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INS Issues Crucial Guidance on 'Public Charge' Policy

Immigrants may use health, nutrition benefits without fear of immigration problems

Comments Due to INS by July 26

On May 26, the U.S. Department of Justice's Immigration and Naturalization Service (INS) published proposed rules that spell out, for the first time, the circumstances under which the use of public benefits by an immigrant or an immigrant's family member will have an impact on applications for legal immigration status. Many immigrants, both those with legal status and the undocumented, have avoided using basic public health services and emergency care due to fear, confusion, and misinformation about whether they would be denied a green card, denied naturalization, deported, or asked to repay the value of benefits. Many U.S. citizen children and spouses of immigrants have avoided using benefits to which they are fully entitled, because they feared the impact on their immigrant relatives. In some cases, improper actions by INS employees and State Department consular officials contributed to these fears. The new guidance establishes several important principles:

- 1) **Use of the following benefits by immigrants and their family members will NOT affect their ability to get a green card (legal permanent resident status) or to become citizens.**
 - **Health Care Services** — Medicaid, CHIP, Emergency Medicaid for legal and undocumented immigrants, immunizations, prenatal care, city and county health programs, Community Health Centers, Texas Healthy Kids Corporation, mental health services, substance abuse services, and all other public health programs.
 - **Nutrition Services** — like Food Stamps, WIC, school meals, senior nutrition programs, or federal commodity assistance.
 - **Other non-cash benefits** — like public housing, disaster relief, family violence services, child care and Head Start, energy assistance, job training, or transportation assistance.
- 2) **Immigrants MAY have problems getting a green card if they have relied on the following benefits in the past AND are likely to continue to rely on them:**
 - **Cash Assistance benefits for Income Maintenance** — like TANF (Temporary Assistance for Needy Families, formerly AFDC), Supplemental Security Income (SSI), or (in states other than Texas) General Assistance (GA).
 - **OR if the immigrant's family's only source of support is cash assistance received by their CHILDREN or other FAMILY MEMBERS.**
 - **OR if the immigrant is in a nursing home or other LONG-TERM INSTITUTIONAL CARE paid for by Medicaid or other government funds.**
- 3) **This guidance takes effect immediately.** INS and the Department of State have issued field guidance *effective immediately* to put these policies in place.
 - **Public comments will be accepted through July 26.** Details provided below.
 - **INS has pledged in its "Q & A" that if any substantive changes are made to public charge policy after the comment period, immigrants will be held harmless from any negative immigration consequences related to accepting benefits based on the proposed rule.**

Background: Public Charge Policy

History. The principle that applicants for immigration to the U.S. can be denied entry if they are found likely to rely on government benefits for their support (become a "public charge") has been a part of U.S. immigration law for more than 100 years. Until now, however, no specific law or rule has ever specified the grounds for a public charge determination. As a result, INS and State Department consular officials had enormous latitude in applying the public charge test. Immigrants had no written policy helping them understand which benefits would be "safe" to use, and INS and State Department officials applied the policy inconsistently.

Requesting Repayment of Benefits is Generally Illegal. The fear and misinformation among immigrants regarding the use of public benefits has been exacerbated by the unauthorized and illegal actions of certain INS offices and State Department consulates, most of which took place in 1997-1998 and have since ceased. In a number of widely-publicized incidents, legal immigrants were asked to repay the cash value of properly-received public benefits (particularly Medicaid) as a condition of re-entering the U.S.. Other immigrants and citizens who wished to sponsor the immigration of relatives abroad were similarly told they would have to repay government agencies for benefits used. In December 1997, the Department of State, the INS, and the U.S. Department of Health and Human Services (USDHHS) issued simultaneous guidance to their respective field offices, clarifying that neither INS nor the State Department had any authority to request repayment of these benefits. Moreover, USDHHS clarified that it was in fact illegal for state agencies to release any information regarding who was eligible for benefits in their state, **except in cases where fraud has been established**. Any time benefit-related fraud has been established (e.g., when a client lies about his income to qualify for benefits), the recipient — whether a citizen or an LPR — **is** liable for repayment.

"Public Charge" Issue Mainly Affects Persons Applying for a Green Card. The public charge test is principally a concern for persons who are attempting to get a visa to enter the U.S. for legal permanent residence: a "green card." Applicants for immigration to the U.S. can be denied entry if they are found likely to rely on government for their support (**ONLY** the benefits listed in #2 above) — that is, likely to be a "public charge." This may affect:

- persons who are in other countries, and applying to a U.S. State Department consulate for a visa to enter the U.S. as a legal permanent resident, or
- persons in the U.S. either without documentation, or with some sort of temporary legal status, who are applying to INS for legal permanent resident status.

