Overview of Immigrant Eligibility for Federal Programs

By Tanya Broder, Avideh Moussavian, *and* Jonathan Blazer *DECEMBER 2015*

The major federal public benefits programs have always left some non–U.S. citizens out of eligibility for assistance from the programs. Since their inception, programs such as the Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program), nonemergency Medicaid, Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF) and its precursor, Aid to Families with Dependent Children (AFDC), have been inaccessible to undocumented immigrants and people in the United States on temporary visas.

However, the 1996 federal welfare and immigration laws introduced an unprecedented new era of restrictionism.[1] Prior to these laws' enactment, lawful permanent residents of the U.S. generally were eligible for assistance in a manner similar to U.S. citizens. After these laws' enactment, most lawfully residing immigrants were barred from receiving assistance under the major federal benefits programs for five years or longer. Even where eligibility for immigrants was preserved by the 1996 laws or restored by subsequent legislation, many immigrant families hesitate to enroll in critical health-care, job-training, nutrition, and cash-assistance programs due to fear and confusion caused by the laws' chilling effects. As a result, the participation of immigrants in public benefits programs decreased sharply after passage of the 1996 laws, causing severe hardship for many low-income families who lacked the support available to other low-income families.[2]

This article focuses on eligibility and other rules governing immigrants' access to federal public benefits programs. Many states have attempted to fill some of the gaps in noncitizen coverage resulting from the 1996 laws, either by electing federal options to cover more eligible noncitizens or by spending state funds to cover at least some of the immigrants who are ineligible for federally funded services. Many state-funded programs, however, have been reduced or eliminated in state budget battles. Some of these cuts have been challenged in court.[3]

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

[2] Michael Fix and Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant Provisions* (Discussion Paper No. 02-03) (The Urban Institute, Jan. 2002), www.urban.org/publications/410412.html.

[3] A state's denial of benefits to lawfully present immigrants may be unconstitutional, even if apparently authorized by the 1996 welfare law. See, e.g., *Aliessa v. Novello*, 96 N.Y.2d 418 (N.Y. 2001) (New York's denial of health coverage to lawfully residing immigrants violated federal and state Equal Protection clauses, as well as state constitutional obligation to care for the needy); *Ehrlich v. Perez*, 394 MD. 691 (Md. 2006) (enjoining Maryland's termination of health coverage to lawfully residing children and pregnant women); *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232 (Mass. 2012) (striking Massachusetts law that denied state health care coverage to certain lawfully present immigrants). But see *Pham v. Starkowsky*, 300 Conn. 412 (Conn. 2011) (Connecticut's termination of health coverage to lawfully residing immigrants did not constitute discrimination on the basis of alienage); *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004); *Pimentel v. Dreyfus*, 670 F.3d 1096 (9th Cir. 2012) (upholding Washington's denial of state SNAP benefits to certain lawful immigrants); *Bruns v. Mayhew*, 750 F.3d 61 (1st Cir. 2014) (Maine's termination of state medical assistance for those not eligible for Medicaid did not violate Equal Protection).

Even where the courts failed to find an Equal Protection violation, however, some states decided to preserve or restore access to benefits. For example, the Colorado legislature chose to

This monograph, "Overview of Immigrant Eligibility for Federal Programs," is periodically updated as new developments warrant. The edition published immediately prior to this December 2015 edition was dated October 2011.

LOS ANGELES (Headquarters)
3450 Wilshire Blvd. #108 – 62
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

NATIONAL IMMIGRATION LAW CENTER

WASHINGTON, DC
1121 14th Street, NW, Ste. 200
Washington, DC 20005
202 216-0261
202 216-0266 fax

In determining an immigrant's eligibility for benefits, it is necessary to understand the federal rules as well as the rules of the state in which an immigrant resides. Updates on federal and state rules are available on NILC's website.[4]

Immigrant Eligibility Restrictions

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

The 1996 welfare law created two categories of immigrants for benefits eligibility purposes: "qualified" and "not qualified." Contrary to what these names suggest, the law excluded most people in *both* groups from eligibility for many benefits, with a few exceptions. The "qualified" immigrant category includes:

