEW YORK STATE

Category	Documents	WMS ACI code
Refugees	**►I-94 or passport with annotation "Section 207" or "refugee"** **►I-551 coded R8-6, RE6, RE7, RE8, or RE9** **►I-571 Refugee Travel Document** **►I-688B or I-766 coded 274a.12(a)(3) or A3**	**R**

- **Employment Authorization Documents (EAC and EAD) USCIS FORMS I-688B, I-766:**
  If the USCIS permits an immigrant to work legally in the U.S., an Employment Authorization Document or Card (EAD or EAC) will be issued. Permanent residents, PRUCOLs and individuals waiting for an adjustment of status can all apply for and may be issued such documents.

  An Employment Authorization Document (EAD) Form I-688B is issued to immigrants who are not permanent residents but have been granted permission to be employed in the U.S. for a specific period of time. (This may include foreign students, visitors on business or pleasure and certain other visa holders).

  An Employment Authorization Card (EAC) Form I-766 is a newer version similar to a credit card document. Both the I-688B and the I-766 have a "category" section that indicates the immigration status code when issued.

  The status code indicated in the category section of the EAD or EAC must be checked on the desk guide Attachment D-3 "Key to I-766, I-688B, Employment Authorization Documents (EADs)" to determine the individual's immigration status and type of health benefit they may be eligible for.

  Because an EAD/EAC can be issued to non-immigrants it can not stand alone. Therefore, an eligibility worker must look at additional documentation to establish immigrant status.

  An expired EAD or EAC alone is **not** acceptable proof of immigration status because these forms may be issued to nonimmigrants. If used, an expired EAD or EAC must be accompanied by other supporting USCIS document(s).

F. PERSONS PERMANENTLY RESIDING UNDER COLOR OF LAW (PRUCOL)

Persons permanently residing in the United States under color of law (PRUCOL) are eligible for Medicaid, Family Health Plus (FHPlus) and Child Health Plus A (CHPlus A) provided they meet all other eligibility requirements. There is **no** Federal Financial Participation for this group. This means the federal government will not pay a share of their Medicaid costs. The shares are generally split
50% State/50% local.

Immigrants who are PRUCOL for Medicaid eligibility purposes are any persons who are permanently residing in the United States with the **knowledge and permission or acquiescence** of the United States Citizenship and Immigration Services (USCIS) and whose departure from the United States the USCIS does not contemplate enforcing.

An immigrant is considered as one whose departure the USCIS does not contemplate enforcing if, based on all the facts and circumstances of the particular case, it appears that the USCIS is otherwise permitting the immigrant to reside in the United States indefinitely or it is the policy or practice of the USCIS not to enforce the departure of immigrants in a particular category.

Prior to August 22, 1996, immigrants who were considered PRUCOL were eligible for a number of federal programs, including Medicaid, SSI, and Aid to Families with Dependent Children (AFDC). The term is now used for Unemployment Insurance purposes and also by a number of States in determining eligibility for state funded programs such as FNP Medicaid. The term also has been defined in decisions of federal and state courts, and the number and types of statuses that may be considered PRUCOL vary from state to state, benefit program to benefit program.

There are several categories of PRUCOL immigrants. These categories are listed below and are also set forth in several attachments to this directive including Attachments B-1, B-2, entitled “Documentation Guide for PRUCOL Alien Categories,” and D-1, entitled “Documentation Guide Immigrant Eligibility for Health Coverage in New York State.”

All immigrants who establish their status as PRUCOL under any of these categories are eligible for Medicaid, Family Health Plus and Child Health Plus A, provided they meet such programs’ other eligibility requirements.

In New York State, for the purposes of Medicaid eligibility, the following statuses are considered PRUCOL:

a) Persons paroled into the U.S. pursuant to Section 212(d)(5) of the INA showing status for less than one year, except Cuban/Haitian entrants;
b) Persons residing in the U.S. pursuant to an Order of Supervision;
c) Persons residing in the U.S. pursuant to an indefinite stay of deportation;

d) Persons residing in the U.S. pursuant to an indefinite voluntary departure;
e) Persons on whose behalf an immediate relative petition has been approved and their families covered by the petition, who are entitled to voluntary departure, but whose departure the USCIS does not contemplate enforcing;
f) Persons who have filed applications for adjustment of status pursuant to Section 245 of the INA that USCIS considers "properly filed" or granted and whose departure the USCIS does not contemplate enforcing;
g) Persons granted stays of deportation by court order, statute, or regulation, or individual determination by USCIS pursuant to Section 243 of the INA and whose departure the USCIS does not contemplate enforcing;
h) Persons granted voluntary departure pursuant to Section 242 (b) of the INA;
i) Persons granted deferred action status pursuant to USCIS operating instructions;
j) Persons who entered and have continuously resided in the U.S. since before 1/01/72;
k) Persons granted suspension of deportation pursuant to Section 244 of the INA; USCIS does not contemplate enforcing the departure; and
l) Other persons living in the United States with the knowledge and permission or acquiescence of the USCIS and whose departure the USCIS does not contemplate enforcing. Examples include but are not limited to, the following:
    - Permanent non-immigrants pursuant to Public Law 99-239 (applicable to Citizens of the Federated States of Micronesia and Marshall Islands);
    - Applicants for adjustment of status, asylum, suspension of deportation or cancellation of removal, or deferred action;
    - Persons granted extended voluntary departure, or Deferred Enforced Departure (DED) for a specified time due to conditions in their home country;
    - Persons granted Temporary Protected Status; and
    - Persons having a "K", "V", "S" or "U" visa.

G. VERIFICATION OF PRUCOL STATUS

The Medicaid eligibility worker must understand that the USCIS does not determine whether an immigrant is PRUCOL. To the contrary, the eligibility worker must determine whether the immigrant is PRUCOL by reviewing the documentation and other information that the immigrant presents to establish that he or she is PRUCOL.

To be PRUCOL, the immigrant must possess or obtain documentation that establishes that he or she is permanently residing in the United States with either of the following:

- the knowledge and permission of the USCIS; **or**
- the knowledge and acquiescence of the USCIS.

These concepts are important and are explained further, below.

Permanently residing in the U.S. with the knowledge and permission of the USCIS:

This means that the USCIS "knows" that the immigrant is present in the U.S. and has granted its permission for the immigrant to remain in this country, at least for the time-being; that is, the USCIS is not contemplating enforcing the immigrant's departure at this time. As a general rule, immigrants will be permanently residing in the U.S. with the knowledge and permission of the USCIS when the USCIS has granted the immigrant a particular immigration status. The immigrant will have a document or form issued by the USCIS that indicates the particular immigration status that the USCIS has granted. The USCIS provides different documents and forms to immigrants, depending upon that immigrant's specific immigration status. In some cases, an immigrant may also have a document issued by an immigration court that permits the immigrant to remain in this country.

Permanently residing in the U.S. with the knowledge and acquiescence of the USCIS:

This means that the USCIS "knows or can reasonably be expected to know" that the immigrant is present in the U.S. and, although the USCIS may not have officially granted the immigrant permission to remain in this country, as demonstrated by a particular USCIS document or form granting a particular immigration status, the USCIS, through its silence or inaction, is apparently acquiescing in the immigrant's presence here, at least for the time-being. These immigrants will not have any USCIS document or form establishing that the USCIS has granted them a particular immigration status. However, the immigrant can be expected to present documentation of his or her contacts with the USCIS. This documentation must be sufficient to establish that the USCIS has knowledge of the immigrant's presence in the U.S. or, given all the facts and circumstances of the particular case, one may reasonably conclude that the USCIS knows that the immigrant is here. For example, the immigrant may have a copy of his or her letter to the USCIS applying for a particular immigration status and documentation, such as a return receipt for certified mail, showing that the USCIS would have received this letter. The USCIS's acquiescence in the immigrant's presence in the U.S. may be established when the USCIS, despite having been notified of the immigrant's presence in this country, fails after a reasonable period of time to respond to the immigrant's letters or fails to take any action to enforce the immigrant's departure from the U.S.

Both of these concepts are explained below, with specific reference to the PRUCOL categories listed at pages 19 and 20 of this directive. For most of these PRUCOL categories, the USCIS will have issued the immigrant a document or form showing that the USCIS has granted the immigrant a particular immigration status. As noted, however, immigrants may be found to be PRUCOL even in the absence of a USCIS document or form granting an immigration status.

1. VERIFICATION OF PRUCOL STATUS FOR IMMIGRANTS TO WHOM THE USCIS HAS ISSUED DOCUMENTS OR FORMS GRANTING AN IMMIGRATION STATUS:

a. Immigrants to whom PRUCOL categories (a)-(k) apply:

When an eligibility worker verifies immigration documents for PRUCOL categories "a" through "k", documentation is fairly straight forward. By referring to the desk guide "DOCUMENTATION GUIDE FOR PRUCOL ALIEN CATEGORIES" (Attachment B-2 of this directive and/or Desk Guide Attachment D-1: "Category 3") the worker needs only to match the appropriate document presented to the category of PRUCOL "a through k".

For example: When an individual presents an I-797 Notice of Action indicating an I-130 Petition for Alien Relative has been approved, the worker would review page 5 of the desk guide "Documentation Guide, Immigrant Eligibility for Health Coverage in New York State" (Attachment D-1 of this directive) to determine the type of USCIS document the worker is reviewing.

Reproduced below is the relevant portion of page 5 of the desk guide highlighting the I-797 and I-130:

U. S. Citizenship and Immigration Services (USCIS) Documents

I-94	**Arrival Departure Card**	I-571	**Refugee Travel Document**
I-181	**Memorandum Of Creation of Record of Lawful Permanent Residence**	I-688	**Temporary Resident Card**
I-210	**Voluntary Departure**	I-688A	**Employment Authorization For Legalization Applicants**
I-220B	**Order of Supervision**	I-688B	**Employment Authorization Card**
I-130	**Petition for Alien Relative**	I-766	**Employment Authorization Card**
I-140	**Immigrant Petition for Alien Worker**	**I-797**	**Notice of Action (I-797C current version)**
I-327	**Reentry Permit for permanent residents**	DD-Form 2	**Military Identification Card**
I-551	**Legal Permanent Resident Card, Resident Alien Card or "green card"**	DD-214	**Report of Separation Military Discharge Document**

Next, the worker would turn to page 3 of the desk guide "Documentation Guide Immigrant Eligibility for Health Coverage in New York State" (Attachment D-1 of this directive)under "Category 3: Persons who are Permanently Residing under Color of Law (PRUCOL)". The worker can then identify the category of PRUCOL by matching the documentation to the category. In this particular example, the worker would conclude that the appropriate PRUCOL category is (e), "Persons on whose behalf an immediate relative petition has been approved and his or her families covered by one petition", as illustrated below:

Category 3: Persons who are Permanently Residing Under Color of Law (PRUCOL)*

Category	Documentation	WMS ACI code
e. Persons on whose behalf an immediate relative petition has been approved and her/his families covered by the petition ***(Non-citizens who are immediate relatives (spouse, father, mother, or unmarried child under 21) of a U.S. citizen/LPR who has filed an I-130 on their behalf.)***	**►I-94 and/or I-210 indicating departure on a specified date, however, the USCIS expects the non-citizen's visa will be available within this time** **►I-797 indicating I-130 petition has been approved** **►Also see documentation listed under category "l"**	O

b. <u>Immigrants granted a "K," "V," "S" or "U" visa</u>:

There have been several new visa categories issued by the United States Citizenship and Immigration Services (USCIS) over the past several years.

Some categories of "special" nonimmigrant statuses allow the status (visa) holder to work and eventually adjust to lawful permanent residence. These categories allow the individual to apply for adjustment to LPR status after he or she has had the non-immigrant status for a period of time. These statuses are included in the category defined as: "Other persons living in the U.S. with the knowledge and permission or acquiescence of USCIS and whose departure USCIS does not contemplate enforcing."

Such statuses include, for example:

K status: For the spouse, child, or fiancé(e) of a U.S. citizen.

S status: For informants providing evidence for a criminal investigation. Also known as the "Snitch Visa".

U status: For victims or witnesses of specified crimes (who have suffered substantial physical or mental abuse and agrees to cooperate with the government).

V status: For spouses and children of LPR's whose visa petitions (Form I-130) have been pending for at least three years.

NOTE: THE ABOVE USCIS VISA CATERGORIES ARE NOT TO BE CONFUSED WITH WMS ALIEN CITIZENSHIP INDICATOR CODES (ACI CODES).

If otherwise eligible, an individual with a visa category of K or V or S or U should be authorized for Medicaid, FHPlus and CHPlus A as PRUCOL. These visa categories are discussed further, below:

The K and V Visa Status

Nonimmigrant visas V (Visa codes V-1, V-2 and V-3) and K (Visa codes K-3 and K-4) are two new categories of "special" nonimmigrant visas that were created by the Legal Immigration and Family Equity Act (LIFE Act) and are issued to persons intending to live permanently in the United States. The V visa may be issued to alien spouses and minor children of lawful permanent residents whose family petitions (the I-130) have been pending for some time. The V visa is intended to permit family reunification while the immigration cases of the lawful permanent resident's spouse and children are pending. The K visa allows alien spouses and minor children of United States citizens to enter the United States legally and obtain work authorization. Individuals issued any of these visas may enter the United States as nonimmigrants to complete the immigration process.

The S and U Visa Status

Holders of the S (Visa codes S-5, S-6 and S-7) or U visas (Visa codes U-1, U-2, U-3, and U-4) are considered PRUCOL and, if otherwise eligible, may receive Medicaid, FHPlus or CHPlus A.

The S visa status is given to aliens who assist U.S. law enforcement to investigate and prosecute crimes and terrorist activities. S visa holders are allowed to adjust status to permanent resident under Section 245(j) of the Immigration and Nationality Act.

The U visa status is given to aliens who are victims and/or witnesses of certain crimes who are assisting an investigation or prosecution. This status allows the nonimmigrant to remain in the U.S. and to work. After three years in this status, a U status holder can apply to adjust their status.

With respect to the U visa status, the USCIS has directed that individuals who satisfactorily demonstrate to USCIS that they are eligible for a U visa are to be granted Deferred Action status. As such, holders of U visas are to be considered PRUCOL and, if otherwise eligible, may receive Medicaid, FHPlus or CHPlus A.

c. Immigrants granted temporary protected status:

- These immigrants are treated as PRUCOL for purposes of their eligibility for Medicaid, FHP or CHPlus A. "Temporary protected status" is a temporary immigration status granted under federal law at 8 U.S.C. 1254a to immigrants who are physically present in the United States and who are from certain countries designated by the U.S. Attorney General as unsafe to accept their return because of ongoing environmental disasters or other extraordinary and temporary conditions. Currently, the following countries have TPS designation Angola, Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia, and Sudan. [A list

of countries designated for TPS is located at the United States Citizenship and Immigration Services' (USCIS) (formerly the Immigration and Naturalization Service-INS) website, at http://uscis.gov].

Persons granted TPS are authorized to remain in the United States for a specific limited period; the U.S. Attorney General can extend it for a further specified period. Prior to 1990, a similar status called "Extended Voluntary Departure" was used in the same way to provide relief to particular nationalities.

Persons granted temporary protected status will have one of the following types of documentation:

- Form I-688B; or
- Form I-766 EAD coded 274a.12(a)(12) or A12; or
- A letter, verification or correspondence from USCIS, such as a Notice of Action (I-797) indicating temporary protected status has been granted.