Legal Permanent Residents (Green Card Holders) Are Rarely Subject to Public Charge Test. Generally, people who **already have** legal permanent resident (LPR) status are **not** subject to a public charge test. However, an LPR who leaves the U.S. for 6 months or longer can be subject to the test once again when the immigrant attempts to re-enter the U.S.. Thus, immigrants who are relying on cash assistance or long-term care (the benefits listed in #2, above) for their support should not leave the U.S. for 180 days or more, if they wish to return.

Also, *under extremely rare circumstances*, a legal permanent resident could be deportable as a public charge. The new INS guidance clarifies that deportation could occur **ONLY** if **ALL** of the following were true:

- 1) the immigrant received cash assistance or long-term institutional care, AND
- 2) the reasons the immigrant is relying on the cash assistance or institutional care existed **before** he or she entered the U.S., AND
- 3) the immigrant received the cash assistance or long-term institutional care *during the first 5 years* after his or her date of entry into the U.S., AND
- 4) the immigrant owes a legal debt to the government agency that provided the benefit (examples: an overpayment of cash assistance, or the immigrant's sponsor is liable for repayment of benefits), AND
- 5) That government agency gave notice of the debt and demand for payment (to either the immigrant or the sponsor) within the first 5 years after the immigrant's date of entry into the U.S., AND
- 6) The immigrant or his sponsor refused to repay that debt, even after the government agency obtained a final judgement and took all necessary steps to collect on the judgement.

Such cases are extremely rare, and are likely to remain rare, because new entrants (on or after 8/22/96) into the U.S. are subject to a 5-year bar on participation in most major federal programs (Medicaid, TANF, CHIP; SSI and Food Stamps only after 5 years and 40 quarters of U.S. work history). Thus it would be difficult for an immigrant to ever receive cash assistance or long-term institutional care during their first 5 years in the U.S. Also, the non-fraudulent use of Medicaid, TANF, CHIP, Food Stamps, or SSI never creates a debt on the part of the recipient (except in cases of overpayment errors by the state).

There Is NO Public Charge Test for Legal Immigrants Becoming Citizens. When a legal permanent resident applies for citizenship, there is NO public charge test. The use of public benefits could negatively affect the immigrant's ability to become a citizen **only** if those benefits were fraudulently received. The immigrant would then be denied citizenship based on failure to establish "good moral character."

Benefit-Related Fraud CAN Jeopardize an Immigrant's Status. It is especially important that immigrants who use public benefits be well-informed of the need to promptly notify a state agency when they have a change in address or income, or when they leave the country for a period of time. **To fail to do so could make the immigrant vulnerable to charges of fraud, which could jeopardize an immigrant's ability to remain in the U.S. or to become a citizen.**

Other Important Points in the New INS Guidance

- **Even if an immigrant has relied on government-funded cash assistance or long-term institutional care in the past, it is still possible that he may be granted admission as a legal permanent resident.** INS and State Dept. officials must consider the immigrant's age, health, family status, resources, financial status, education and skills. If an immigrant's current status suggests that he is **no longer** dependent on government for his support, he may be granted LPR status. Also, in some cases where a family member of the immigrant is receiving some cash assistance benefits (e.g., a disabled citizen family member is collecting SSI), but the family is also being supported by earned income and not relying on the SSI cash assistance for the family's sole support, the immigrant can still get a green card.
- **Certain "special-purpose" cash benefits are NOT considered cash assistance for income maintenance, and will NOT be considered by INS for public charge test purposes.** For example, the Low Income Home Energy Assistance Program (LIHEAP), transportation or child care subsidies, or Food Stamp benefits, even if they are given in the form of cash, are not considered. Even a one-time (lump sum) cash payment from TANF is exempt. Also, earned cash benefits like Social Security and Unemployment Insurance are not considered cash assistance for income maintenance.
- **Past or current use of public benefits will not prevent an individual from sponsoring an immigrant.** The sponsor must be able to support his household, including the sponsored immigrant, at an income at or above 125% of the federal poverty income. Any government-funded cash assistance the sponsor or his family receives may **not** be counted toward meeting that income requirement, but the receipt of assistance does not automatically disqualify him from being a sponsor.
- **Refugees and Asylees are NOT Subject to Public Charge Tests.** Because refugees and asylees are admitted for humanitarian reasons, and are not assumed to have either relatives or resources in the U.S., they are not subject to the public charge test either for admission to the U.S. or for adjustment from their refugee/asylee status to LPR status.