- lawful permanent residents, or LPRs (people with green cards)
- refugees, people granted asylum or withholding of deportation/removal, and conditional entrants
- people granted parole by the U.S. Department of Homeland Security (DHS) for a period of at least one year
- Cuban and Haitian entrants
- certain abused immigrants, their children, and/or their parents [5]
- certain survivors of trafficking [6]

All other immigrants, including undocumented immigrants, as well as many people who are lawfully present in the U.S., are considered "not qualified."[7]

In the years since the initial definition became law, there have been a few expansions of access to benefits beyond the qualified immigrant categories. In 2000, Congress established a new category of noncitizens—survivors of trafficking—who are eligible for federal public benefits to the same extent as refugees, regardless of whether they have a qualified immigrant status.[8] In 2003, Congress clarified that "derivative beneficiaries" listed on trafficking victims' visa applications (spouses and children of adult trafficking survivors;

restore Medicaid eligibility before any individual's coverage was terminated; Hawaii similarly restored health coverage for certain noncitizens; and Washington continued to provide nutritional assistance to immigrants ineligible for federal SNAP, albeit at a lower benefit level.

[4] *Guide to Immigrant Eligibility for Federal Programs* update page, www.nilc.org/issues/economic-support/updatepage/.

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

[6] Survivors of trafficking and their derivative beneficiaries who obtain a T visa or whose application for a T visa sets forth a prima facie case are considered "qualified" immigrants. This group was added to the definition of "qualified" by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457, § 211 (Dec. 23, 2008), http://tinyurl.com/23otojy.

[7] Throughout the remainder of this article, *qualified* will be understood to have this particular meaning, as will *not-qualified*; they will not be enclosed in quotation marks.

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

[8] The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 107 (Oct. 28, 2000). Federal agencies are required to provide benefits and services to individuals who have been subjected to a "severe form of trafficking in persons" to the same extent as refugees, without regard to their immigration status. To receive these benefits, the survivor must be either under 18 years of age or certified by the U.S. Dept. of Health and Human Services (HHS) as willing to assist in the investigation and prosecution of severe forms of trafficking in persons. In the certification, HHS confirms that the person either (a) has made a bona fide application for a T visa that has not been denied, or (b) is a person whose continued presence in the U.S. is being ensured by the attorney general in order to prosecute traffickers in persons.

spouses, children, parents, and minor siblings of child survivors) also may secure federal benefits.[9]

Federal Public Benefits Generally Denied to "Not Qualified" Immigrants

With some important exceptions detailed below, the law prohibits not-qualified immigrants from enrolling in most federal public benefit programs.[10] Federal public benefits include a variety of safety-net services paid for by federal funds.[11] But the welfare law's definition does not specify which particular programs are covered by the term, leaving that clarification to each federal benefit–granting agency. In 1998, the U.S. Department of Health and Human Services (HHS) published a notice clarifying which of its programs fall under the definition.[12] The list of 31 HHS programs includes Medicaid, the Children's Health Insurance Program (CHIP), Medicare, TANF, Foster Care, Adoption Assistance, the Child Care and Development Fund, and the Low-Income Home Energy Assistance Program. Any new programs must be designated as federal public benefits in order to trigger the associated eligibility restrictions and, until they are designated as such, should remain open to broader groups of immigrants.

The HHS notice clarifies that not every benefit or service provided within these programs is a federal public benefit. For example, in some cases not all of a program's benefits or services are provided to an individual or household; they may extend, instead, to a community of people—as in the weatherization of an entire apartment building.[13]

The welfare law also attempted to force states to pass additional laws, after August 22, 1996, if they choose to provide state public benefits to certain immigrants.[14] Such micromanagement of state affairs by the federal government is potentially unconstitutional under the Tenth Amendment.[15]

Exceptions to the Restrictions

The law includes important exceptions for certain types of services. Regardless of their status, not-qualified immigrants are eligible for emergency Medicaid[16] if they are otherwise eligible for their state's Medicaid program.[17] The law does not restrict access to public health programs that provide immunizations and/or treatment of communicable disease symptoms (whether or not those symptoms are caused by such a disease). School breakfast and lunch programs remain open to all children regardless of immigration status, and every state has opted to provide access to the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).[18]

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

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

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

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

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

[14] Welfare law § 411 (8 U.S.C. § 1621).