- Applicants who have applied for Temporary Protected Status (TPS): These immigrants are treated as PRUCOL for purposes of their eligibility for Medicaid, Family Health Plus or Child Health Plus A if it reasonably appears, based on all the facts and circumstances of the case, that they are present in the United States with the **knowledge** and **permission** or the **acquiescence** of the federal immigration agency and that such agency is not presently contemplating deporting them. Social Services districts should request proof from the immigrant that he or she filed the Application for Temporary Protected Status (Form I-821) and the Application for Employment Authorization (Form I-765) to the USCIS or its predecessor, the INS. For example, the immigrant may have a receipt or letter from the federal immigration agency that shows that such agency received these documents. However, the immigrant does not need to have written confirmation from the federal immigration agency acknowledging its receipt of these documents. An immigrant can be considered PRUCOL if the immigrant can prove that he or she mailed these documents to the federal immigration agency on a certain date. When the federal immigration agency has not acted on the application after a reasonable period of time after mailing, the district may reasonably presume that the applicant is PRUCOL. Applicants for temporary protected status will have one of the following types of documentation:
  - Receipt or notice showing filing of Form I-821 (Application for Temporary Protected Status) and Form I-765 (Application for Employment Authorization); or
  - Form I-688B; or
  - Form I-766 EAD coded 274a.12(c)(19) or C19; or
  - Any letter, verification or correspondence from USCIS or a U.S. Postal Return Receipt.

2. VERIFICATION OF PRUCOL STATUS FOR OTHER IMMIGRANTS, INCLUDING APPLICANTS FOR A PARTICULAR IMMIGRATION STATUS:

An immigrant can be PRUCOL even if the USCIS has not granted him or her a particular immigration status. Typically, these immigrants have applied to the USCIS for a particular immigration status or for work authorization. These immigrants will not necessarily have a document or form issued by the USCIS that officially grants them a particular immigration status. Nonetheless, they can be PRUCOL when they establish that they are permanently residing in the U.S. with the knowledge and permission or acquiescence of the USCIS. These PRUCOL immigrants are included among the immigrants in PRUCOL category "l": that is, "other persons living in the United States with the knowledge and permission or acquiescence of the USCIS and whose departure the USCIS does not contemplate enforcing."

Determining whether an immigrant is present in the U.S. with the knowledge and acquiescence of the USCIS.

The particular facts and circumstances of each immigrant's case establishes whether the USCIS has "knowledge" of the immigrant's presence in the U.S. and whether the USCIS can be seen as acquiescing in, or accepting, the immigrant's presence, at least for the time-being. Both of these elements must be established for the immigrant to be PRUCOL under this category.

To determine whether an immigrant is within this PRUCOL category, the eligibility worker must look for the following:

a. Establishing that the USCIS has "knowledge" of the immigrant's presence:

Any correspondence that the immigrant has received from the USCIS will establish that the USCIS has knowledge of the immigrant's presence in the United States. Such correspondence may include, but is not limited to, any of the following:

- USCIS receipt notice;
- "Notice of Action" issued by USCIS;
- USCIS fee receipt; or
- Cancelled check for payment of a USCIS fee.

Each of these documents proves that the USCIS has received a form or other request for change in status or issuance of a work authorization. As proof of correspondence with the USCIS, the eligibility worker may also accept a copy of a letter that the immigrant has sent to the USCIS together with documentation, such as a U.S. Postal Service Return Receipt form, showing that the USCIS actually received such letter. A letter to the USCIS, without verification that USCIS actually received the letter, is not sufficient documentation to support PRUCOL status.

b. Establishing that the USCIS is acquiescing in the immigrant's presence in the U.S.:

It is important for the eligibility worker to understand that there are two ways to establish that the USCIS is acquiescing in the immigrant's presence in the U.S. First, the immigrant may have a document from the USCIS that demonstrates acquiescence. For example, the immigrant may have a document from the USCIS in which the USCIS advises the immigrant that it is reviewing the immigrant's application for a change in status. Acquiescence can be demonstrated, however, even if the immigrant has no documentation from the USCIS but, rather, the USCIS has failed to respond to the immigrant's correspondence within a reasonable period of time. For example, the worker may determine that the USCIS is acquiescing in the immigrant's presence in the U.S. when the immigrant has applied to the USCIS for a change in status, presents documentation (such as a return receipt form) establishing that the USCIS has received an application but has failed to respond within a reasonable period of time or has failed to take any action to enforce the immigrant's departure.

A few examples illustrate how the eligibility worker may determine whether the immigrant is PRUCOL because he or she is permanently residing in the U.S. with the **knowledge** and **permission** or **acquiescence** of the USCIS even if the immigrant does not have a document or other form from the USCIS that grants the immigrant a particular immigration status:

Example 1: An immigrant has written to the USCIS to request a change in his immigration status. He has completed the appropriate USCIS application form. He has a U.S. Postal Service Return Receipt indicating that the USCIS received his letter. Alternatively, he might have a USCIS receipt that verifies the fee for filing the form was paid. In addition, he may have a Notice of Action (I-797) from the USCIS stating that his application was received and is being reviewed. All of this documentation shows the Medicaid eligibility worker that the USCIS knows the individual is present in the U.S. and is acquiescing in his or her presence, at least for the time-being.

Example 2: Same fact pattern as above, but the USCIS has failed to respond in any way to the immigrant's letter after having a reasonable time in which to respond. In this case, the immigrant has established that the USCIS knows he is present in this country. The USCIS's acquiescence may be inferred by the USCIS's silence; that is, its failure to respond in any way to the immigrant's letter after having been afforded a reasonable period of time in which to do so.

H. GENERAL DOCUMENTATION REQUIREMENTS

1. SOCIAL SECURITY NUMBERS

Effective April 1, 2003, applicants for Medicaid, Child Health Plus A and Family Health Plus who are required to provide a Social Security Number (SSN) or proof of application for a SSN must continue to do so, but are no longer required to document the SSN. This means that applicants are required to tell the district what

their SSN is, but they are not required to show proof of the SSN initially. The only time documentation is necessary is if the SSN cannot be verified or validated through the Welfare Management System (WMS) SSN Validation process (GIS 03 MA/008). Documentation of application for SSN continues to be required when appropriate. Districts must continue to confirm that the SSN provided is correct.

Some immigrants may not have a SSN. The Social Security Administration (SSA) may issue Social Security Numbers (SSN) to immigrants if State Law requires a SSN as a condition of eligibility for Public Benefits. New York State's laws and regulations require a Social Security Number for public benefits, including Medicaid [Social Services Law Section 134-a(2), 18 NYCRR Sections 351.2(c), 360-1.2]. All applicants for Medicaid thus must provide a Social Security Number or proof that they have applied for one or tried to apply for one. The only exceptions are pregnant women, undocumented immigrants and temporary non-immigrants applying for the treatment of an emergency medical condition and certain battered women immigrants who prove their status under the Violence Against Women ACT (VAWA), as set forth in the section titled "Battered Immigrant" of this directive.

A Medicaid eligibility worker should try to help the immigrant apply for a SSN. The worker should refer the applicant to a local Social Security office and provide the applicant with a letter on agency letterhead requesting a Social Security Number be issued. A sample letter "Agency Letter Request for Social Security Number" is attached to this directive as Attachment A-1.

If an applicant still cannot get a SSN, then the applicant can submit a statement to the Medicaid eligibility worker describing how s/he tried to get an SSN. A sample "Social Security Number Attestation Form" is attached to this directive as Attachment A-2.

A Medicaid application **cannot be delayed or denied** if the immigrant does not have a SSN or cannot get "proof" from the Social Security Administration that they tried to apply. If the applicant makes no attempt to supply a SSN or a statement attesting to the applicant's efforts to apply for a SSN, the application can be denied.

2. LOST AND/OR EXPIRED DOCUMENTS

Immigrants' eligibility for benefits is based on the immigration status they receive from the United States Citizenship and Immigration Services (USCIS). Immigrants are required by law to carry immigration documents as evidence of their status.

Generally, expired USCIS documents cannot be used to establish an immigrant's status. The only exception is an expired I-151 or I-551 "Green Card". That is because the expiration date on a "Green Card" is only an indicator of when the card must be renewed. It is not an indication that the immigrant's status has expired. Lawful Permanent Resident status does not have an expiration date.

Any other expired USCIS document an immigrant may present can not stand alone to establish the immigrant's status. A Medicaid eligibility worker must see other supporting USCIS documentation to properly determine the immigrant's status.

When an immigrant applicant has only expired USCIS documentation or claims a lawful immigration status, but has lost his/her immigration documentation, local districts should follow the appropriate procedure outlined below:

- **Lost Immigration Documentation**

Immigrants claiming a lawful immigration status and who have lost their immigration documentation should be referred to the USCIS for replacement documentation. Local districts need some verification from USCIS of an immigrant's lawful presence in order to make a determination of the immigrant's eligibility for benefits.

- **Expired Immigration Documentation**

a.) Permanent Resident Card

The most common USCIS document used to prove lawful permanent resident status (LPR) is the Permanent Resident Card (I-551). Commonly called the "Green Card", an I-551 expires after 10 years. USCIS began implementing a 10-year expiration period in 1989 to allow the agency to update photo identification and implement new card technologies that will increase the card's resistance to counterfeiting and tampering. Immigrants do not lose permanent resident status because their Green Card has expired. However, they are required by law to carry evidence of their immigration status, such as a valid Green Card or some other temporary proof of status provided by USCIS, while a Green Card renewal is being processed.

If the only immigration document an immigrant has is an expired Green Card, local districts can use it to determine the immigrant's eligibility for benefits.

Many immigrants do not renew their Green Cards because of the processing fee. A fee is imposed because federal guidelines require the processing of immigration benefits to be self-supported by filing fees.

USCIS does have discretion to waive any fee, if the applicant establishes that he/she is unable to pay the fee. Information on how an applicant can apply for a fee waiver is found on the USCIS Web site at: http://uscis.gov

b.) Foreign Passport with a Form I-551 Stamp

It often takes many months for immigrants to actually receive their Green Cards. While they are waiting for their card, USCIS can provide temporary evidence of permanent residence by stamping an immigrant's passport with an I-551 stamp. Immigrants' passports can also have an I-551 stamp for Green Card renewals. If the I-551 stamp has expired and the immigrant has no other immigration documents, districts can use the expired I-551 stamp to determine an immigrant's eligibility for benefits.

c.) Form I-94 Arrival/Departure Record

The I-94 record is created by USCIS when an immigrant is inspected upon arrival in the United States. The I-94 is a 3″ X 5″ card that the inspector endorses with the date, place of arrival and the class of admission. The card is stamped or handwritten with a notation that indicates the immigration category or the section of immigration law under which the person is granted admission. The words "Employment Authorized" may also be stamped on the card. Only immigrants with an Arrival/Departure Record (I-94) that has specific satisfactory immigration status notations would be eligible for benefits. Districts need to carefully note the admitting status on the I-94 and use the Desk Guide "KEY to I-94 Arrival Departure Record" (Attachment D-4) to determine an immigrant's eligibility for benefits.

d.) Form I-668B or I-766 Employment Authorization Documents (EAD)

These documents indicate that an immigrant or non-immigrant is authorized to work in the U.S. Many qualified immigrants are not automatically authorized to work in the U.S. by virtue of their immigration status. Both these forms indicate an individual's immigration status. If the only documentation an immigrant has is an expired EAD, districts may use it to determine the immigrant's eligibility for benefits. EADs are also issued to temporary residents who are non-immigrants and are eligible only for the treatment of an emergency medical condition. The immigrant's immigration status on the EAD must be checked against USCIS immigration statuses on the Desk Guide "Key to I-766, I-688B Employment Authorization Document (EAD)" (Attachment D-3) to determine benefits for which the immigrant may be eligible.

Any time a district must use expired immigration documents for a determination of an immigrant's eligibility the district needs to:

- Verify the immigrant's status by sending a G-845 (Documentation Verification Request) to USCIS. The form and instructions for filing may be downloaded from the USCIS web site at http://uscis.gov. Go to "Forms and Fees" or by following the procedures in 1999-LCM-23 (Implementation of the Systematic Alien Verification for Entitlements (SAVE)-Interim Process). http://sdssnet5/otda/directives/1999/LCM/99 LCM-23.pdf
- Advise the immigrant that s/he needs to go to USCIS to renew his/her Green Card or other immigration documentation.
- Use the immigration status on the expired immigration documentation as the basis for the immigrant's eligibility. Districts should refer to the attached Desk Guides: Attachments B-1, B-2, D1, D2, D-3 and D-4.

I. ELIGIBILITY OF IMMIGRANTS FOR MEDICAID COVERAGE FOR THE TREATMENT OF AN EMERGENCY MEDICAL CONDITION

1. UNDOCUMENTED IMMIGRANTS

An immigrant who is not a qualified immigrant and not PRUCOL (hereafter referred to as undocumented) is not eligible to receive medical care or services under the Medicaid program unless the immigrant is otherwise eligible and the care and services are necessary for the treatment of an emergency medical condition.

NOTE: Undocumented immigrant does not include PRUCOL category "l" in which the immigrant has contacted the USCIS and may or may not have substantial/official documentation.

Undocumented immigrants are unable to provide documentation of immigration status; therefore, absent any documentation they are eligible only for the treatment of an emergency medical condition.

2. TEMPORARY NONIMMIGRANTS

Some immigrants may be lawfully admitted to the United States, but only for a temporary or specified period of time, as legal nonimmigrants. These immigrants are not eligible for Medicaid because of the temporary nature of their admission status. These immigrants are never qualified immigrants, but in some cases may meet the state residence rules. If this is the case, such nonimmigrants could be determined eligible for Medicaid for the treatment of an emergency medical condition, if otherwise eligible, provided they did not enter the state for the purpose of obtaining medical care.

A visa is issued to persons with permanent residence outside the U.S. but who are in the U.S. on a temporary basis, for example: tourism, medical treatment, business, temporary work or study. Districts are reminded that because of the temporary nature of their admission status, these nonimmigrants, although lawfully admitted to the United States, are eligible for Medical Assistance care and services only for the treatment of an emergency medical condition. (See attached Desk Guide Attachment D-1, Category 4: "NONIMMIGRANTS".)

Most nonimmigrants can be accompanied or joined by spouses and unmarried minor (or dependent children).

The following categories of individuals are examples of temporary legal nonimmigrants and their visa category:

NOTE: THESE USCIS VISA CATERGORIES ARE NOT TO BE CONFUSED WITH WMS ALIEN CITIZENSHIP INDICATOR CODES (ACI CODES).