Certain other Cuban, Haitian, and Central American immigrants are also exempted from the public charge test. Immigrants from those countries should check with an agency or attorney with immigration expertise to find out if they are exempt.

- **"Long Term Institutional Care" is Not Specifically Defined.** The guidance does not provide any details clarifying what kinds of residential settings will be considered "institutionalization for long-term care at government expense," or whether persons who finance most of their long-term care from their own resources but accept some government assistance for care will be considered a public charge. It is not clear at this time whether this topic will be further clarified after the comment period, or defined on a case-by-case basis as questions arise in the future.

Your Comments Are Important

Groups that oppose the availability of public benefits for legal immigrants will submit negative comments on these proposed rules. It is very important that federal officials also hear from organizations that support the rules. Model comments can be found on both the National Immigration Law Center's web page at www.nilc.org, or Families USA's web site at www.familiesusa.org. **It is recommended that you modify or personalize your comments by at least adding one or two paragraphs in your own words, as federal authorities will give more weight to comments that are not identical.**

To Read the INS Proposed Rules, Fact Sheet, and "Q & A": The fact sheet and the "Questions and Answers" prepared by INS are now available in Spanish and English on the INS web site. An easy link to these materials and the actual proposed rules is through the National Immigration Law Center's web page at www.nilc.org (go to the "What's New" section). NILC is the best resource for accurate, up to date, detailed information on national issues affecting immigrants and immigration law.

Comments on the proposed rule are due by July 26. Submit 3 copies of your comments to:
Director, Policy Directives and Instructions Branch
Immigration and Naturalization Service
425 I Street NW, Room 5307
Washington, DC 20536

Comments should reference INS #1989-99.

Community Education Flyers Available for Distribution

The NILC web site also provides HTML and PDF versions of a one-page (front and back) flyer, "*New INS Guidance on Public Charge: When Is It Safe to Use Public Benefits?*" CPPP will make a Texas-specific version of this flyer available on our web site at www.cppp.org very soon. Or, call CPPP at (512) 320-0222 if you need copies faxed or mailed.

What the New Guidance Does NOT Do:

Resolve Fears of Reporting to INS

The new public charge guidance will put to rest many of the fears that have prevented immigrants from accessing benefits for themselves or their children. However, the proposed rule does not address undocumented immigrants' fears that they will be reported to INS if they use benefits available to undocumented persons themselves (e.g., WIC, school lunch, emergency Medicaid), or if they apply for benefits for their citizen children (those children are eligible on the same basis as any other U.S. citizen), or their legal immigrant children (most of whom are eligible). Immigrants fear reporting by either the agency where they apply for benefits (in Texas, the Texas Department of Human Services, TDHS), or by the actual service providers.

Federal law does not impose any INS reporting requirements on either the Medicaid eligibility agency or any health care provider. However, federal law since 1996 **does** require reporting of persons "known to be unlawfully present" by TANF, Housing, and SSI agencies. Unfortunately, no federal guidance has been issued clarifying what, if any, firewalls exist when an agency that determines eligibility for TANF also conducts Medicaid and Food Stamp eligibility, as in the case of TDHS. For example, no guidance has been issued to establish:

- a federal standard for what constitutes knowing a person is not lawfully present, or
- whether parents applying for Medicaid or Food Stamps (but not TANF) for their child are exposed to any agency reporting requirement simply because that same agency also conducts TANF eligibility.

Current TDHS Policy. At present, TDHS relies on long-standing Food Stamp policy, under which the agency reports to INS only persons applying for or receiving benefits (i.e., non-eligible household members are not subject to reporting), **and** also known to be under final order of deportation, a relatively rare occurrence. However, the agency's reliance on this policy is not widely understood. Reports of occasional incidents have come in from all parts of Texas in which individual case workers have told parents that applying for benefits for their children might result in deportation. TDHS officials have been cooperative in responding and contacting those offices to ensure that such practices do not continue.

CPPP encourages readers to contact us (512-320-0222) if you hear of problems with TDHS eligibility staff threatening to report parents to INS, or giving out inaccurate information regarding public charge issues. We will be happy to relay information to TDHS officials. The more specific information you can report the better, though it is not necessary to reveal the name of the applicant.

TDHS Cannot Require Parents Applying for Children's Medicaid and CHIP Coverage to Provide SSN or Immigration Documents. In September 1998, federal Medicaid officials notified state Medicaid and CHIP officials that states are **prohibited** from requiring provision of a parent's (or any other household member's) Social Security number as a condition of either Medicaid or CHIP eligibility. States are **also prohibited** from requiring any verification or documentation of the non-applicant parents' (or any other household members) citizenship or immigration status. States were encouraged to be active in informing parents that such information would not be required.