[15] See, e.g., *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York* (2015 NY Slip Op 04657; decided on June 3, 2015, Appellate Division, Second Department Per Curiam) (holding that the requirement under 8 U.S.C. § 1621(d) that states must pass legislation in order to opt-out of the federal prohibition on issuing professional licenses — in this case, admission to the New York State bar — to undocumented immigrants infringes on New York State's 10th amendment rights)

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

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

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

Short-term noncash emergency disaster assistance remains available without regard to immigration status. Also exempted from the restrictions are other in-kind services necessary to protect life or safety, as long as no individual or household income qualification is required. In 2001, the U.S. attorney general published a final order specifying the types of benefits that meet these criteria. The attorney general's list includes child and adult protective services; programs addressing weather emergencies and homelessness; shelters, soup kitchens, and meals-on-wheels; medical, public health, and mental health services necessary to protect life or safety; disability or substance abuse services necessary to protect life or safety; and programs to protect the life or safety of workers, children and youths, or community residents.[19]

Verification Rules

When a federal agency designates a program as a federal public benefit foreclosed to not-qualified immigrants, the law requires the state or local agency to verify the immigration and citizenship status of all program applicants. However, many federal agencies have not specified which of their programs provide federal public benefits. Until they do so, state and local agencies that administer the programs are not obligated to verify the immigration status of people who apply for them.

And under an important exception contained in the 1996 immigration law, nonprofit charitable organizations are not required to "determine, verify, or otherwise require proof of eligibility of any applicant for such benefits." This exception relates specifically to the immigrant benefits restrictions in the 1996 welfare and immigration laws.[20]

Eligibility for Major Federal Benefit Programs

Congress restricted eligibility even for many qualified immigrants by arbitrarily distinguishing between those who entered the U.S. before or "on or after" the date the law was enacted, August 22, 1996. The law barred most immigrants who entered the U.S. on or after that date from "federal means-tested public benefits" during the five years after they secure qualified immigrant status.[21] Federal agencies clarified that "federal means-tested public benefits" are Medicaid (except for emergency care), CHIP, TANF, SNAP, and SSI.[22]

TANF, Medicaid, and CHIP

States can receive federal funding for TANF, Medicaid, and CHIP to serve qualified immigrants who have completed the federal five-year bar.[23] Refugees, people granted asylum or withholding of deportation/removal, Cuban/Haitian entrants, certain Amerasian immigrants,[24] Iraqi and Afghan Special Immigrants,[25] and

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

[20] IIRIRA § 508 (8 U.S.C. § 1642(d)).

[21] Welfare law § 403 (8 U.S.C. § 1613).

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

[23] States were also given an option to provide or deny federal TANF and Medicaid to most qualified immigrants who were in the U.S. before Aug. 22, 1996, and to those who enter the U.S. on or after that date, once they have completed the federal five-year bar. Welfare law § 402 (8 U.S.C. § 1612). Only one state, Wyoming, denies Medicaid to immigrants who were in the country when the welfare law passed. Colorado's proposed termination of Medicaid to these immigrants was reversed by the state legislature in 2005 and never took effect. In addition to Wyoming, five states (Alabama, Mississippi, North Dakota, Texas, and Virginia) do not provide Medicaid to all qualified immigrants who complete the federal five-year ban. Texas and Virginia, however, provide health coverage to lawfully residing children, regardless of their date of entry into the U.S. Five states (Indiana, Mississippi, Ohio, South Carolina, and Texas) fail to provide TANF to all qualified immigrants who complete the federal five-year waiting period.

[24] For purposes of the exemptions described in this article, the term *Amerasians* applies only to individuals granted lawful permanent residence under a special statute enacted in 1988 for Vietnamese Amerasians. See § 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in § 101(c) of Public Law 100-202 and amended by the 9th proviso under Migration and Refugee Assistance in Title II of the Foreign Operations, Export

survivors of trafficking are exempt from the five-year bar, as are qualified immigrant veterans, active duty military, and their spouses and children. In addition, children who receive federal foster care are exempt from the five-year bar for Medicaid.