- A Visa: Foreign government officials
- B-1, B-2 Visa: Temporary Business/pleasure Visitors
- C Visa: Aliens in transit through the United States
- D-1 Visa: Crewmen
- E-1, E-2 Visa: Treaty Traders and Investors
- F Visa: Students (including spouses and children)*
- G Visa: International Representatives
- H-1B Visa: Skilled Professionals, Temporary Workers
- I Visa: Representatives of foreign information media
- J-1 Visa: Practical Trainees, Exchange Visitors
- L Visa: Intra-company Transferees
- NATO Visa: NATO officials
- *TN Visa-Canada: Canadian Professionals and Consultants*
- *TN Visa-Mexico: Mexican Professionals and Consultants*
- O Visa: Temporary Workers with Extraordinary Abilities
- P Visa: Athletes, artists and entertainers (including spouses and children)
- Q Visa: Participants in international cultural exchange programs
- R-1, R-2 Visa: Temporary workers performing work in religious occupations (including spouses and children)

These immigrants have the following types of USCIS documentation:

- Form I-94 Arrival-Departure Record (contains the visa category code and Date of Entry);
- Form I-185 Canadian Border Crossing Card (BCC)*;
- Form I-186 Mexican Border Crossing Card (BCC)*;
- Form SW-434 Mexican Border Visitor's Permit*; or
- Form I-95A Crewman's Landing Permit.

*B-1/B-2 Visa/BCC is now issued in place of these documents.

TREATMENT OF AN EMERGENCY MEDICAL CONDITION

To be eligible for treatment of an emergency medical condition, an undocumented immigrant or a temporary nonimmigrant must meet all eligibility requirements, including state residence.

An "**emergency medical condition**" is defined as a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in:

- -placing the person's health in serious jeopardy;
- -serious impairment to bodily functions; or
- -serious dysfunction of any bodily organ or part.

Treatment of emergency medical conditions does not include care and services related to an organ transplant procedure.

Federal regulations at 42 CFR 440.255 provide that federal reimbursement is available after the sudden onset of the medical condition. Certain types of care provided to chronically ill persons are beyond the intent of federal law and are not considered emergency services. Such care includes alternate level of care (including private duty nursing) and personal care.

Temporary nonimmigrants and undocumented immigrants applying for coverage for the treatment of emergency medical conditions must submit the LDSS-3955 (Upstate) or MAP 2151 (NYC): "Certification of Treatment of Emergency Medical Condition," completed and signed by a physician. The DSS-3955 has been revised is attached to this directive as Attachment E-1. Social Service districts must begin using the revised LDSS-3955 immediately. Social services districts must discard any existing supplies of the previous version of the LDSS-3955.

Because the care that can be covered by Medicaid under the definition of emergency medical condition is limited, authorizations for emergency care **must** cover a specific period of time in the past. The social services district must notify the provider of the acceptance/denial of the application, the period of coverage and the individual's Client Identification Number (CIN) when appropriate.

A new DSS-3955 or MAP 2151 must be obtained from a physician at least once every 90 days, in order to continue the Medicaid authorization.

V. SYSTEMS IMPLICATIONS

Upstate Systems Implications

Over the past few years, various systems changes have been implemented to support the Department's policy pursuant to the Aliessa decision. The purpose of this section is to reiterate existing system support for these immigrants.

WMS utilizes a series of Alien/Citizenship Indicator Codes (ACI) to identify citizens, qualified and PRUCOL immigrants, and those immigrants eligible for the treatment of an emergency medical condition.

The following is a listing of the Alien/Citizenship Codes currently supported by WMS:

CITIZENSHIP/ALIEN INDICATOR CODES

A Person Granted Asylum
B Battered Alien
C Citizen
D Trafficking Victims (Upstate)
E Alien Only Eligible for Emergency
F Person Granted Conditional Entry
G Person Paroled into the U.S. for at Least 1 Year
H Cuban and Haitian Entrant
J Person whose Deportation is being withheld
K Lawful Permanent Resident W/O 40 Quarters or 40 Quarters Not Determined
M Qualified immigrant on Active Duty in Armed Forces (inc. Spouse & Dependent Child)
N PRUCOL Alien Diagnosed with AIDS or Residing in RHCF on 8/4/97
O PRUCOL Eligible for MA/FHP/CHPA/SN/FAP
R Person Admitted as Refugee/Amerasian (includes Victims of Trafficking-NYC)
S Lawful Permanent Resident with 40 Qualifying Quarters
T Person Paroled into the U.S. for less than One Year
V Veteran of the Armed Forces (including the Spouse & Dependent Child)

NOTE: THE ABOVE WMS ALIEN CITIZENSHIP INDICATOR CODES (ACI CODES) ARE NOT TO BE CONFUSED WITH USCIS VISA CATEGORIES.

In addition to the ACI, the proper Recipient Coverage Code and/or State/Federal Charge Code should be entered, as described below, to assure that the proper Federal/State/Local shares are derived.

Specifically; for individuals in the five year federal ban, the following system support exists:

1. For fully eligible, fee for service (non-Managed Care) individuals, Recipient Coverage Code 11 (Legal Alien – Full Coverage) is now generated for Case Types 11, 12, 16, 17, and 20. This Coverage Code produces an Aid Category Value of 76 (Legal Alien – FNP). This Aid Category assures that non-emergency Medicaid claims are reimbursed at 50% State/50% Local share.
   - Entry, or generation, (if Blank) of the Coverage Code 11 is allowed for ACI of B, F, G, K, S or T when the Date of Entry is greater than or equal to 9/96 and the MA coverage “from” date is less than five years from the Date of Entry (DOE).
   - When the ACI is N or O, Coverage Code 11 is entered or system generated. ACI codes N or O are always FNP regardless of the Date of Entry.

2. For Managed Care (including Family Health Plus) or spenddown cases, the appropriate Managed Care, FHP, or spenddown Coverage Code should be entered. Entry of a Coverage Code 11 is valid for entry into the PCP subsystem. Following storage of the PCP enrollment, the proper PCP Coverage Code will be generated based upon the recipient's Categorical Code. It is important to data enter the State/Federal Charge Code of 60 or 67 so that when the Coverage Code is changed, proper State and Local claiming is achieved (Details in GIS 02 MA/002 and 01 MA/030).

   Specifically:
   a. State/Federal Charge Code 60 (TANF Ineligible Alien) should be entered on any case type.
      - State/Federal Charge Code 60 is required for individuals with a Citizenship Indicator of B, F, or K and a Date of Entry greater than or equal to 9/96 and an MA From Date less than five years from the Date of Entry.
   b. State/Federal Charge Code 67 (State Charge – Qualified Alien in the five year ban for Medicaid/PRUCOL) should be entered for MA Only (Case Type 20), Family Health Plus (Case Type 24) and Cash Assistance (Case Types 11, 12, 16, 17) cases.
      - State/Federal Charge Code 67 is also required when the ACI is G, S, or T and the Date of Entry is greater that or equal to 9/96 and the MA From Date is less than five years from the Date of Entry.
      - State/Federal Charge Code 67 is also required for an ACI of O. Since O does not require a Date of Entry, 67 is required regardless of the Date of Entry, including a BLANK.

3. Anticipated Future Action (AFA) Code 522 (Expiration of MA 5 Year ban) will appear on WMS Report, WINR 4137- Undercare-Notice of Anticipated Future Action, when the federal 5 year ban is due to expire. The 522 AFA Code can be data entered or is system generated 4 years, 11 months after the Date of Entry. The worker should then remove the State/Federal Charge Code from WMS.

4. Emergency Medical Assistance is provided to illegal or undocumented immigrants and temporary nonimmigrants who are in need of care due to an emergency medical condition and are otherwise eligible. In order to properly pay for these services, the ACI for these individuals must be "E" (Aliens Only Eligible for Emergency MA). In addition, the Recipient Medicaid Coverage Code on Screen 5 should be "07" (Emergency Services Only). The Medicaid Coverage From and To Dates should reflect the actual duration of the emergency condition and must be date specific. When a claim is received from an enrolled provider indicating it is for the treatment of an Emergency, the claim will be paid with federal participation (50% Federal/25% State/25% local).

NYC Systems Implications

New York City WMS instructions have been issued separately.

NOTICE REQUIREMENTS

As of November 2004, with the implementation of CNS Acceptance Notices (upstate) for the treatment of an emergency medical condition, Manual Notice Form 3622 will be revised deleting all references to emergency medical care.

Manual Notice Form 36622A is rescinded.

Social services districts must discard any existing supplies of the previous version of the manual notice 3622A.

CNS Notices of Acceptance (Upstate) for the treatment of an emergency medical condition, including spenddown cases have been developed:

Reason Code	Paragraph #	Description
• S77	Y0051	"Accept Nonimmigrant/Undocumented Immigrant Emergency Excess Income"
• C22	Y0052	"Accept Nonimmigrant/Undocumented Immigrant Emergency Coverage Only"
• S78	Y0057	"Accept Nonimmigrant/Undocumented Immigrant Emergency Excess Resources"
• S79	Y0058	"Accept Nonimmigrant/Undocumented Immigrant Emergency Excess Income and Resources"

- E0007 "Explanation of the Excess Income Program for Nonimmigrant/Undocumented Immigrant Emergency Only"
- E0008 "Explanation of the Excess Resource Program for Nonimmigrant/Undocumented Immigrant Emergency Only"

In addition, revisions were made to existing CNS notices (denials and discontinues) to reflect the Aliessa court decision. The language has been changed to include additional categories of immigrants not included in current notices.

New York City should use the approved language from the body of the Upstate CNS notices for their manual notices.

We anticipate the CNS notices migrating in November 2004, will cover most contingencies. However, in the unlikely event the LDSS must use a manual notice, local districts are reminded to use the following language to deny/discontinue undocumented immigrants and temporary nonimmigrants (i.e. formerly called "nonqualified/non-PRUCOL aliens"):

> "This is because you are not a citizen, qualified alien or permanently residing in the United States under color of law (PRUCOL).
>
> To be eligible for New York State Medicaid Programs, individuals must be a U.S. citizen, national, Native American or have satisfactory immigration status.

An individual with satisfactory immigration status will fall under one of the following categories:

Qualified “aliens” include the following immigrants:

- persons lawfully admitted for permanent residence;
- persons admitted as refugees;
- persons granted asylum;
- persons granted status as Cuban and Haitian entrants;
- persons admitted as Amerasian immigrants;
- persons whose deportation has been withheld;
- persons paroled into the United States for at least one year;
- persons granted conditional entry;
- persons determined to be battered or subject to extreme cruelty in the United States by a family member;
- Victims of trafficking; or
- Veterans or persons on active duty in the Armed Forces and their immediate family members.

PRUCOL “aliens” include the following immigrants:

- persons paroled into the United States for less than one year;
- persons residing in the United States pursuant to an Order of Supervision;
- persons residing in the United States pursuant to an indefinite stay of deportation;
- persons residing in the United States pursuant to an indefinite voluntary departure;
- persons on whose behalf an immediate relative petition has been approved and their families covered by the petition;
- persons who have filed applications for adjustment of status that INS has accepted as “properly filed” or has granted;
- persons granted stays of deportation;
- persons granted voluntary departure;
- persons granted deferred action status;
- persons who entered and continuously resided in the United States before January 1, 1972;
- persons granted suspension of deportation; or
- other persons living in the United States with the knowledge and permission or acquiescence of the USCIS and whose departure the USCIS does not contemplate enforcing. Examples include but are not limited to the following:
    - permanent non-immigrants, pursuant to Public Law 99-239 (includes Citizens of the Federated States of Micronesia and Marshall Islands);
    - applicants for adjustment of status, asylum, suspension of deportation or cancellation of removal, or deferred action or persons granted extended voluntary departure, or Deferred Enforced Departure (DED) for a specified time due to conditions in their home country;
    - persons granted Family Unity; or
    - persons granted Temporary Protected Status.

Some immigrants maybe lawfully admitted to the United States, but only for a temporary or specified period of time as legal nonimmigrants (i.e. tourists, short term visa holders and foreign students). These immigrants are not eligible for Medical Assistance under Medicaid because of the temporary nature of their admission status. However, individuals who are not citizens, nationals, Native Americans or in satisfactory immigration status may receive Medical Assistance coverage ONLY for the treatment of emergency medical conditions, or for medical services provided to pregnant women, if they are otherwise eligible.

This decision is based on Regulations 18 NYCRR 360-3.2(j), 360-3.3, 360-4.8, Section 122(1)(e) of the Social Services Law and General Information System (GIS) 01-MA-026 and 01-MA-030.

NOTE: Undocumented immigrants and temporary nonimmigrants are eligible only for coverage for the treatment of an emergency medical condition, if they meet all other eligibility requirements.

VI. EFFECTIVE DATE

The provisions of this OMM/ADM are effective immediately.

Kathryn Kuhmerker, Deputy Commissioner
Office of Medicaid Management

26 Misc.3d 1225(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

In the Matter of BRUNSWICK HOSPITAL CENTER, INC. as Representative for Clare Thompson,, Petitioner, For a Judgment pursuant to Article 78, CPLR
v.
Richard F. DAINES, M.D., as Commissioner of the Department of Health of the State of New York, and John E. Imhof, PhD., as Commissioner of the Nassau County Department of Social Services, Respondents.

No. 019223/09.
|
Feb. 22, 2010.

Attorneys and Law Firms

Abrams, Fensterman, Fensterman et al., Lake Success, for Petitioner.

Office of the Attorney General, Mineola, for Respondent NYSDOH.

Office of the County Attorney, Mineola, for Respondent Imhoff.

Opinion

RANDY SUE MARBER, J.

***1** The Petitioner, the Brunswick Hospital Center, Inc. ("Hospital") brings this Article 78 proceeding for an order and/or Judgement from this Court to annul and reverse the decision of the Respondents, the Department of Health of the State of New York ("NYSDOH") finding Clare Thompson ineligible for Medicaid benefits for the time period of April 24, 2002 to June 5, 2007 and directing payment at the Medicaid rates to Clare Thompson for the time period of April 24, 2002 to June 5, 2007. The petition is determined as hereinafter provided.

Clare Thompson, a native of Jamaica West Indies, entered the United States with a valid passport on a guest visa status in 1990. She, however, remained in the United States beyond the prescribed time limit which consequently converted her legal immigrant status to that of illegal alien as her passport was cancelled by the then named United States Department of Justice and Naturalization Services ("INS")[1] in 2000. On or about December 25, 2000, Ms. Thompson was admitted to Brunswick Hospital Center ("Hospital") for medical treatment resulting from a stroke and thereafter was admitted to its Nursing Home facility from March, 2001 until June, 2007 when the facility closed.

As Ms. Thompson had no or inadequate medical coverage, the Hospital, on or about January 4, 2001, applied for emergency Medicaid benefits on her behalf. The application was submitted to the agency charged with administering and/or implementing the New York State Department of Health ("NYSDOH") Medicaid benefit program in the appropriate geographic area, the Nassau County Department of Social Services ("NCDSS"). NCDSS denied the application citing failure to submit the requisite emergency medical documentation and/or forms. The Hospital, in compliance with the application process, resubmitted the application. However, NCDSS did not take action on the application. The Hospital requested a fair hearing regarding that issue. Ms. Thompson remained in the Hospital until March 5, 2001 when she was transferred to its Nursing Home where she resided until June 5, 2007.

In the interim, on or about April 23, 2002, the Hospital "applied" by letter, mailed by certified return receipt, to the USCIS for a change in Ms. Thompson's illegal immigrant status to Voluntary Departure Status. The fair hearing, held on December 9, 2002 and its ensuing decision upheld NCDSS' denial of benefits while directing it to process the Petitioner's resubmitted Medicaid application. NCDSS processed the application but it only approved Medicaid benefits for what it considered emergency treatment during the time period of December 25 through December 31, 2000. NCDSS again denied coverage for Ms. Thompson's continued hospitalization and subsequent residency and treatment in its Nursing Home contending that she was an undocumented immigrant ineligible for inclusion in the Person Residing Under Color of Law ("PRUCOL") immigrant classification thus disqualifying her from receiving medical benefits at that level of treatment.