Food Stamp policy is somewhat less clear. As noted above, ineligible members of a household (such as a legal or an undocumented immigrant parent or other relative) are **not** subject to the reporting requirement. However, eligibility workers processing a Food Stamp application are instructed to **ask for** Social Security numbers and documentation of immigration status for all members of the household, even those who are not eligible for, or asking for, Food Stamps. The person filing out the application **can** decline to provide that information for the non-eligible household members. In fact, federal Food Stamp rules say, "*when a person indicates inability or unwillingness to provide documentation of alien status, that person should be classified as an ineligible alien. In such cases the State agency shall not continue efforts to obtain that documentation.*" So, while non-applicant parents can apply for Food Stamps for their children without supplying Social Security numbers or immigration documents for the parents, they **will** be asked for those documents during the interview. Simply being asked will be intimidating to many immigrants unless they have been well-informed of their rights and are prepared for the interview.

Finally, it is important to recall that in Texas the Medicaid and Food Stamp applications are combined. Virtually all families whose children qualify for Medicaid in Texas will also meet Food Stamp income guidelines. Thus it would be appropriate for an eligibility worker processing a child-only Medicaid application to offer to check the children's Food Stamp eligibility, too — in which case both SSNs and immigration documents would be requested.

Steps to Reassure Immigrant Families

Federal Law Cloudy On TDHS Ability to Limit Employees Reporting to INS: What CAN TDHS Do to Reassure Applicants? Unfortunately, provisions of two 1996 federal laws (the *Personal Responsibility and Work Opportunity Reconciliation Act* and the *Illegal Immigration Reform and Immigrant Responsibility Act*) say that local, state, and federal government entities may not be prohibited from sending to, or receiving from the INS, information regarding the immigration status of an immigrant.

However, there are steps TDHS could take to limit the opportunities for "maverick" employees to report (or intimidate) applicants. While TDHS clearly has an obligation to report TANF or Food Stamp applicants known to be under final order of deportation, the agency **can** take a number of steps to reassure families that include immigrants. The agency could:

- direct eligibility staff not to ever request (or demand) information which they are not required — and in some cases are not authorized — to collect. For example, the agency can instruct eligibility staff that they are not authorized to request Social Security numbers (SSNs) or immigration documentation from non-applicant parents seeking children's Medicaid only.
- stress that Food Stamp applications for children can be completed without any non-applicants, including parents, providing SSNs or immigration documentation.
- forbid employees from giving out inaccurate information regarding the public charge implications of using benefits.
- state and publicize its reporting policy — that only applicants known to be under final order of deportation will be reported to INS — using signs, flyers, etc.
- modify application forms to clearly state that SSNs and immigration documentation are NOT required from non-applicants.

What Other Agencies Can Do To Reassure Immigrants. Many providers of public benefits — WIC clinics, health centers, hospitals, etc. — can reassure immigrant families by making their policies clear in signs, pamphlets, and other materials. Private and non-profit service providers can still adopt and publicize "no reporting" policies. Even city and county-operated health providers can adopt and publicize policies similar to those described above for state agencies, i.e.,

- publicize that the agency has no **official** policy of reporting (local health providers have no legal reporting responsibilities under federal law),
- prohibit all but eligibility staff from **asking** clients about immigration status or social security numbers,
- carefully instruct eligibility staff on how to clarify a client's status for purposes of ruling out Medicaid coverage, but without intimidating the client, and
- use signs, pamphlets, etc. to reassure immigrants that they are welcome regardless of status, and that information requested is used by the agency only for funding purposes.

While the policies listed above can help state and local agencies and service providers reassure immigrants, it will remain difficult for any public entity to truly guarantee a

"no reporting to INS by employees" policy without a change in federal law.

Next Steps. Now that clear guidance on the public charge issue exists, CPPP hopes to work closely with THHSC, TDHS, and the Texas Department of Health to encourage outreach efforts to educate affected families about the real risks and protections related to public benefits. We will encourage these agencies to adopt — and make public — clear reporting policies that support access to benefits by all eligible groups, and to renew efforts to educate front-line staff about the rights of immigrant families. The Center will also draft outreach materials aimed at quelling the fears of immigrant families, and work with other advocates to disseminate those materials widely to organizations that are trusted by immigrants. Watch our web page and future issues of *Policy Page* for new developments.

For more information on these issues, contact Anne Dunkelberg, dunkelberg@cphp.org or (512) 320-0222. An updated overview of eligibility of immigrants for federal and state benefits will be posted on our web page, www.cphp.org, in the near future.

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