Over half of the states have used state funds to provide TANF, Medicaid, and/or CHIP to some or all of the immigrants who are subject to the five-year bar on federally funded services, or to a broader group of immigrants.[26] Several states or counties provide health coverage to children or pregnant women, regardless of their immigration status.

In 2009, when Congress first reauthorized the CHIP program, states were granted an option to provide federally funded Medicaid and CHIP to "lawfully residing" children and pregnant women, regardless of their date of entry into the U.S.[27] Twenty-nine states plus the District of Columbia (as of September 2015) have opted to take advantage of this federal funding for immigrant health care coverage, [28] which became available on April 1, 2009.

CHIP was reauthorized in April 2015 for an additional two years without any changes to immigrant coverage.

Sixteen states plus the District of Columbia use federal funds to provide prenatal care to women regardless of immigration status, under the CHIP program's option enabling states to enroll fetuses in CHIP. Thus the pregnant woman's fetus, rather than the woman herself, is technically the recipient of CHIP-funded services. This approach potentially limits the scope of services available to the pregnant woman to those directly related to the fetus's health.

The District of Columbia and New York provide prenatal care to women regardless of immigration status, using state or local funds.

Although the federal health care reform law, known as the Affordable Care Act (ACA),[29] did not alter immigrant eligibility for Medicaid or CHIP, it provided new pathways for lawfully present immigrants to obtain health insurance. Coverage purchased in the ACA's health insurance marketplaces is available to lawfully present noncitizens who are ineligible for Medicaid.[30]

SNAP

Although the 1996 law severely restricted immigrant eligibility for the Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program), subsequent legislation restored access for many immigrants. Qualified immigrant children, refugees, people granted asylum or withholding of deportation/removal, Cuban/Haitian entrants, certain Amerasian immigrants, Iraqi and Afghan special immigrants, survivors of trafficking, qualified immigrant veterans, active duty military, and their spouses and children, lawful permanent residents with credit for 40 quarters of work history, certain Native Americans, lawfully residing Hmong and Laotian tribe members, and immigrants receiving disability-related assistance are eligible regardless of their date of entry into the U.S.[31] Qualified immigrant seniors who were born

Financing, and Related Programs Appropriations Act, 1989, Public Law 100-461, as amended).

[25] Iraqis and Afghans granted Special Immigrant Visas under § 1244(g) of the Refugee Crisis in Iraq Act of 2007 (subtitle C of title XII of division A of Public Law 110-181; 122 Stat. 398) or § 602(b)(8) of the Afghan Allies Protection Act of 2009 (title VI of division F of Public Law 111- 8; 123 Stat. 809) are now eligible for benefits to the same extent as refugees. Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, §8120 (Dec. 19, 2009).

[26] See *Guide to Immigrant Eligibility for Federal Programs*, 4th ed. (National Immigration Law Center, 2002), and updated tables at www.nilc.org/issues/economic-support/updatepage/.

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

[28] Post-partum care is not covered by these federal funds unless a state normally pays for this care as part of a bundled payment or global fee method. HHS Letter to State Health Officials (Nov. 12, 2002). See also *Medical Assistance Programs for Immigrants in Various States* (National Immigration Law Center, Sep. 2015), www.nilc.org/wp-content/uploads/2015/11/med-services-for-imms-in-states-2015-09.pdf.

[29] Pub. Law No. 111-148, as amended by the Health Care and Education Act of 2010, Pub. Law No. 111-152. For more information about immigrant eligibility for coverage under the Affordable Care Act, see *Immigrants and the Affordable Care Act (ACA)* (NILC, Jan. 2014), www.nilc.org/issues/health-care/immigrantshcr/.

[30] For more information on the ACA, please see NILC's fact sheets at www.nilc.org/issues/health-care/acafacts/.