***2** The Hospital again petitioned the State seeking coverage for Ms. Thompson's hospitalization from on or about December 31, 2001 to March 5, 2002. That petition was denied. On or about August 5, 2005, pursuant to the 2004 settlement of the case, *Aliessa v. Novello,* 274 A.D.2d 347 [1st Dept 2000], the Hospital submitted a

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written request to NCDSS for retroactive relief as Ms. Thompson was qualified as a PRUCOL immigrant. PRUCOL members who were previously ineligible for non-emergency Medicaid benefits under Social Service Law § 122, were now eligible under the *Aliessa* decision and the resulting settlement agreement.

The NYSDOH issued and promulgated the following administrative policies to facilitate the provisions set forth by the *Aliessa* settlement: Administrative Directive 04 OMM/ADM–8, dated October 26, 2004[2]; Administrative Directive 04 OMM/ADM–7, dated December 31, 2004[3]; Informational Letter 07 OHIP/INF–2, dated March 15, 2007[4]; and Informational Letter 08 OHIP/INF–4, dated August 4, 2008[5].

As the State took no action in response to the August 5, 2005 letter, the Hospital petitioned the NYSDOH for a fair hearing which was held on December 1, 2006 and January 4, 2007. Pursuant to that decision, NCDSS processed the Medicaid application. After requesting documents and bills from the Hospital, NCDSS determined that Ms. Thompson was not qualified as a PRUCOL and denied the request for Medicaid coverage. The Hospital petitioned the NYSDOH for a fair hearing, and the May 2009 decision affirmed NCDSS' denial of benefits. The State cited the policies set forth in 07 OHIP/INF–2 and 08 OHIP/INF–4 as basis for its decision.

A cogent discussion of the background regarding the relevant statutes affecting immigrants is in order. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") [1. Pub.L. No. 104–193] signed into law on August 22, 1996, substantially restricted immigrants' eligibility for Medicaid. States were given the opportunity to continue to cover immigrants as before but would receive no federal funds for such coverage. New York State opted not to continue coverage for immigrants, enacting Social Services Law § 122 which conformed to the PRWORA.

Prior to this Act, immigrants who had been lawfully admitted to the United States for permanent residence or immigrants classified as PRUCOL were deemed eligible for Medicaid coverage. To be considered eligible as PRUCOL, immigrants must be living in the United States with the "knowledge and permission or acquiescence" of the United States Citizenship and Immigration Services. The twelve *Aliessa* plaintiffs who immigrated to the United States from various countries, were members of both classifications and all had serious life threatening illnesses. Those entering on or after August 22, 1996, were no longer immediately eligible for Medicaid and were now required to wait five years for coverage.

The Plaintiffs successfully argued that this statute violated the New York State Constitution and equal protection under the United States and New York State constitutions as the New York State Court of Appeals held that Social Services Law § 122 violated provisions of the State Constitution, which guarantees that aid for the needy be provided, by imposing an overly burdensome condition on eligibility that had nothing to do with need. Further, the statute did not meet the strict scrutiny standard and violated equal protection guarantees of the Federal and State Constitutions. Medicaid benefits were then restored to the affected immigrants. The *Aliessa* plaintiffs and the State negotiated an agreement to provide retroactive relief to those immigrants who were previously denied Medicaid coverage, which was so ordered by the Supreme Court of New York County on or about August 5, 2004.

***3** While this Court acknowledges that an agency's interpretation of a statute that it administers and the regulations implementing it is entitled to great weight and judicial deference, the instant case turns upon specific facts in determining whether the Respondent State agency was reasonable in its administration and interpretation warranting such judicial deference.

Under the arbitrary and capricious standard of review, the State agency must examine relevant data and articulate a satisfactory explanation for its action including a rational connection between facts found and the choice made. *Public Citizen, Inc. v. Mineta,* 340 F3d 39, *Cohen v. State of New York,* 2 AD3d 522 [2nd Dept 2003], *Tockwotten Associates, LLC v. New York State Div. Of Housing and Community Renewal,* 7 AD3d 453 [1st Dept 2004] Generally, abuse of discretion is not an independent ground for review under CPLR § 7803(3). If a court overturned an agency's exercise of discretion, the agency was also said to have acted arbitrarily and capriciously. (McKinney's Consolidated Laws of New York Annotated, CPLR § 7803, Practice Commentaries).

The Respondent claims that Ms. Thompson did not produce documentation to support her classification as PRUCOL in its statement; "... [p]etitioner did not introduce this document [April 23, 2002 letter] at the fair hearing held on April 17, 2009 ..."[6] However, the transcript of the subject hearing uncovers that the Respondent was reading from that very letter on page 21.[7] This inconsistency undermines any claim that there was a rational connection between the facts found and the choice made.

The Respondent's insistence that Ms. Thompson does not

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meet its criteria to be classified as PRUCOL pursuant to its policies and procedures, is examined under the NYSDOH's Administrative Directive, specifically ADM–8. Notably, it provides in its Part IV, REQUIRED ACTION, A. DEFINITIONS; ¶ 10:

"Persons Permanently Residing in the United State under Color of Law (PRUCOL): A PRUCOL individual is a non citizen whose presence in the United States is known to the United States Citizenship and Immigration Services (USCIS) but whom the USCIS does not currently intend to remove or deport". p. 6.

The foregoing paragraph makes reference to ADM–7 which specifically sets forth the criterion for establishing knowledge and acquiescence by the USCIS:

> "To determine whether an immigrant is within this PRUCOL category, the eligibility worker must look for the following: ... Any correspondence (emphasis added) that the immigrant has received from the USCIS will establish that the USCIS has knowledge of the immigrant's presence in the United States. Such correspondence may include, but is not limited to, any of the following: ... USCIS receipt notice ... (emphasis added) ... Each of these documents proves that the USCIS has received a form or other request for a change in status ... As proof of correspondence with the USCIS, the eligibility worker may also accept a copy of a letter (emphasis added) that the immigrant has sent to the USCIS together with documentation, such as a U.S. Postal Service Return Receipt form, showing that the USCIS actually received the letter ..." p. 26.

***4** The ADM–7 further sets forth requirements for USCIS' acquiescence to the immigrant's presence in the United States:

> "It is important for the eligibility worker to understand that there are two ways to establish that the USCIS is acquiescing in the immigrant's presence in the U.S. First, the immigrant may have a document from the USCIS that demonstrates acquiescence ... Acquiescence can be demonstrated ... even if the immigrant has *no* documentation from the USCIS, but rather, the USCIS has failed to respond to the immigrant's correspondence within a reasonable period of time. For example, the worker may determine that the USCIS is acquiescing in the immigrant's presence in the U.S. when the immigrant has applied to the USCIS for a change in status, presents documentation (such as a return receipt form) establishing that the USCIS has reviewed an application but has failed to respond within a reasonable period of time or has failed to take any action to enforce the immigrant's departure ...." p. 27.

Ms. Thompson has established knowledge of her existence in the United States by the USCIS pursuant to the foregoing provisions of ADM–8, and ADM–7 as there was correspondence with that agency by its cancellation of her passport in 2000[8], and the receipt of her application for a change in status in 2002. The USCIS has not taken any procedural steps to deport her and as over seven years has passed since it received the 2002 letter[9], it apparently has acquiesced to her presence in this country. The Respondent did not change its policies set forth in the ADM–7 and ADM–8 until three and four years later by issuing INF–07 and INF–08, effective March 2007 and August 2008 respectively where it now requires that an immigrant establish PRUCOL status by completing an actual USCIS issued application for a change of status, and requiring that the applicant make further attempts to contact the USCIS after the application has been submitted. At best, if INF–07 is indeed applicable, then the period of Ms. Thompson's treatment from March 2007 to June 2007 may be at issue. However, the Petitioner's application for Medicaid coverage predates the Respondent's change of its standing policies as provided in the 2007 and 2008 Opinion Letters, therefore having no impact on the entire time period of Ms. Thompson's treatment. As such, it is unreasonable to bind her by the Respondent's directives that postdated her period of eligibility.

The Respondent states that the subject decision after the fair hearing correctly applies the NYSDOH policy on the date that it was rendered and cites the case; *Matter of Miller v. DeBuono,* 90 N.Y.2d 783 (1997) as support that its retroactive application of a 2008 Administrative Directive to an event that predated it. The facts of that case are distinguishable from the instant case. *Matter of Miller* involved new State legislation that prohibited the hiring of an employee in a health care setting with a prior documented history of patient abuse while mandating that such employees be reported to the State Registry. The petitioning nurse's aide, charged with abusing a patient, was terminated pursuant to the new legislation which became effective after the incident. The Court stated that

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her placement on the registry was the only legal consequence arising out of that law and it did not abrogate any rights that she had prior to the enactment of that law. The Court did remand the case to the Commissioner of Health for a new determination regarding her employment status using the constitutionally required preponderance of the evidence standard of proof. (*Matter of Miller* at 790). In the instant case, the retroactive application of the Administrative Directive/Informational Letter deprived Ms. Thompson, unlike the Plaintiff in *Matter of Miller,* of her rights.

***5** In a case following *Matter of Miller, Herkimer v. Daines,* 63 AD3d 1672 [4th Dept 2009], the court held that the State erred in applying a Medicaid Cap Statute retroactively to deny the county's request for reimbursement for expenses incurred prior to the effective date of the statute, absent any legislative or statutory language indicating that the statute should be applied retroactively. Further, the respondent, as the Respondent in the instant case, offered no rational explanation for that action. Therefore, the Respondent agency's decision denying benefits to Ms. Thompson is arbitrary and capricious and erroneous as a matter of law as it was not based on reasoned decision making. The Respondent's reliance on the 2007 and 2008 policies and procedures to retroactively deny benefits is improper.

It is noteworthy that the Respondent refers to the Compilation of Codes, Rules and Regulations of the State of New York (Code'), which sets forth the procedures for a fair hearing after being issued a denial of State issued social service benefits, to argue that Ms. Thompson's alleged failure to make subsequent contact with the USCIS disqualifies her from status as a PRUCOL. The relevant section provides:

> "... At a fair hearing concerning the denial of an application for or the adequacy of ... medical assistance ...; ... the appellant must establish that the agency's denial of assistance or benefits was not correct or that the appellant is eligible for a greater amount of assistance or benefits or is exempt from work requirements pursuant to Part 385 of this Title. Except, where otherwise established by law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, food stamp benefits or services, the social services agency must establish that its actions were correct.... The fair hearing decision must be supported by and in accordance with substantial evidence."(18 NYCRR 358–5.9)

The Respondent implies that the foregoing supports that Ms. Thompson has not met the burden of proof as articulated in the Code. As that section of the Code clearly refers to the procedures of the fair hearing (emphasis added), the Respondent's reference to it for that purpose is disingenuous and without merit. The record is quite clear that the Petitioner presented the documentation to support Ms. Thompson's eligibility for Medicaid at the fair hearing; therefore, the Petitioner has complied with the Code.

Further, the Respondent cites *Papadopoulos v. Shang,* 67 A.D.2d 84 [1st Dept 1979], and *Tonashka v. Weinberg,* 178 Misc.2d 280 to contend that Ms. Thompson has not satisfied the PRUCOL requirement of "person residing under the color of the law with the knowledge and permission or acquiescence" of the USCIS. However, a careful reading of *Tonashka* uncovers that the *Papadopoulos* and *Tonashka* courts were "fortified" by the language in the holding of an earlier case, *Holley v. Lavine,* 553 F.2d 845; "... when an administrative agency or legislative body uses the phrase under color of law' it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border ... With regard to the term permanently residing' the *Holley* court added, a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law,' " *Tonashka* at 283 quoting *Holley v. Lavine,* 553 F.2d at 849–850 .). In actuality, the holding and rationale of the *Tonashka* Court supports that the terms and requirements defining PRUCOL should be broadly interpreted.

***6** In an earlier case, *Berger v. Heckler,* 771 F.2d 1556, the broad interpretation of qualifying the term, "residing in the United States with the knowledge and permission of the [USCIS] and whose departure from the United States the [USCIS] does not contemplate enforcing" was addressed. The litigation arising from the denial of Social Security benefits to PRUCOL immigrants resulted in a consent judgment, executed by the Secretary of Health and Human Services ("Secretary"), where the foregoing terms were broadly defined. Notwithstanding her execution and consent, the Secretary issued departmental polices narrowing the subject terms and she refused to grant the relief to which the class action petitioners were entitled while using her interpretation to deny Social Security benefits to other similarly situated immigrants. Her rationale was that the broad interpretation as provided by the consent judgment would allow benefits to be granted to too wide a range of immigrant applicants. The Court held that the Secretary was bound by the judgment. Similarly, the Respondent in the instant case refused to comply with its own policies and it responded to the Petitioner's Medicaid application by refusing to act and

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ultimately drafting new policies that narrowed the PRUCOL requirements which disqualified the petitioner from receiving benefits. Not only is this unreasonable, it is an abuse of discretion.

The Respondent's statement, "... [i]t is common sense to expect that any alien who has submitted a good faith request [for removal] ... would take steps to follow [up] on the status of the original request if no request to the first letter is at first received ..."[10] is astonishing if not perplexing. If this statement is indeed true and the Respondent actually believed it, then it would obviate the need to make the substantial changes to its own policies in 2007 and 2008. There was no requirement, express or implied, that Ms. Thompson "follow up" with the USCIS to establish PRUCOL status. The Respondent apparently concedes this by making it an express requirement in its Opinion Letters issued **after** (emphasis added) Ms. Thompson submitted her application for Medicaid benefits.

Finally, the CPLR under Article 78 provides that when, in an Article 78 proceeding, an issue is raised as to whether a determination made as a result of a hearing held and at which evidence is taken on the entire record is supported by substantial evidence, the Supreme Court in which the proceeding was commenced must first dispose of such other objections as could terminate the proceeding ... without reaching the substantial evidence issue. CPLR § 7803(4) If the determination of the other objections do not terminate the proceeding, the court must make an order directing that the proceeding be transferred to a term of the Appellate Division. CPLR § 7804(g).

Although the Respondent argues that a transfer to the Appellate Division is appropriate utilizing the standard of review of substantial evidence in this type of proceeding, the issues presented by the Petitioner are issues of law and a transfer to the Appellate Division is not warranted in this matter. Further, it is not unusual for a Petitioner to list several standards of review under Article 78. Therefore, this Court does not have to reach this issue. *Bahouth v. Sardino,* 125 A.D.2d 990 [4th Dept 1986]

***7** The petition is **GRANTED** in its entirety regarding the approval of Medicaid benefits from April 24, 2002 to June 5, 2007 and it is

ORDERED AND ADJUDGED, that the decision of the Respondent State agency is annulled and reversed in its entirety as the Respondent is directed to make payment at the applicable Medicaid rates on behalf of Ms. Thompson from the time period, April 24, 2002 to June 5, 2007.

This decision constitutes the decision and order of the court.