[31] For the purpose of "immigrants receiving disability-related assistance," disability-related programs include SSI, Social Security disability, state disability or retirement pension, railroad retirement disability, veteran's disability, disability-

before August 22, 1931, may be eligible if they were lawfully residing in the U.S. on August 22, 1996. Other qualified immigrant adults, however, must wait until they have been in qualified status for five years before they can secure critical nutrition assistance.

Five states—California, Connecticut, Maine, Minnesota, and Washington—continue to provide state-funded nutrition assistance to some or all of the immigrants who were rendered ineligible for the federal SNAP program.[32]

Supplemental Security Income (SSI)

Congress imposed its harshest restrictions on immigrant seniors and immigrants with disabilities who seek assistance under the SSI program.[33] Although advocacy efforts in the two years following the welfare law's passage achieved a partial restoration of these benefits, significant gaps in eligibility remain. SSI, for example, continues to exclude not-qualified immigrants who were not already receiving the benefits, as well as most qualified immigrants who entered the country after the welfare law passed and seniors without disabilities who were in the U.S. before that date.[34]

"Humanitarian" immigrants (including refugees, people granted asylum or withholding of deportation/removal, Amerasian immigrants, Cuban and Haitian entrants, Iraqi and Afghan Special Immigrants, and survivors of trafficking) can receive SSI, but only during the first seven years after having obtained the relevant status. The main rationale for the seven-year time limit was that it was intended to provide a sufficient opportunity for humanitarian immigrant seniors and those with disabilities to naturalize and retain their eligibility for SSI as U.S. citizens. However, a combination of factors, including immigration backlogs, processing delays, former statutory caps on the number of asylees who can adjust their status, language barriers, and other obstacles, made it impossible for many of these individuals to naturalize within seven years. Recognizing these barriers, in 2008 Congress enacted an extension of eligibility for refugees who faced a loss of benefits due to the seven-year time limit. However, that extension expired in 2011.[35] Subsequent attempts to reauthorize this extension were unsuccessful, and the termination from SSI of thousands of seniors and people with disabilities continues.

Five states—California, Hawaii, Illinois, Maine, and New Hampshire—provide cash assistance to immigrant seniors and people with disabilities who were rendered ineligible for SSI; some others provide much smaller general assistance grants to these immigrants.

The Impact of Sponsorship on Eligibility

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

Congress imposed additional eligibility restrictions on immigrants whose sponsors sign an enforceable affidavit of support. When an agency is determining a lawful permanent resident's financial eligibility for TANF, SNAP, SSI, nonemergency Medicaid, or CHIP,[36] in some cases the law requires the agency to "deem" the income of the immigrant's sponsor or the sponsor's spouse as available to the immigrant. The sponsor's income and resources are added to the immigrant's, which often disqualifies the immigrant as over-income for the program. The 1996 laws imposed deeming rules in certain programs until the immigrant becomes a citizen or secures credit for 40 quarters (approximately 10 years) of work history in the U.S.

Domestic violence survivors and immigrants who would go hungry or homeless without assistance ("indigent" immigrants) are exempt from sponsor deem-

based Medicaid, and disability-related General Assistance, if the disability determination uses criteria as stringent as those used for SSI.

[32] See NILC's updated tables on state-funded services at www.nilc.org/issues/economic-support/updatepage/.

[33] Welfare law § 402(a) (8 U.S.C. § 1612(a)).

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

[35] The SSI Extension for Elderly and Disabled Refugees Act, Pub. Law. 110-328 (Sept. 30, 2008).

[36] Welfare law § 421 (8 U.S.C. § 1631).

ing for at least 12 months.[37] Some programs apply additional exemptions from the sponsor-deeming rules.[38] The U.S. Department of Agriculture (USDA) has issued helpful guidance on the indigence exemption and other deeming and liability issues.[39]

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

Confusion about Eligibility

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

Fear of Being Considered a Public Charge

The immigration laws allow officials to deny an application for lawful permanent residence or to deny an immigrant entry into the U.S. if the authorities determine that he or she is "likely to become a public charge."[40] In deciding whether an immigrant is likely to become a public charge, immigration or consular officials review the "totality of the circumstances," including an immigrant's health, age, income, education and skills, employment, family circumstances, and, most importantly, the affidavits of support.