All Citations

26 Misc.3d 1225(A), 907 N.Y.S.2d 435 (Table), 2010 WL 623707, 2010 N.Y. Slip Op. 50254(U)

Footnotes

1 Now the United State Department of Homeland Security–United States Citizenship and Immigration Services ("USCIS").

2 See petitioner's Verified Petition, Exhibit J.

3 See petitioner's Verified Petition, Exhibit Q.

4 See respondent's Verified Answer, Exhibit 18.

5 See respondent's Verified Answer, Exhibit 19.

6 Commissioner Daines' Memorandum of Law, p. 5.

7 Transcript annexed to Commissioner Daines' Memorandum of Law, Exhibit 17.

8 Petitioner's Verified Petition, Exhibit B, cancelled passport.

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9 Petitioner's Verified Petition, Exhibit E, Letter applying for change of status and return receipt.

10 See respondent's Verified Answer, Memo[randum] of Law, p. 5.

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1995 WL 500477
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Akhtar FARJAM, Plaintiff,
v.
COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, Defendant.

No. CV-94-4486 (CPS).
|
Aug. 8, 1995.

MEMORANDUM AND ORDER

SIFTON, Chief Judge.

***1** This is an action brought by plaintiff Akhtar Farjam to review a final determination of the Commissioner of Social Security (the "Commissioner"), denying her application for disability benefits under Title II of the Social Security Act (the "Act") on the grounds that she is not a United States citizen nor is she permanently residing under color of law ("PRUCOL") in the United States. Both parties have now moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. For the reasons set forth below, the matter is hereby remanded to the Commissioner for a calculation of benefits in accordance with this opinion.

BACKGROUND

Plaintiff is a 75-year-old Iranian citizen who was inspected and admitted to the United States as a non-immigrant visitor on October 31, 1987. Accordingly, she was entitled to remain in the United States until January 29, 1998, and, by remaining here after that date, became an undocumented immigrant or illegal alien.

On December 13, 1991, Congressman James H. Sheuer of New York wrote to the United States Immigration and Naturalization Service ("INS") requesting that plaintiff be granted permission to remain in the United States on the basis that she met INS' published requirements for deferred action or voluntary departure status set forth in INS Operations Instruction 242.1a(22).[1] On April 21, 1992, the Legal Aid Society made the same request to INS -- that it grant plaintiff deferred action or voluntary departure status.

Plaintiff applied for SSI benefits on May 5, 1992, on the basis of a physical disability. Her application for benefits was denied initially and on reconsideration. Plaintiff's case was then referred to an administrative law judge ("ALJ"), who concluded that plaintiff was entitled to benefits since she suffered from a disability as defined by the Act and was an alien with PRUCOL status.[2] The ALJ found that, as a result of her two applications for voluntary departure or deferred action status, the INS was aware for over two years that plaintiff was an alien residing in the United States unlawfully. He also found that the INS had not acted on the requests by Congressman Sheuer or the Legal Aid Society, and neither had INS taken action to initiate deportation proceedings by issuing an order to show cause or given any indication that it was contemplating enforcing plaintiff's departure from the United States. The ALJ finally determined that INS had a policy and practice not to enforce the departure of infirm, sick, frail or elderly individuals.

On August 31, 1993, after the ALJ's decision, the Social Security Administration ("SSA") sent to INS a request that INS verify plaintiff's immigration status. On September 7, 1993, INS responded to SSA's request by stating that they "are unable to verify unless a copy of the alien's documentation is submitted along with the Document Verification Request." Plaintiff had submitted copies of both applications for voluntary departure or deferred action status to SSA at the time of her application to establish her PRUCOL status. It is not apparent from the record whether SSA ever responded to INS' request.

***2** On February 15, 1994, at the request of the New York Regional Commissioner for SSA, the Appeals Council reopened the ALJ's hearing decision. On July 21, 1994, the Appeals Council reversed the favorable decision of the ALJ, finding that although INS received plaintiff's application for voluntary departure or deferred action status no later than April 21, 1992, and although INS was aware of her presence in the United States, she was ineligible for SSI benefits because she did not have documentation from INS stating that it did not contemplate enforcing her departure from the United States.

Plaintiff contends that the Appeals Council misinterpreted

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the law and moves to have the Appeals Council decision reversed and remanded. Defendant in turn moves for a remand so that the Commissioner can furnish the necessary information to INS to obtain a determination as to plaintiff's immigration status.

DISCUSSION

42 U.S.C. §405(g) provides in pertinent part that "the court shall have the power to enter upon the pleadings and transcript of the record a judgment affirming, modifying or reversing the [Commissioner] with or without remanding the cause for a rehearing." The court may review the factual findings of the Commissioner only to determine whether the administrative record contains substantial evidence for such findings. The court is not empowered to conduct a *de novo* review. The court of course is not bound to accept the Commissioner's conclusions of law, *Selig v. Richardson,* 379 F. Supp. 594, 599 (E.D.N.Y. 1974), and may reverse or remand if the evidence has not been properly evaluated because of an erroneous view of law. *See Marcus v. Califano,* 615 F.2d 23, 27 (2d Cir. 1979).

The Supreme Court has defined the term substantial evidence in the context of a social security case as being "more than a mere scintilla" and as that evidence which "a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). The fact that the record contains evidence which would have supported a different conclusion does not undermine the Commissioner's decision so long as there is substantial support for the decision in the record. *See Blalock v. Richardson,* 483 F.2d 773, 775 (4th Cir. 1972). Thus, the court's sole inquiry is whether the record, read as a whole, yields such evidence as would allow a reasonable mind to accept the conclusions reached by the Commissioner.

It is uncontested that the evidence in the record firmly established that plaintiff is disabled as defined by the Act. The only question for review is whether plaintiff was PRUCOL.

An alien "permanently residing in the United States under color of law" is eligible for SSI benefits. 42 U.S.C. §416.1618. The standards governing the test for PRUCOL were the subject of a consent decree entered into between the Secretary of Health and Human Services (the predecessor of the Commissioner, *see* P.L. 103-296) and a class of undocumented aliens, which was subsequently approved by this Court. *Berger v. Sec'y of HHS,* No. CV-76-1420 (E.D.N.Y. June 13, 1978).

***3** The final judgment and consent decree in *Berger* was amended by this Court in 1985 as a result of the Secretary's substantial non-compliance with the consent decree. This Court amended paragraph 3 of the consent decree to define PRUCOL as follows:

> Aliens who are permanently residing in the United States under color of law and who may be eligible for Supplemental Security Income benefits include, but are not limited to ... (4) any other alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service ("INS") and whose departure the INS does not contemplate enforcing....

> An alien in a particular category shall be considered as one whose departure the INS does not contemplate enforcing if it is the policy or practice of the INS not to enforce the departure of aliens in such category or if, on all the facts and circumstances in that particular case, it appears that the INS is otherwise permitting the alien to reside in the United States indefinitely.

Berger v. Schweiker, No. CV-76-1420 (E.D.N.Y. July 31, 1984).

This amendment to the consent decree was affirmed by the Court of Appeals. *Berger v. Heckler,* 771 F.2d 1556, 1577 n. 33 (2d Cir. 1985). The Court of Appeals further held that under the consent decree this Court could order the Secretary to promulgate regulations, although it could not dictate the exact language to be included in the regulations. *Id.* at 1578.

The Secretary subsequently adopted regulations to implement the consent decree. *See* 52 Fed. Reg. 21939 (June 10, 1987). These regulations state in relevant part:

> (a) We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the INS and that agency does not contemplate enforcing your departure.
>
> (b) Categories of aliens who are [PRUCOL]:

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(17) Any other alien living in the United States with the knowledge and permission of the INS and whose departure that agency does not contemplate enforcing.

(c) How to prove you are in a category listed in paragraph (b) of this section. You must give us proof that you are in one of the categories in paragraph (b) of this section....

(d) We must contact the INS.

(1) We must contact the INS to verify the information you give us to prove you are [PRUCOL].

---

(3) If you give us ... documents that indicate that you meet paragraph (b)(17) of the section, or any other information to prove you are [PRUCOL], we will contact the INS to verify that the document or other information is currently valid. *We must also get information from the INS as to whether that agency contemplates enforcing your departure.*

20 C.F.R. §416.1618 (emphasis added).

The Commissioner contends that in order for a person to establish PRUCOL status under 20 C.F.R. §416.1618(b)(17), that person must give SSA any documents indicating their immigration status. Before giving benefits, SSA must then contact INS to verify that information and must receive from INS a determination as to whether it contemplates enforcing that person's departure. 20 C.F.R. §416.1618(c) and (d).

***4** The Commissioner further contends that the regulations are binding because the Secretary was not required to incorporate the language of paragraph 3 of the amended consent decree into the regulations. Therefore, according to the Commissioner, the language in amended paragraph 3 that would seem to establish plaintiff's PRUCOL status does not trump the specific regulatory language requiring the Commissioner to obtain information from INS before awarding SSI benefits.[3]

This argument, however, misstates the Court of Appeals' holding in *Berger*. While the Court of Appeals held that this Court should not direct the Secretary to include specific language in the regulations, it also held that this Court could and should overturn the prior enacted regulations of the Secretary that were contrary to the consent decree. *Berger,* 771 F.2d at 1578.

This Court in *Berger* held the Secretary in contempt of the consent degree because the Secretary enacted an overly narrow definition of PRUCOL in the regulations promulgated after the initial consent decree. In affirming the contempt finding, the Court of Appeals held that the term "permanently residing under color of law" was to be given an expansive definition under the consent decree. *Berger,* 771 F.2d at 1574 ("we find that the phrase 'under color of law' is designed to be an open vessel -- to be given substance by experience"). Under this expansive definition, the Court of Appeals rejected the Secretary's proposed interpretation of the original paragraph 3 as limiting PRUCOL status to "only those aliens who have received a letter from the Department of Justice stating that the INS does not contemplate enforcing his or her departure from the United States." *Berger,* 771 F.2d at 1561. The Court of Appeals further held that the original paragraph 3 agreed to by the parties did not require a definition of PRUCOL limited to cases where INS gave official determination or authorization and instead affirmed this Court's clarifying amended paragraph 3 quoted above. *Id.* at 1575.

Under the consent decree, therefore, PRUCOL includes "any other alien residing in the United States 'with the knowledge and permission' of the INS, whose departure the INS 'does not contemplate enforcing.'" *Berger,* 771 F.2d at 1575. The term "does not contemplate enforcing" includes aliens whose residence in the United States is "continued by virtue of official permission or *acquiescence." Id.* at 1576 (emphasis in original). Thus, viewed in the context in which it was drawn up, *see United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238 (1975), the consent decree was entered into with the expectation that the language of paragraph 3 would be construed expansively to include the language of amended paragraph 3. *Berger,* 771 F.2d at 1576.

Consent decrees are both contracts and orders; they are construed largely as contracts, but are enforced as orders. They cannot be expanded or contracted by the court or the parties, except by mutual agreement and approval of the court. *Berger,* 771 F.2d at 1568 (citations omitted). The expansive definition of PRUCOL in the consent decree and its amendments would preclude limiting PRUCOL status to the narrow definition promulgated by the Commissioner in section 416.1618 and must, to be consistent with *Berger,* include scenarios in which INS does not respond to requests by the Commissioner, yet in

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which official acquiescence to an individual's presence is nevertheless present. *Id.* at 1576. Such a situation would be present when INS is made aware on numerous occasions of the presence of an illegal alien yet does not take action to enforce the departure.[4]

***5** Plaintiff's situation certainly meets the definition of PRUCOL in *Berger.* Plaintiff must establish that she is residing permanently in the United States with the knowledge and permission of INS and that INS does not contemplate enforcing her departure. INS has been aware of plaintiff's presence since no later than December 13, 1991, when Congressman Sheuer wrote to INS requesting that it grant plaintiff deferred action or voluntary departure status. The Legal Aid Society wrote to INS on April 21, 1992, making the same request, and SSA again informed INS of plaintiff's status in August 1993. Therefore, the evidence in the record can only support the conclusion that plaintiff is residing in the United States with the knowledge of INS.

Under paragraph 3 of the consent decree, an alien in a particular category is deemed to be one whose departure INS does not contemplating enforcing if it is the policy and practice of INS not to enforce the departure of an alien in such category or if, on all the facts and circumstances of that particular case, it appears that INS is otherwise permitting the alien to reside in the United States. *Berger,* 771 F.2d at 1577 n. 33. The ALJ held in a finding undisputed by the Appeals Council that "INS has a long standing policy against enforcing the departure of the infirm, frail and elderly," of which group plaintiff was a member. The only evidence in the record supports the ALJ's determination. Accordingly, the Commissioner lacked substantial evidence to determine that as a rule INS does not enforce the departure of members of plaintiff's group and that, therefore, under the law established by amended paragraph 3 consent decree and the Court of Appeals' decision in *Berger,* the Commissioner erred as a matter of law in determining that plaintiff was not PRUCOL.

In all events, the facts and circumstances of this case establish that INS is permitting plaintiff to reside in the United States. Three times in the past three and a half years INS was informed of plaintiff's presence in the United States, and each time INS declined to take any action against plaintiff such as making a determination of plaintiff's status or issuing an order to show cause to compel plaintiff's departure. Accordingly, given the legal standard for evaluating PRUCOL status set out in the consent decree and defined by the Court of Appeals, there is no substantial evidence in the record to support the Commissioner's determination that plaintiff has failed to carry her burden of proving that the facts and circumstances of this case establish that plaintiff is residing here with the permission of INS and that INS does not contemplate enforcing her departure. *See Berger,* 771 F.2d at 1576; *see also Holley v. Lavine,* 553 F.2d 845, 850 (2d Cir. 1977) ("There is no more common instance of action 'under color of law' than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute or regulation."), *cert. denied,* 435 U.S. 947 (1978).[5]

***6** Notwithstanding the Commissioner's interpretation of PRUCOL, the long delay in processing plaintiff's application for benefits would independently warrant reversal. Plaintiff applied for SSI benefits over three years ago and is still waiting for a determination by INS as to her status. Plaintiff provided the Commissioner with the proper documentation under 20 C.F.R. § 416.1618(c) when she applied for benefits in May 1992, and the Commissioner admits that it is due to the fault of SSA that INS was not given the proper forms at the time the request for action was sent to INS in August 1993. Moreover, the Commissioner has had ample opportunity since that time to send the requisite forms in her possession to INS and has failed to do so. Plaintiff is a 75-year-old woman in declining health. Given that over two years have passed from the time INS informed the Commissioner that additional information was required, "the Court sees no reason to prolong 'the often painfully slow process by which disability determinations are made.'" *Carrillo v. Heckler,* 599 F. Supp. 1164, 1171 (S.D.N.Y. 1984) (quoting *Carroll v. Sec'y of HHS,* 705 F.2d 638, 644 (2d Cir. 1983)).

Plaintiff asks for, in the alternative, interim benefits. However, since this case is not being remanded for a further determination, the Court does not need to address this issue now.

Accordingly, for the reasons set forth herein, this Court finds that plaintiff was permanently residing in the United States as of December 13, 1991, and was disabled during the time in question within the meaning of the Act and remands the matter to the Secretary for a calculation of benefits from May 5, 1992.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1995 WL 500477

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Footnotes

1 INS Operations Instruction 242.1a(22) provides that INS will consider the age or physical condition affecting an alien's ability to travel as well as the presence of sympathetic factors in making deferred action determinations.