The misapplication of this public charge ground of inadmissibility immediately after the welfare law passed contributed significantly to the chilling effect on immigrants' access to services. The law on public charge did not change in 1996, and people's use of programs such as Medicaid or SNAP had never weighed heavily in determining whether they were inadmissible under the public charge ground.

Confusion and fear about these rules, however, became widespread.[41] Immigrants' rights advocates, health care providers, and state and local governments organized to persuade federal agencies to clarify the limits of the rules. In 1999, the Immigration and Naturalization Service (INS, whose functions were later assumed by the Department of Homeland Security) issued helpful guidance and a proposed regulation on the public charge doctrine.[42] The guidance clarifies that receipt of health care and other noncash benefits will not jeopardize the immigration status of recipients or their family members by putting them at risk of being considered a public charge.[43] Nevertheless, sixteen years after this guidance was issued, widespread confusion and concern about the public charge rules remain, deterring many eligible immigrants from seeking critical services.

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[37] IIRIRA § 552 (8 U.S.C. § 1631(e) and (f)).

[38] Children, for example, are exempt from deeming in the Supplemental Nutrition Assistance Program. In states that choose to provide Medicaid and CHIP to lawfully residing children and pregnant women, regardless of their date of entry, deeming and other sponsor-related barriers do not apply to these groups.

[39] 7 C.F.R. § 274.3(c). See also *Supplemental Nutrition Assistance Program: Guidance on Non-Citizen Eligibility* (USDA, June 2011), www.fns.usda.gov/sites/default/files/Non-Citizen_Guidance_063011.pdf. See also *Deeming of Sponsor's Income and Resources to a Non-Citizen* (HHS, TANF-ACF-PI-2003–03, Apr. 17, 2003), www.acf.hhs.gov/programs/ofa/resource/policy/pi-ofa/2003/pi2003-2htm-0.

[40] INA § 212(a)(4).

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

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

[43] The use of all health care programs, except for long-term institutionalization (e.g., Medicaid payment for nursing home care), was declared to be irrelevant to public charge determinations. Programs providing cash assistance for income maintenance purposes are the only other programs that are relevant in the public charge determination. The determination is based on the "totality of a person's circumstances," and therefore even the past use of cash assistance can be weighed against other favorable factors, such as a person's current income or skills or the contract signed by a sponsor promising to support the intending immigrant.

Requirement of Affidavits of Support

The 1996 laws enacted rules that make it more difficult to immigrate to the U.S. to reunite with family members. Effective December 19, 1997, relatives (and some employers) who sponsor an immigrant have been required to meet strict income requirements and to sign a long-term contract, or affidavit of support (USCIS Form I-864), promising to maintain the immigrant at 125 percent of the federal poverty level and to repay any means-tested public benefits the immigrant may receive.[44]

The specific federal benefits for which sponsors may be liable have been defined to be TANF, SSI, SNAP, nonemergency Medicaid, and CHIP. Federal agencies have issued little guidance on sponsor liability, however. Regulations on the affidavits of support issued in 2006 make clear that states are not obligated to seek reimbursement from sponsors and that states cannot collect reimbursement for services used prior to issuance of public notification that the services are considered means-tested public benefits for which sponsors will be liable.[45]

Most states have not designated which programs would give rise to sponsor liability, and, for various reasons, agencies generally have not attempted to seek reimbursement from sponsors. However, the specter of making their sponsors liable financially has deterred eligible immigrants from applying for critical services.

Language Policies

Many immigrants face significant linguistic and cultural barriers to obtaining benefits. As of 2013, approximately 21 percent of the U.S. population (5 years of age and older) speaks a language other than English at home.[46] Although 97 percent of long-term immigrants to the U.S. eventually learn to speak English well,[47] many are in the process of learning the language, and around 8.5 percent of people living in the U.S. speak English less than very well.[48] These limited–English proficient (LEP) residents cannot effectively apply for benefits or meaningfully communicate with a health care provider without language assistance.