2 The ALJ found that plaintiff was suffering from severe exertional angina and dyspnea, arteriosclerotic heart disease, hypertension, angina pectoris, calcific aortic stenosis and osteoarthritis of the spine and knees. Because of her weakness, she could not travel alone, use public transportation, or travel for a prolonged period of time.

3 The Commissioner does not dispute that under the definition in *Berger* plaintiff would be PRUCOL.

4 If failure to respond by INS was sufficient grounds to deny PRUCOL status, INS could prevent any alien from establishing PRUCOL by refusing or neglecting to respond to a request by SSA.

5 The Secretary is not without remedy if INS subsequently determines to deport plaintiff. 20 C.F.R. §416.1618(d)(3)(iv) provides that "[i]f at any time after you begin receiving benefits we receive information from the INS which indicates that the INS contemplates enforcing your departure, we will suspend your benefits under §416.1321 and any benefits you have received after the date of the INS began contemplating enforcing departure will be overpayments."

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Velasquez v. Secretary of Dept. of Health and Human Services of U.S., E.D.N.Y., February 14, 1984

553 F.2d 845
United States Court of Appeals,
Second Circuit.

Gayle McQuoid HOLLEY, Individually and on behalf of James McQuoid, et al.,
Plaintiffs-Appellants,
v.
Abe LAVINE, as Commissioner of the New York State Department of Social Services, and James Reed, as Commissioner of the Monroe County Department of Social Services,
Defendants-Appellees.

No. 731, Docket 76-7588.
|
Argued April 6, 1977.
|
Decided April 27, 1977.

Canadian citizen, who was illegally in the United States but whose six children were American citizens, brought action challenging provision of New York Social Services Law rendering aliens unlawfully residing in this country ineligible for benefits under aid to families with dependent children program. Following remand, 529 F.2d 1294, the United States District Court for the Western District of New York, Harold P. Burke, J., rendered summary judgment for defendants, and plaintiff appealed. The Court of Appeals, Wyzanski, Senior District Judge for the District of Massachusetts, sitting by designation, held that: (1) where an alien parent has official assurance that the parent will not be deported until at least his or her children are no longer dependent on the parent, such parent is "permanently residing in the United States under color of law" within meaning of eligibility regulation promulgated under Social Security Act and, hence, is eligible for benefits and (2) plaintiff, who entered United States at age 12 as a temporary nonimmigrant student and whose residence in this country was assured by Immigration and Naturalization Service at least until all her children were grown to full age, was permanently residing in this country under color of law.

Reversed and remanded for issuance of appropriate injunction and for consideration of damages and attorney fees.

West Headnotes (6)

[1] **States**
Social security and public welfare

Federal law, so far as applicable, governs payment of aid to families with dependent children benefits, as a consequence of the supremacy clause. Social Security Act, §§ 401, 402(a)(10), 406(b)(1), 42 U.S.C.A. §§ 601, 602(a)(10), 606(b)(1); U.S.C.A.Const. art. 6, cl. 2.

Cases that cite this headnote

[2] **Public Assistance**
Aliens

Phrase "under color of law" as used in Social Security Act regulation requiring state plans of aid to families with dependent children to include an alien lawfully admitted to permanent residence or otherwise permanently residing in this country under color of law includes actions not covered by specific authorizations of law; phrase means that which an official does by virtue of power, as well as what he does by a virtue of right; phrase encircles the law, its shadows and its penumbra. Social Security Act, § 401, 42 U.S.C.A. § 601.

22 Cases that cite this headnote

[3] **Public Assistance**
Aliens

In view of letter that Immigration and Naturalization Service did not contemplate enforcing Canadian resident's departure "at this time," the resident, who had entered as temporary nonimmigrant student, who was presently illegally in this country and whose six minor children were born in this country, was in

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the United States "under color of law" as that phrase as used in federal regulations governing qualifications of state plans for aid to families with dependent children; the mother, who sought benefits in her own right, was also "permanently residing" in this country since her residence was assured at least until her children had grown to full age. Social Services Law N.Y. § 131–k, subd. 1; Social Security Act, §§ 401, 402(a)(10), 406(b)(1), 42 U.S.C.A. §§ 601, 602(a)(10), 606(b)(1); Immigration and Nationality Act, §§ 101(a)(15)(F), 203(a)(7), 212(d)(5), 8 U.S.C.A. §§ 1101(a)(15)(F), 1153(a)(7), 1182(d)(5).

31 Cases that cite this headnote

[4] **Public Assistance**
Aliens

Where an alien parent of children born in United States has an official assurance that he or she will not be deported at least until the children are no longer dependent on her or him, such parent is "permanently residing in United States under color of law" within meaning of federal regulation requiring state plans of aid to families with dependent children to include an alien permanently residing in United States under color of law. Social Security Act, § 401, 42 U.S.C.A. § 601.

27 Cases that cite this headnote

[5] **Public Assistance**
Construction

Provision of Social Security Act that word "includes" is not deemed to exclude things otherwise within the meaning of term defined is a legislative caution to lean more on the "ejusdem generis" than on the "inclusio unius, exclusio alterius" canon of construction. Social Security Act, § 1101(b), 42 U.S.C.A. § 1301(b).

Cases that cite this headnote

[6] **Judges**
Presiding at former trial relating to same or similar matter

Since it appeared that original judge might have difficulty in putting aside views previously expressed in alien mother's suit challenging termination of payment of aid to families with dependent children benefits the proceeding was to be reassigned to a different judge on remand. Social Security Act, § 401, 42 U.S.C.A. § 601.

2 Cases that cite this headnote

Attorneys and Law Firms

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Jean M. Coon, Asst. Sol. Gen., Alan W. Rubenstein, Principal Atty., Albany, N. Y., for Lavine.

Charles G. Finch, Chief Counsel, Charles G. Porreca, of counsel, Monroe County Department of Social Services, Rochester, N. Y., for Reed.
Before OAKES, Circuit Judge, HOLDEN, District Judge,* and WYZANSKI, Senior District Judge.**

Opinion

WYZANSKI, Senior District Judge:

This is an appeal from a judgment entered by Judge Harold P. Burke in the United States District Court for the Western District of New York. Plaintiff is an alien unlawfully residing in the United States but covered by an official communication from the Immigration and Naturalization Service stating that it "does not contemplate enforcing her departure from the United States at this time." Defendants administer New York Social Services Law s 131-k-1 and New York State

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Department of Social Services regulation 18 N.Y.C.R.R. s 349.3(a), both of which provide that "an alien who is unlawfully residing in the United States" shall not be "eligible for aid to dependent children".

Pursuant to those New York state regulations defendants cut off payments of Aid for Dependent Children (AFDC) benefits to plaintiff.

The question presented is whether such application of New York state law is repugnant to provisions of the national Social Security Act incorporated in 42 U.S.C. ss 601, 602(a)(10), and 606(b)(1) and to the implementing regulation set forth in 45 C.F.R. s 233.50. The relevant part of the Social Security Act, 42 U.S.C. s 601 authorizes "payments to States which have submitted, and had approved by the Secretary (of H.E.W.), State plans for aid and services to needy families with children." The Secretary, by 45 C.F.R. s 233.50, has stipulated that the "State plan . . . shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provision of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act)."

The basic facts in this case were found by the New York authorities and are undisputed.

Plaintiff, then called Diane Gayle Rivers, was born in Smith Falls, Ontario, Canada on August 22, 1942. At birth she was, and ever since she has been, a citizen of Canada. As a single girl aged twelve she entered the United States lawfully in 1954 as a temporary non-immigrant student, pursuant to an ***848** earlier version of 8 U.S.C. s 1101(a)(15)(F). Since 1954, except for three months in 1958, she has continuously resided in the United States. On September 6, 1959 in the United States she married Norman Stanley McQuoid. She then took the name of Gayle McQuoid. Five children, who are still minors, were born in the United States of that marriage. By virtue of the Fourteenth Amendment to the United States Constitution, they are American citizens. In August 1966 she and Stanley McQuoid separated. Later she had a sixth child born in the United States, and hence an American citizen.

Initially, the New York State Department of Social Services through the Monroe County Department of Social Services paid to plaintiff on account of herself and each of her six children a separately calculated sum on account of the Aid to Families with Dependent Children (AFDC) program cooperatively operated by the State of New York and the federal Department of H.E.W. After the State of New York in 1974 enacted s 131-k-1 of its Social Services Law, which provided that every alien "unlawfully residing in the United States . . . is not eligible for aid to dependent children", the Commissioner of the State Department for Social Services and the Commissioner of the Monroe County Department for Social Services, on behalf of the State of New York, ceased to pay to the plaintiff anything on her own account as parent, but did continue to pay to the plaintiff AFDC benefits for her six children.

Following appropriate application to the New York state authorities which was unsuccessful, plaintiff, on her own behalf and on behalf of her six children, filed a complaint in the District Court against the defendants, who are respectively the Commissioner of the New York State Department of Social Services and the Commissioner of the Monroe County Department of Social Services, seeking equitable and monetary relief on account of the non-payment to her as a parent of any AFDC benefit. Judge Burke dismissed the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. This court reversed in a short per curiam opinion, Holley v. Lavine, 529 F.2d 1294 (2nd Cir.), cert. denied, 426 U.S. 954, 96 S.Ct. 3181, 49 L.Ed.2d 1193 (1976), in which the District Court on remand was directed to convene a three-judge court to consider appellant's constitutional claims unless it found her statutory claims to be meritorious, id. at 1296. On remand both plaintiff and defendants ultimately moved for summary judgment. The District Court entered judgment for defendants. In the District Court Judge's opinion the state statute, s 131-k-1 of the New York Social Services Law, as applied to cut off the plaintiff's individual AFDC benefits as parent, was not repugnant to the national Social Security Act. The District Judge denied the motion to convene a three-judge court. Plaintiff appealed to this court.

We start with the obvious point that the elimination of payments to plaintiff for herself was plainly authorized by the text of the state law. But the first question for us is whether that law is in conflict with the plan approved by the Secretary of H.E.W. pursuant to 45 C.F.R. s 233.50, implementing 42 U.S.C. s 601.

[1] It is not contested that the federal law, so far as it is applicable, governs the payment of AFDC benefits, as a consequence of the Supremacy Clause, Article VI of the United States Constitution. King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968).

What are contested are the conditions upon which the

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Secretary of H.E.W. gave his approval to the New York State plan. More specifically the question relates to the meaning of "permanently residing in the United States under color of law", a phrase appearing in 45 C.F.R. s 233.50, which provides that:

> ". . . A state plan . . . shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing ***849** in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203(a)(7) or Section 212(d)(5) of the Immigration and Nationality Act.)"

We are not supplied with the administrative or legislative background, if any existed, of the quoted regulation. Nor, despite our proposal, has the Department of H.E.W. chosen to help us. Pursuant to this Court's suggestion when this case was here before, Holley v. Lavine, supra, plaintiff's counsel requested the views of the Department of H.E.W. The Department replied that it would require a request from the District Court for the Department's appearance as an amicus curiae. April 7, 1976 plaintiff asked the District Court to invite H.E.W. to appear. But the District Judge did not respond.

In the absence of other background material, defendants, speaking for their State government, argued that the New York statute and the federal regulation reflect a problem of horrendous proportions. We are asked to take judicial notice that millions of persons are unlawfully in the United States. Their presence is said to be the cause of major financial burdens to the states and the nation because these illegal aliens claim unearned benefits from welfare systems. It is argued that the states to protect their solvency have the right to drop from the welfare rolls those who, because their residence is in violation of law, are subject to deportation.

The picture presented in such vivid colors hardly represents this particular case.

We are not dealing with a person who is residing in the United States without the knowledge or permission of the Immigration and Naturalization Service. She fully disclosed her situation to the Department of Justice which found that plaintiff, having been admitted lawfully as a student, married in this country a husband; they had five children born here as American citizens; plaintiff then separated from her husband, and later had a sixth child who is also an American citizen by birth; all six children are minors living with their mother; and all six are now entitled to receive and are receiving AFDC payments.

Having this information, a responsible official of the Immigration and Naturalization Service the officer authorized by the Department of Justice to initiate in the District of Buffalo, where plaintiff is living, any appropriate deportation proceeding by formal letter, mentioned earlier in this opinion, notified a responsible official of the New York State Department of Social Services that "deportation proceedings have not been instituted . . . for humanitarian reasons" and the "Service does not contemplate enforcing her departure from the United States at this time."

Far from being in a class with millions of aliens unlawfully residing in the United States, plaintiff is in what is almost certainly a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice stating that the Immigration and Naturalization Service "does not contemplate enforcing . . . (the alien's) . . . departure from the United States at this time."

This case is thus narrowed to the precise question whether, in the unusual situation where an alien parent has an official assurance that the parent will not be deported at least until the children are no longer dependent on that parent, such parent is "permanently residing in the United States under color of law."

[2] We first answer so much of the question as calls for a construction of the phrase "under color of law" as used in this regulation. The phrase obviously includes actions not covered by specific authorizations of law. It embraces not only situations within the body of the law, but also others enfolded by a colorable imitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative ***850** agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.

There is no more common instance of action "under color of law" than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute or regulation because such enforcement would involve consequences, or inflict suffering, beyond what

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the authors of the law contemplated. The discretionary refusal of a prosecutor or like administrator of the law to use his enforcement powers is often not supported by specific language in a statute or other charter of authority. Yet there is a legion of adjudicated cases which recognize that the prosecutor or like enforcing official may exercise a discretionary power, virtually unreviewable by a court, not to enforce a statutory command, and not to seek the imposition of penalties or other sanctions upon a known violator. Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Newman v. United States, 127 U.S.App.D.C. 263, 382 F.2d 479 (1967); Nader v. Kleindienst, 375 F.Supp. 1138 (D.C.D.C.1973).

[3] [4] [5] The case at bar is an obvious instance of an executive department, here INS, determining not to enforce one set of laws because to do so would defeat another avowed Congressional object, here that involved in enacting 42 U.S.C. s 606(b)(1). According to House Report No. 1300, cited in Shirley v. Lavine, 365 F.Supp. 818, 822 (N.D.N.Y., 1973), aff'd, 420 U.S. 730, 95 S.Ct. 1190, 43 L.Ed.2d 583 (1975), the statute provides AFDC payments to the parent or other adult with whom a dependent child lives, on the ground that "in families with small children, it is necessary for the mother or the adult to be in the home full time to provide proper care and supervision". Congress sought to avoid suffering by innocent American minor children, and perhaps sought to prevent the public treasury from incurring greater expense for foster care than it now incurs for parental care. In short, "under color of law", those charged with the power to deport have allowed plaintiff, as a parent of American citizens, to remain a resident.

But it is argued that the parent is not "permanently residing" in the United States, inasmuch as the parent's status is dependent upon a letter which explicitly states that "the Service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with circumstances then existing". (Emphasis added.)

In construing H.E.W. Regulation 45 C.F.R. s 233.50, we are mindful that the regulation is expressed in words of art carefully chosen. The regulation makes a distinction based on whether "an otherwise eligible individual . . . is . . . an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act)".

In matters arising under, or cognate to, the Immigration and Nationality Act the phrase "permanently residing in the United States under color of law" may properly be construed with an eye to 8 U.S.C. s 1101(a)(31) which provides that in the immigration law "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law". The statutory definition of the adjective "permanent" aids in the interpretation of the adverb "permanently".