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding from discriminating on the basis of national origin. Benefit agencies, health care providers, and other entities that receive federal financial assistance are required to take "reasonable steps" to assure that LEP individuals have "meaningful access" to federally funded programs, but compliance with this law varies widely, and language access remains a challenge.[49]

Verification

Rules that require benefit agencies to verify applicants' immigration or citizenship status have been misinterpreted by some agencies, leading some to demand immigration documents or Social Security numbers (SSNs) in situations when applicants are not required to submit such information.

In 1997, the U.S. Department of Justice (DOJ), the department primarily responsible for implementing and enforcing immigration laws prior to the creation of DHS in 2002, issued interim guidance for federal benefit providers to use in verifying immigration status.[50] The guidance, which remains in effect, directs benefit

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

[45] U.S. Dept. of Homeland Security, "Affidavits of Support on Behalf of Immigrants," 71 FR 35732, 35742–43 (June 21, 2006).

[46] *Percent of People 5 Years and Over Who Speak a Language Other Than English at Home* (American Community Survey table, 2013), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_GCT1601.US01PR&prodType=table (hereinafter "American Community Survey").

[47] James P. Smith and Barry Edmonston, eds., *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* (Washington, DC: National Academy Press, 1997), www.nap.edu/catalog.php?record_id=5779#toc, p. 377.

[48] American Community Survey, *supra* note 46.

[49] See the federal interagency language access website, www.lep.gov, for a variety of materials, including guidance from the U.S. Dept. of Justice and federal benefit agencies.

[50] DOJ, "Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 62 FR 61344–416 (Nov. 17, 1997). In Aug. 1998, the agency issued proposed regulations that draw heavily on the interim guidance and the Systematic Alien Verification for Entitlements (SAVE) program. See DOJ, "Verification of Eligibility for Public Benefits," 63 FR 41662–86 (Aug. 4, 1998). Final regulations have not yet been issued. Once the regulations become final, states will have two years to implement a conforming system for the federal programs they administer.

agencies already using the computerized Systematic Alien Verification for Entitlements (SAVE) program to continue to do so.[51] Previously, the use of SAVE in the SNAP program was an option that could be exercised by each state, but the 2014 Farm Bill mandated that SAVE be used in SNAP nationwide.[52]

However, important protections for immigrants subject to verification remain in place. Applicants for most benefits are guaranteed a "reasonable opportunity" to provide requested immigration documents, including, in some cases, receipts confirming that the person has applied for replacement of lost documents. In the federal programs that are required by law to use SAVE, applicants who declare that they have a satisfactory status and who provide documents within the reasonable opportunity period should remain eligible for assistance while verification of their status is pending. And information submitted to the SAVE system may not be used for civil immigration enforcement purposes.

The 1997 guidance recommends that agencies make financial and other eligibility decisions before asking the applicant for information about his or her immigration status.

Questions on Application Forms

Federal agencies have worked to reduce the chilling effect of immigration status–related questions on benefits applications. In 2000, HHS and USDA issued a "Tri-Agency Guidance" document, recommending that states delete from benefits application forms questions that are unnecessary and that may chill participation by immigrant families.[53] The guidance confirms that only the immigration status of the applicant for benefits is relevant. It encourages states to allow family or household members who are not seeking benefits to be designated as nonapplicants early in the application process. Similarly, under Medicaid, TANF, and SNAP, only the applicant must provide a Social Security number. SSNs are not required for people seeking only emergency Medicaid.

In 2001, HHS said that states providing CHIP through separate programs (rather than through Medicaid expansions) are authorized, but not obligated, to require SSNs on their CHIP applications.[54] In 2011, the USDA issued a memo instructing states to apply these principles in their online application procedures.[55]

Reporting to the Dept. of Homeland Security

Another common source of fear in immigrant communities stems from a 1996 provision that requires benefits-administering agencies to report to DHS people who the agencies *know* are not lawfully present in the U.S. But this requirement is, in fact, quite narrow in scope.[56] It applies only to three programs: SSI, certain federal housing programs, and TANF.[57]

In 2000, federal agencies outlined the limited circumstances under which the reporting requirement is

[51] SAVE is currently used by DHS to verify eligibility for several major benefit programs. See 42 U.S.C.§ 1320b-7. DHS verifies an applicant's immigration status through a computer database and/or through a manual search of its records. This information is used only to verify eligibility for benefits and may not be used to initiate deportation or removal proceedings (with exceptions for criminal violations). See the Immigration Reform and Control Act of 1986, 99 Pub. L. 603, § 121 (Nov. 6, 1986); DOJ, "Verification of Eligibility for Public Benefits," 63 FR 41662, 41672, and 41684 (Aug. 4, 1998).

[52] 113 Pub. L. 79, § 4015 (Feb. 7, 2014).

[53] Letter and accompanying materials from HHS and USDA to State Health and Welfare Officials: "Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits" (Sept. 21, 2000).

[54] HHS, Health Care Financing Administration, Interim Final Rule, "Revisions to the Regulations Implementing the State Children's Health Insurance Program," 66 FR 33810, 33823 (June 25, 2001). The proposed rule on Medicaid and CHIP eligibility under the Affordable Care Act of 2010 codifies the Tri-Agency Guidance, restricting the information that may be required from nonapplicants, but proposes to make SSNs mandatory for CHIP applicants. 76 FR 51148, 51191-2, 51197 (Aug. 17, 2011).

[55] *Conforming to the Tri-Agency Guidance through Online Applications* (USDA, Feb. 2011), www.fns.usda.gov/sites/default/files/Tri-Agency_Guidance_Memo-021811.pdf.

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

[57] *Id.* See also H.R. Rep. 104–725, 104th Cong. 2d Sess. 382 (July 30, 1996). The Food Stamp Program (now called the Supplemental Nutrition Assistance Program, or SNAP) had a reporting requirement that preexisted the 1996 law.

triggered.[58] Only people who are actually seeking benefits (not relatives or household members applying on their behalf) are subject to the reporting requirement. Agencies are not required to report such applicants unless there has been a formal determination, subject to administrative review, on a claim for SSI, public housing, or TANF. The conclusion that the person is unlawfully present also must be supported by a determination by the immigration authorities, "such as a Final Order of Deportation."[59] Findings that do not meet these criteria (e.g., a DHS response to a SAVE computer inquiry indicating an immigrant's status, an oral or written admission by an applicant, or suspicions of agency workers) are insufficient to trigger the reporting requirement. Finally, the guidance stresses that agencies are not required to make immigration status determinations that are not necessary to confirm eligibility for benefits. Agencies are not required to submit reports to DHS unless they have knowledge that meets the above requirements.

There is no federal reporting requirement in health programs. To address the concerns of eligible citizens and immigrants in mixed–immigration status households, the DHS issued a memo in 2013 confirming that information submitted by applicants or family members seeking Medicaid, CHIP, or health care coverage under the Affordable Care Act would not be used for civil immigration enforcement purposes.[60]

Looking Ahead

The 1996 welfare law produced sharp decreases in public benefits participation by immigrants. Proponents of welfare "reform" see that fact as evidence of the law's success, noting that a reduction of welfare use, particularly among immigrants, was precisely what the legislation intended. Critics of the restrictions question, among other things, the fairness of excluding immigrants from programs that are supported by the taxes they pay.

These debates rage on at the federal, state, and local levels.

[58] Social Security Administration, HHS, U.S. Dept. of Labor, U.S. Dept. of Housing and Urban Development, and DOJ – Immigration and Naturalization Service, "Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity 'Knows' Is Not Lawfully Present in the United States," 65 FR 58301 (Sept. 28, 2000). USDA similarly has clarified that "State agencies must conform to the reporting requirements of the Interagency Notice." See *Supplemental Nutrition Assistance Program: Guidance on Non-Citizen Eligibility* (USDA, June 2011), www.fns.usda.gov/sites/default/files/Non-Citizen_Guidance_063011.pdf, pp. 48-52. See also 7 C.F.R. § 273.4(b)(1).

[59] *Id.*

[60] *Clarification of Existing Practices Related to Certain Health Care Information* (DHS, Oct. 25, 2013), www.ice.gov/doclib/ero-outreach/pdf/ice-aca-memo.pdf.