Far more significant as aids to interpretation of 45 C.F.R. s 233.50 are the very parts of the Immigration and Nationality Act which the regulation itself gives as illustrative, that is the provisions of section ***851** 203(a)(7) (8 U.S.C. s 1153(a)(7)) and section 212(d)(5) (8 U.S.C. s 1182(d)(5)) of the Immigration and Nationality Act. Section 203(a)(7) permits a refugee to have only conditional entry pursuant to regulations of the Attorney General and section 212(d)(5) permits the Attorney General in his discretion to parole into the United States temporarily an otherwise inadmissible alien.

Those sections are themselves instances where the alien is permitted to stay in the United States not necessarily forever, but only so long as he is in a particular condition. Those statutory references furnish a suitable occasion to invoke the maxim noscitur a sociis. Such invocation is congenial to the general attitude displayed in the Social Security Act for in 42 U.S.C. s 1301(b) which admittedly governs interpretation only of the statute itself and not of regulations thereunder Congress provided that the word "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined". This is a legislative caution to lean more on the "ejusdem generis" than on the "inclusio unius, exclusio alterius" canon of construction.

We, therefore, reach the conclusion that as the Secretary of H.E.W. used the phrase "permanently residing in the United States" in 45 C.F.R. s 223.50, the Secretary included such a person as plaintiff whose residence in this country was assured at least until all her children had grown to full age, and might be extended thereafter indefinitely dependent upon conditions then existing. We also note that extension is highly probable because this alien's ties are so close to six American citizens that no executive department is likely to require her to return to a land she left when she was a beginning student and before she was educated and married in the United States.

Our conclusion moots the issue as to whether s 131-k-1 of the New York Social Services Law, if applied to preclude

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the payment of AFDC benefits to an alien not permanently residing lawfully in the United States, would violate the Fourteenth Amendment to the United States Constitution. Hence there is no need to convoke a three judge District Court to consider the matter.

There remains to be considered by the District Court the appropriate form of injunction as well as issues of damages, (cf. Edelman v. Jordan, 415 U.S. 651, 667, n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)) and attorney's fees both in the District Court and in this Court. (See Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641; Torres v. Sachs, 538 F.2d 10 (2nd Cir., 1976).)

[6] Since it appears the original judge might have difficulty in putting aside previously expressed views, and reassignment is advisable to avoid the appearance of prejudgment, the case will be remanded to the District Court for reassignment in keeping with the principles stated in United States v. Robin, 553 F.2d 8, 10 (2nd Cir., March 30, 1977).

Reversed and remanded for the issuance of an appropriate injunction, and for consideration of issues of damages and attorney's fees both in the District Court and in this Court.

All Citations

553 F.2d 845

Footnotes

* Chief Judge for the District of Vermont, sitting by designation.

** Senior District Judge for the District of Massachusetts, sitting by designation.

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STATE OF NEW YORK : COUNTY OF ERIE
SUPREME COURT

In the Matter of the Application of
YOUSIF KARAMALLA, on behalf of himself and
all people similarly situated,

Petitioner-Plaintiff,

vs.

Index # 0107-2015
MEMORANDUM DECISION and JUDGMENT

SHARON DEVINE, as Executive Deputy
Commissioner of the New York State Office of
Temporary and Disability Assistance,

and

AL DIRSCHBERGER, as Commissioner of the Erie
County Department of Social Services,

Respondents-Defendants.

For a Judgment Pursuant to §3001 and Articles 9 and 78
of the Civil Practice law and Rules.

Appearances:

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Hon. Catherine Nugent Panepinto, J.S.C.

Petitioner-Plaintiff, YOUSIF KARAMALLA, noticed an Article 78 Verified Petition and Class Action Complaint with Exhibits, as well as an Attorney Certification pursuant to CPLR §1101; a Memorandum of Law with Exhibits; and Reply with Exhibits. Respondent-Defendant, SHARON DEVINE, Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance (OTDA), responded with a Verified Answer and Amended Answer and Return with Exhibits; a Notice of Motion to Dismiss; a Memorandum of Law; and a Respondent Affidavit with Exhibits. Respondent-Defendant AL DIRSCHBERGER, as Commissioner of the Erie County Department of Social Services (County) responded with a Verified Answer and Return; and Cross Motion to Dismiss with an Attorney Affirmation.

Statement of Facts/Background:

Mr. KARAMALLA earned a bachelor's degree in accounting from the University of Cairo in 1973. He came to this country in 1995 on a six month visitor visa, which was extended six months until August, 1995, when he applied for asylum. His application was denied four years later, in December, 1999. Unable to utilize his degree here, he has worked a variety of jobs. He is a Sudanese national who was granted Temporary Protected Status (TPS) in 2005. Grantees of TPS are in a lawful status in the United States. Grants of TPS may be re-registered for as long as the conditions persist that gave rise to the designation of the country by the Attorney General. Sudan has been on the list of designated countries since 1997 as a country experiencing internal armed conflict such that it is unsafe for the return of its nationals. Most recently, Mr. KARAMALLA's TPS status was re-registered on December 5, 2014. He lives alone in Buffalo, New York.

Because of his diabetes and declining health in 2013, Mr. KARAMALLA stopped working. He applied for and now receives $324.00 a month in Social Security Retirement benefits. He is eligible for Social Security Title II benefits because he is considered to be lawfully residing in the U.S. under the immigration law. He applied for Safety Net Assistance (Safety Net), New York's state-funded welfare program, as well as the federally funded Supplemental Nutrition Assistance Program (SNAP) and Medicaid from Respondent AL DIRSCHBERGER (ERIE COUNTY) in January and September, 2014. His application was denied both times on the ground that he is neither a citizen nor "an alien with a certain kind of immigration status". After a OTDA hearing, Respondent SHARON DEVINE (OTDA) upheld the denial of his application for Safety Net but directed ERIE COUNTY to re-determine Mr. KARAMALLA's eligibility for Medicaid.

Unlike Respondent OTDA which administers the Safety Net program, the Department of Health (DOH), which administers New York's Medicaid program, considers people with TPS as permanently residing under color of law (PRUCOL) and therefore, eligible for Medicaid. Upon remand, ERIE COUNTY approved Mr. KARAMALLA's Medicaid benefits.

Argument:

Petitioner/Plaintiff's (hereinafter Petitioner) argument is among other things, that Respondents/Defendants' affirmation of ERIE COUNTY's denial of Petitioner's Safety Net Assistance application was arbitrary and capricious, an error of law, and in violation of federal and state constitutions, laws and regulations. Consequently, Petitioner has asked this Court to direct Respondent County to re-determine Petitioner's eligibility for Safety Net Assistance benefits retroactive to his September 26, 2014 application; declare as a violation of law its policy denying benefits to immigrants with TPS (temporary protected status); permanently enjoin Respondent from following its policy; certify this action as a class action; order identification of all class members; and award costs and disbursements.

Respondents/Defendants (hereinafter Respondents) respond that among other things, immigration is governed entirely by federal statute and by virtue of Mr. KARAMALLA's TPS status, he is ineligible for Safety Net assistance. Further, Respondents argue they did not act in an arbitrary way, nor in derogation of the law and that should this Court determine the Article 78 portion of this matter raises a substantial evidence question, that portion should be transferred to the Appellate Division and the class action complaint should be dismissed. Respondents also argue that pursuant to the four month statute of limitations described in CPLR §217, Petitioners' claims are untimely and must be dismissed. Respondents assert the denial of Petitioner's benefits did not violate his rights under the Federal and New York Constitutions.

CPLR §217

> 1. Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, ...
>
> CPLR §217(1)

CPLR § 7803

> The only questions that may be raised in a proceeding under this article are:
>
> 1. Whether the body or officer failed to perform a duty enjoined upon it by law; or
> 2. Whether the body or officer proceeded, is proceeding or is about

to proceed without or in excess of jurisdiction; or
3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. Whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.
CPLR §7803 (1)-(4)[(5) omitted as irrelevant here]

Federal and New York State Law–

[No State shall] deny to any person within its jurisdiction the equal protection of the laws.
US Constitution, 14th Amendment, §1.

Federal law excludes grantees of TPS, such as Mr. KARAMALLA from access to federal benefits via exclusion from the federal benefit eligibility classification of individuals considered permanently residing under color of law (PRUCOL). However, Federal law left the decision regarding access to state benefits up to each individual state. To wit, in pertinent part,

(f) Benefits and status during period of temporary protected status [TPS]

During a period in which an alien is granted temporary protected status under this section –
(1) the alien shall not be considered to be permanently residing in the United States under color of law;
(2) the alien ***may*** be deemed ineligible for public assistance by a State (as defined in section 1101(a)(36) of this title) or any political subdivision thereof which furnished such assistance. (Emphasis added)
8 USC §1254a[f][1-2]

Accordingly, the New York State Court of Appeals has ruled that because federal law does not set a uniform rule with respect to the rights of non citizens to ***state*** benefits (***may be deemed ineligible***) there is no federal preemption with respect to state laws providing public assistance to aliens granted TPS status. See, *Aliessa v. Novello,* 96 NY2d 418 at 434-435 (2001) Logically, if a State ***may*** deem a TPS alien ***ineligible*** for assistance, it ***may*** instead deem such alien ***eligible*** for assistance. In other words, the Court of Appeals ruled that New York State cannot exclude legally present immigrants from receiving state benefits solely because the Federal government is allowed to do so relative to federal benefits eligibility. See, *Aliessa v. Novello,* 96 NY2d 418 (2001) ["The Supreme Court drew limits on the power of entities other than Congress or the President to make alienage classification in

furtherance of Federal immigration policy...The Court concluded that if Congress or the President had created the classification, it could be justifiable as a valid exercise of immigration authority in the national interest."] Should New York chose to so exclude, as it did in the *Aliessa* case involving Medicaid benefits, it opened itself up to strict scrutiny because "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Aliessa,* Id. at 434, quoting *Hampton v. Mow Sun Wong,* 426 US 88 (1976); *Graham v. Richardson,* 403 US 365, at 382 (1971).

The New York Court of Appeals has made clear that immigrants have long been included as "persons" entitled to equal protection. See, *Aliessa v. Novello,* 96 NY2d 418, 430 (2001), citing *Yick Wo v. Hopkins,* 118 US 356, 369 (1886)["The fourteenth amendment to the Constitution is not confined to the protection of citizens."]

New York Constitution–

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.
> NY Constitution, Art. I, § 11

> [t]he aid, care and support of the needy are public concerns and shall be provided by the State and by such of its subdivisions, and in such manner and by such means, as the Legislature may from time to time determine.
> New York Constitution, Art. XVII, §1.

[C]are for the needy is not a matter of 'legislative grace', it is a constitutional mandate." *Matter of Aliessa v. Novello,* 96 NY2d 418 at 428 (2001), quoting *Tucker v. Toia,* 43 NY2d 1,7 (1977) Further, Article XVII "unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy," and the Legislature may not deny assistance, "solely on the basis of criteria having nothing to do with need." *Tucker,* Id. at 8-9.

PRUCOL

Respondents list the following as categories of PRUCOL, (Thus, eligible for Safety Net assistance):

--Aliens paroled for less than one year;

--Aliens residing in the United States pursuant to an Order of Supervision under Section 241(a)(3) of the Immigration and Nationality Act (INA);

--Aliens granted cancellation of removal pursuant to Section 240A of

the INA;
--Aliens granted deferred action status, which defers their departure;
--Aliens granted K3 or K4 visa status established under the Legal Immigration Family Equity Act (Life Act);
--Aliens granted V visa status under the Life Act;
--Aliens granted S visa status;
--Aliens granted U visa status
--Aliens who demonstrated that they entered the U.S. and have continuously resided in the U.S. since January 1, 1972 pursuant to Section 249 of the INA.

Analysis and Decision:

The parties agree that the CPLR §217(1) four month period applies to this case; but disagree as to the date of commencement. Respondents argue the four month period commenced on March 14, 2014 when Respondent OTDA issued a Decision after Fair Hearing, in which it affirmed the Erie County Agency's denial of benefits to Mr. KARAMALLA. Petitioner refutes that date and argues instead, the four month period commenced almost a year later, on February 17, 2015; the date on which Respondent OTDA issued a separate and unrelated Hearing Decision # 6870825M, whereby OTDA decided,

> "The Agency's [Erie County Social Services] determination that Appellant is not eligible for Public Assistance benefits on the grounds that he is an ineligible alien was correct and is affirmed."

It is this decision that Petitioner has pled as the subject of this Article 78/declaratory judgment/class action proceeding. There is no mention in the 2015 decision that Petitioner had applied for benefits previously nor any reference linking it back to the March, 2014 decision. Perhaps Petitioner could have filed an Article 78 action in 2014, however nothing compelled him to do so. Meanwhile, his Notice of Petition and Class Action Complaint relative to the February 17, 2015 determination of Respondent OTDA was filed on June 15, 2015; timely by two days.

Having dispensed with Respondents' timeliness defense, this Court shall address the questions raised in this Article 78 hybrid proceeding. As in any Article 78 matter, the Court's role is limited. "It is not the function of judicial review in an Article 78 proceeding to weigh the facts *de novo* and substitute the Court's judgment for that of the body reviewed, but only to determine if the action sought to be reviewed was authorized and can be supported on any reasonable basis." *Matter of Kayfield Constr. Corp. V. Morris,* 15 AD2d 373 at 378, (1st Dept., 1962); *Matter of Diocese of Rochester v. Planning Bd.,* 1 NY2d 508 at 520 (1956) [It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.] It is well settled that Courts regularly, "defer to an

administrative agency's interpretation of its regulations if not irrational." *Blossom View Nursing Home v. Novello,* 4 NY3d 581, 594 (2005); *Matter of Isabella Geriatric Ctr. Inc. V. Novello,* 38 AD3d 356, 357 (1st Dept., 2007) See also, *Koch v. Sheehan,* 95 AD3d 82 (4th Dept., 2012)[New York State Medicaid Office decision was arbitrary and capricious.]; *Monroe Community Hospital v. Commissioner of Health of State,* 289 AD2d 951 (4th Dept., 2001)[Concluded Respondent had no rational basis to deny Petitioner a hearing on multiple issues.]

Unfortunately for Respondents, this Court is persuaded that it cannot rationally defer to their interpretation of the applicable law. Respondents' determination was affected by an error of law and further, was arbitrary and capricious. The errors begin with Respondents' claims of preemption by the Federal Government to justify denial of Safety Net assistance to Mr. KARAMALLA, an individual admittedly needy under the relevant guidelines. As explained above, the permissive language of 8 USC §1254a[f][2]; to wit, ***"may*** be deemed ineligible***"***, allows for individual states to enact laws in conflict with Federal laws and deem TPS aliens eligible for State assistance. This Court is unpersuaded by the argument that an alien must fit into the Federal PRUCOL categories to be deemed eligible by Respondents. PRUCOL is not an alien classification and Respondents are free to establish their own list of categories for eligibility. Section §1254a[f][2] allows them to do so.

Albeit, having chosen to deem TPS aliens ineligible for Safety Net assistance, Respondents opened up their actions to strict scrutiny. Though they argue for Federal preemption, Respondents rightly admit that if found not preempted as has this Court, "state classifications of aliens for the purpose of entitlement to public benefits are subject to strict judicial scrutiny." See *Graham v. Richardson,* 403 U.S. 365, 372 (U.S. 1971) This is a point upon which counsel agree. Further, from Respondents' papers, a state statute [reviewed under strict scrutiny] "will withstand an equal protection challenge only when the State can show that the law furthers a compelling state interest by the least restrictive means practically available." See, Aliessa, Supra. at 431, quoting *Bernal v. Fainter,* 467 U.S. 216, 227 (1984) Other than arguing for preemption, Respondents have made no such showing.

Moreover, the Court of Appeals found no such compelling interest when it applied strict scrutiny in the *Aliessa* case, where medicaid benefits were denied to plaintiffs based on their status as legal aliens. [The federal government cannot, "constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens."] See, *Aliessa,* 96 NY2d 418 at 433(2001) Accordingly, this Court hereby finds that Respondents erred in affirming the denial of state funded welfare benefits to Petitioner, as well as all people granted TPS based solely on their alien status. This error of law is a violation of his and their rights to equal protection of the laws under both the State and Federal Constitutions.

In addition, it is well established that Article XVII of the New York State Constitution, as cited above, prohibits Respondents from limiting its constitutional obligation by implementing restrictions on the provision of benefits to needy people unrelated to a person's need. See, *Minino v. Perales,* 79 NY2d 883 (1992) [Sponsor income deeming amendment to the Federal AFDC statute does not require this Court to uphold an otherwise unconstitutional restriction on the State's duty to aid the needy.] ; *Lee v. Smith,* 43 NY2d 453 (1977)[Any classification which denies to one class of needy persons public assistance which is available to all others, cannot be justified...]; *Brownley v. Doar,* 12 NY3d 33 (2009) [No violation of constitutional command unless a group of needy people has been impermissibly excluded from eligibility for benefits.]; *Matter of Bernstein v. Toia,* 43 NY2d 437 (1977) [what we there held prohibited was the Legislature's simply refusing to aid those whom it has classified as needy.]; *Tucker v. Toia,* 43 NY2d 1(1977)[Constitutional violation found in requiring needy minors to seek court orders of support against parents prior to applying for public assistance.]

This well established obligation inures to Mr. KARAMALLA as well. He is a lawfully residing alien and Respondents are excluding him from access to basic welfare assistance because of his immigration status, which has nothing to do with his need. See, *Aliessa,* Supra at 429 [SSL §122(c) "violates the letter and spirit of article XVII, §1 by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits."] Thus, this Court also hereby finds an error of law as to the denial of state funded welfare benefits to Petitioner, as well as all people granted TPS based solely on their alien status. This error of law is a violation of his and their rights under Article XVII of the New York State Constitution.

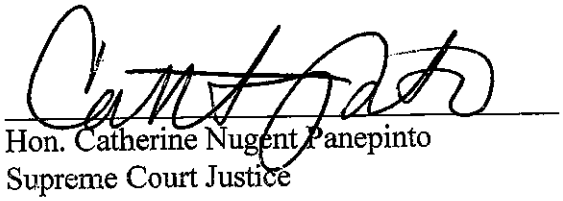
Sadly for Respondents, this Court also finds Respondents' determination to be arbitrary and capricious. Respondents utilize a list of nine categories of aliens to which they provide Safety Net Assistance; inaptly named as Permanently Residing Under Color Of Law (PRUCOL). (Complete list is recited above.) Included are at least three categories of aliens with questionable permanent status: aliens paroled for less than a year. [The Attorney General may... *parole into the United States* temporarily under such conditions as she may prescribe *only on a case-by-case basis for urgent humanitarian reasons or significant public benefit* any alien..., but such parole... shall not be regarded as an admission of the alien. 8 USC §1182(d)(5)(A) (emphasis added); aliens residing under an Order of Supervision; and aliens granted deferred action status. [Deferred action ... is an informal administrative stay of deportation, implemented by INS... having no effect on an alien's adjudication as deportable but potentially leading to an extended stay in this country.] *Wan Chung v. Ferro,* 543 FSupp 1016, 1017 (WDNY 1982) Perhaps most arbitrary is the inclusion of an alien who is residing under an Order of Supervision; defined as an alien who has been ordered deported (some because of criminal convictions) but

whose removal cannot be executed within 90 days, sometimes because of unrest in the alien's home country. Various conditions, such as submitting to psychiatric exams are placed upon those "under supervision". 8USCA §1231

It is arbitrary to decide said "supervised/pending deportation" alien should fall into the safety net, while Mr. KARAMALLA, a law abiding individual, with no deportation order should fall outside the net. Both may be waiting for conditions in their home country to improve but only the one ordered to be deported and supervised gets assistance? This is not reasoning deserving of deference. Hence, this Court finds and declares Respondents' determination was arbitrary and capricious pursuant to CPLR § 7803. Because of this finding as well as those above, this Court need not address Respondents' contention that this matter should be transferred to the Appellate Division based upon a substantial evidence issue.

In sum, this Court hereby denies Respondents' motions and cross motions to dismiss, as well as motion to transfer. Further, I hereby annul and reverse Respondents' Fair Hearing Decision #6870825M dated February 17, 2015; direct Respondent DIRSCHBERGER to re-determine Petitioner's eligibility for Safety Net Assistance benefits retroactive to his September 26, 2014 application; declare that the policy of Respondents regarding the denial of Safety Net Assistance benefits to immigrants with TPS is in violation of law; permanently enjoin Respondents from continuing to follow, implement, or enforce the policy of denying benefits to applicants for Safety Net Assistance solely on the basis of their Temporary Protected Status. This Court is reserving on Petitioner's request for class certification.

This constitutes the Decision and Judgment of this Court. Submission of a Judgment granting the Article 78 Petition is not necessary. The mailing of a copy of this Decision and Judgment by this Court to counsel and the Clerk's Office shall not constitute notice of entry and service.



Hon. Catherine Nugent Panepinto
Supreme Court Justice

Dated: February 23, 2016
Buffalo, New York

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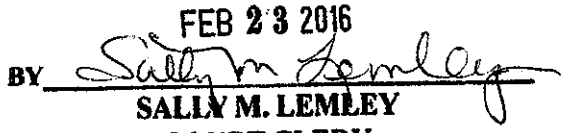
BY 

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Distinguished by Doe v. Commissioner of Transitional Assistance, Mass., August 15, 2002

178 Misc.2d 280
Supreme Court, Rockland County, New York.

Savka TONASHKA, Plaintiff,
v.
Noah WEINBERG, as Commissioner of Rockland County Department of Social Services, et al., Defendants.

Sept. 23, 1998.

Alien whose application for permanent residency was pending with Immigration and Naturalization Service (INS) applied for Safety Net Assistance under State law. The Department of Social Services denied application. Alien then brought action for declaratory relief. Parties cross-moved for summary judgment. The Supreme Court, Rockland County, Miller, J., held that alien was permanently residing in United States under color of law (PRUCOL).

Alien's motion granted, Department's motion denied.

West Headnotes (1)

[1] **Public Assistance**
Aliens

Alien who was present on visitor's visa, and who possessed work authorization from Immigration and Naturalization Service (INS), was "permanently residing in the United States under color of law" (PRUCOL), and thus, she was entitled to Safety Net Assistance under State law; alien had application pending with INS for permanent residency, she had continually resided in United States, and INS had taken no action to deport her. McKinney's Social Services Law §§ 122, subd. 1(c)(ii), 158, subd. 1(g).

2 Cases that cite this headnote

Attorneys and Law Firms

****884 *280** Greater Upstate Law Project, Inc., White Plains, for plaintiff.

Gary C. Samuels, for Pomona, for Noah Weinberg, defendant.

Dennis C. Vacco, Attorney–General, White Plains, for Brian Wing, as Commissioner of New York State Office of Temporary and Disability Assistance, defendant.

Opinion

***281** HOWARD MILLER, Justice.

Motion by plaintiff, and cross-motion by defendant Brian Wing, Commissioner, New York State Office of Temporary and Disability Assistance ("NYSTDA"), for summary judgment.

Ordered that plaintiff's motion for summary judgment is granted to the extent that plaintiff may enter judgment declaring that she is entitled to the benefits afforded by Social Services Law § 122(1)(c)(ii) and § 158(1)(g) so long as she is an alien permanently residing under color of law as hereinafter set forth; and it is further

Ordered, that the determination of the Rockland County Department of Social Services is annulled, and the matter remitted to that agency for a reevaluation of plaintiff's eligibility for Safety Net Assistance consistent with this determination and the judgment to be entered herein; and it is further

Ordered, that the remainder of the relief sought by plaintiff is denied; and it is further

Ordered, that the cross-motion is denied; and it is further

Ordered, that the trial scheduled for October 19, 1998 is cancelled.

Plaintiff states she arrived in the United States from Bulgaria on a visitor's visa in July of 1990. After arrival, she filed an application for asylum with the Immigration and Naturalization Service ("INS"), which is still pending. Plaintiff has had a work authorization issued by the INS since the fall of 1990, and has been employed for approximately six of the last seven years. Allegedly as the result of the violence of a roommate, plaintiff went to the

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Rockland Family Shelter in the fall of 1997. Plaintiff states that she became homeless in March 1998 and either voluntarily went to the Rockland County Emergency Shelter, or was placed there by the Rockland County Department of Social Services ("RCDSS"), on March 10, 1998. She was moved to a motel in May of 1998. On May 9, 1998 the RCDSS notified plaintiff it was discontinuing all assistance. A Fair Hearing was held June 4, 1998, and the May 9, 1998 decision was affirmed June 25, 1998. Following the June 25, 1998 decision, the complaint was allegedly amended to include a challenge to that decision under CPLR article 78.

Although the pleadings are not annexed to the moving papers, it is alleged that plaintiff commenced this action seeking declaratory relief. The parties agree that there are no disputed material issues of fact. Plaintiff contends she is entitled to summary judgment declaring that she is entitled to Safety Net Assistance for three reasons: (1) plaintiff has been ***282** permanently residing in the United States under color of law ("PRUCOL") since 1990; (2) New York State Constitution Article XVII, § 1, mandates that aid, care and support be provided to the needy; and (3) under the equal protection clauses of the New York and federal constitutions, the eligibility requirements of the Safety Net Program which conditions eligibility on immigration status are invalid.

In arguing this motion, both plaintiff and defendants rely on several cases in support of their respective positions regarding whether plaintiff is a PRUCOL for purposes of public assistance, all of which predate the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub.L. 104–193; 110 US Stat. 2105),[1] codified ****885** at 42 USC §§ 601 *et seq.* ("PRWORA"). In the opinion of at least one commentator, that legislation abolished the PRUCOL doctrine[2]. However, subsequent to the passage of PRWORA, New York State enacted the Welfare Reform Act of 1997 (L.1997, ch. 436, part B), and extended Safety Net Assistance to persons not otherwise eligible under PRWORA. Under SSL § 122(1)(c)(ii) and § 158(1)(g), an alien who does not fall within the federal definition of "qualified alien" (8 USC § 1641[b]), but "who is otherwise permanently residing in the United States under color of law" (Social Services Law § 122 [1][c][ii]) is eligible for Safety Net Assistance. The legislature, in enacting SSL §§ 122 and 158, elected to continue utilizing a PRUCOL standard for determining Safety Net Assistance eligibility, without providing any further definition. Thus the case law extant at the time the statutes were enacted will provide guidance on who the legislature considered to be PRUCOL for Safety Net Assistance purposes.

Respondents have determined that plaintiff is not a PRUCOL solely because she has applied for asylum and possesses a work authorization from the INS, and rely upon three California cases, *Sudomir v. McMahon,* 767 F.2d 1456 (9th Cir.1985); *Khasminskaya v. Lum,* 47 Cal.App.4th 537, 54 Cal.Rptr.2d 915 (1st Dist.1996), and *Zurmati v. McMahon,* 180 Cal.App.3d 164, 225 Cal.Rptr. 374 (2 Dist. 1986); and one Fourth Department case, *Matter of Bibezic v. Schauseil & Wing,* 236 A.D.2d 899, 653 N.Y.S.2d 786, to support their determination. Florida has, however, criticized the *Sudomir* case ***283** (*Velez v. Coler,* 767 F.Supp. 253 (M.D.Fla.1991)), and held that persons with a pending asylum application are PRUCOL (*Dept. of Health and Rehabilitative Services v. Solis,* 580 So.2d 146).

In *Matter of Bibezic,* the Fourth Department recently upheld denial of benefits to a person with an asylum application pending, relying on the fact that the Desk Aid of the Department of Social Services' Public Assistance Source Book, which contains a list of persons considered to be PRUCOL, did not include a person awaiting a determination on an asylum application. It should be noted, however, that the prefatory language to the list of persons considered to be PRUCOL says that "Please note that this list is not all inclusive."

The First and Second Departments, prior to *Matter of Bibezic,* held that aliens with applications pending with the INS for permanent residency are considered PRUCOL (*Papadopoulos v. Shang,* 67 A.D.2d 84, 414 N.Y.S.2d 152; *St. Francis Hosp. v. D'Elia,* 71 A.D.2d 110, 422 N.Y.S.2d 104, affd. 53 N.Y.2d 825, 440 N.Y.S.2d 185, 422 N.E.2d 830). Although decided prior to PRWORA, both cases address the PRUCOL issue and, given the affirmance by the Court of Appeals, represented the state of the law at the time of enactment of SSL § 122(1)(c)(ii) and § 158(1)(g).

In *Papadopoulos* (*supra*, at 87, 414 N.Y.S.2d 152), the First Department noted that its holding was "fortified by the ruling in *Holley v. Lavine*, 553 F.2d 845 * * * (2nd Cir.1977)," a New York federal case. In both Papadopoulos and *St. Francis Hospital,* the appellate courts relied heavily upon language from *Holley* that, "When an administrative agency or legislative body uses the phrase 'under color of law' it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border." (*Holley v. Lavine,* 553 F.2d, at 849–850.) With regard to the term "permanently residing" the *Holley* court added, " 'a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of

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the individual, in accordance with law,' " (at 850 [cite omitted]).

Since *St. Francis Hosp. v. D'Elia, supra,* has been affirmed by the Court of Appeals, this court is bound by the doctrine of *stare decisis* to follow the principles set forth in that decision until the Court of Appeals pronounces a contrary rule (see *Mountain View Coach v. Storms,* 102 A.D.2d 663, 476 N.Y.S.2d 918), despite the fact that the recent federal legislation and more recent decisions in other jurisdictions offering a compelling case that plaintiff is not a PRUCOL.

****886** Plaintiff has continually resided in the United States and no action has been taken by INS to deport her in the eight years ***284** her asylum application has been pending. Under *Holley* she is, therefore, a PRUCOL.

Given the foregoing, plaintiff's remaining arguments with respect to constitutional issues and equal protection claims are not reached. In any event, those arguments were discussed at length and determined to be without merit in *Abreu v. Callahan,* 971 F.Supp. 799 (S.D.N.Y. 1997).

All Citations

178 Misc.2d 280, 678 N.Y.S.2d 883, 1998 N.Y. Slip Op. 98557

Footnotes

1 *Lisboa v. Dade Cty. Property Appraiser,* 705 So.2d 704, while a recent case, related to a homestead exemption and not public assistance.

2 See *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens From Becoming Public Charges,* Michael J. Sheridan, J.D., A.M., 31 Creighton Law Review 741, May 1998.

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