

# When Should Agencies Inquire about Immigration Status?

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The 1996 Welfare Reform Act,<sup>[1]</sup> combined with the 1996 Immigration Reform Act<sup>[2]</sup> and other federal legislation, dramatically changed the rules on immigrants' access to federal and state public benefits. These changes have added to existing confusion and fear in the immigrant community in dealing with government agencies. They also have created confusion among North Carolina human services workers, who are charged with administering federal and state public benefit programs.

The confusion surrounding the new rules already has led to a marked decrease in immigrant households' use of basic benefit programs, such as Child Nutrition Act programs and public health services, even though eligibility rules for those programs remain largely unchanged and most immigrants remain eligible to use the programs.<sup>[3]</sup> This decrease in usage has fallen particularly hard on children who live in the nearly ten million households of "mixed immigration status"—households that include at least one child who is a U.S. citizen and at least one parent who is an immigrant.<sup>[4]</sup> One-fourth of uninsured children who are eligible for Medicaid or the Child Health Insurance Program (CHIP) live in such households.<sup>[5]</sup> These complicated situations can make eligibility determinations difficult and threaten a family's access to needed benefits. Further, members of households with mixed immigration status may be reluctant to apply for benefits for fear that undocumented family members will be deported or that their applying will have adverse consequences on their immigration status.<sup>[6]</sup>

To ensure that eligible immigrants receive needed benefits and to avoid liability for discriminatory treatment of applicants or wrongful denial of benefits, agencies that administer public benefits must understand the new rules and implement them properly. The article, "Immigrants' Access to Public Benefits: Who Remains Eligible for What?", [. . .], addresses which immigrants are eligible for various federal, state, and local benefits. This article focuses on two related issues:

1. When agencies that administer federal and state public benefits must verify immigration status before providing them
2. Under what limited circumstances agencies must report applicants for benefits who are undocumented immigrants to the Immigration and Naturalization Service (INS), and which agencies must do so

## Background

Before passage of the Welfare Reform Act, the major federal benefit programs were required to verify an applicant's immigration status through the Systematic Alien Verification for Entitlements system (SAVE). The programs that used SAVE included Aid to Families with Dependent Children (AFDC), Medicaid, Food Stamps, federal housing assistance, unemployment insurance, and some education loan and grant programs.

The Welfare Reform Act expanded the verification requirements to cover all "federal public benefits" and "state public benefits" except those that continue to be available to all immigrants. The Welfare Reform Act also required the INS, along with the U.S. Department of Health and Human Services (DHHS), to develop regulations implementing a uniform verification system, at least for federal public benefits. From the date on which the INS publishes final regulations, states will have twenty-four months to put a verification system into effect for their programs that administer federal public benefits.[\[7\]](#)

Final regulations have not yet been issued, so the twenty-four-month period has not begun to run. However, federal agencies have issued two documents that address when and how local government agencies should verify immigration status in the meantime. On November 17, 1997, the U.S. Department of Justice (DOJ) issued interim guidance (hereafter DOJ Guidance) on procedures for verifying immigrants' eligibility for federal public benefits.[\[8\]](#) On August 4, 1998, the INS issued proposed regulations on verification procedures, which are very similar to the DOJ Guidance.[\[9\]](#) The regulations state that they should be used "in tandem" with the DOJ Guidance and that the DOJ Guidance should be followed to the extent that it is consistent with the proposed regulations. The remainder of this article focuses on the contents of the DOJ Guidance, discussing the proposed regulations only when they vary from the DOJ Guidance.

Before the verification procedure is reviewed, three preliminary issues must be addressed. First, the DOJ Guidance relates to federal public benefits only. Future DOJ guidelines will address the rules for state public benefits. The proposed INS regulations, however, give state and local governments the option of using the proposed verification procedures in administering state public benefits. State and local governments that wish to set up an alternative procedure should do so carefully. Under the U.S. Constitution, the federal government has plenary (that is, full) power over immigration matters, and any procedures that are inconsistent with federal law in this area will be subject to close scrutiny.

Second, the DOJ Guidance does not define which benefits fall under the definition of federal public benefit. Each federal agency bears the responsibility of determining which of its benefit programs meet the definition. For example, on the same day that the INS issued proposed regulations on verification procedures, DHHS published a notice identifying which of its programs fall under the definition of federal public benefit.[\[10\]](#) [ . . . ]

Third, the DOJ Guidance instructs agencies that have been using SAVE to continue using it until the final regulations are issued and a final verification system is established. Thus, agencies such as those administering Medicaid and public housing benefits, which currently are using SAVE, should continue to do so pending establishment of the final verification system. The one exception to this rule is that states now may use a system other than SAVE to verify immigrants' eligibility for food stamps.[\[11\]](#) The continued use of SAVE includes the continued use of SAVE procedures, including the privacy protections. For example, information obtained through SAVE ordinarily may not be used for any purpose other than to verify a person's immigration status.[\[12\]](#)

Benefit providers that use SAVE still must understand the new welfare and immigration laws because SAVE will not always generate sufficient information to determine an immigrant's eligibility for benefits. For example, SAVE will not necessarily show whether a person is a "qualified alien," a designation critical to determining a person's eligibility for benefits under the Welfare Reform Act. Consequently, all benefit providers should become familiar with the verification procedure described in the next section.

Finally, nonprofit charitable organizations are exempt from these verification regulations.

## The Verification Procedure

The DOJ Guidance sets out a four-step procedure for verification. If it is properly implemented, the procedure should not operate to deny benefits to eligible immigrants or unduly deter them from applying. The DOJ Guidance stresses that agencies administering federal public benefits continue to be subject to federal civil rights laws and privacy rules.<sup>[13]</sup> In this respect the new verification procedure must correspond to SAVE,<sup>[14]</sup> which likewise contains civil rights and privacy protections. The DOJ Guidance instructs agencies to implement neutral policies and procedures that apply equally to all applicants. It also provides that individuals should not be singled out or asked for additional documentation just because they look foreign, have ethnic-sounding names, or have a foreign accent.

The four steps established by the DOJ Guidance<sup>[15]</sup> are as follows.

**Step 1: Determine if the assistance being requested is a federal public benefit subject to the verification requirements.**

The verification requirements do not apply to all federal benefits. They apply only if the benefits are (1) federal public benefits and (2) nonexempt. Before attempting to verify a person’s immigration status, the benefit provider must determine whether the benefit being requested falls within the definition of federal public benefit. Whether a benefit meets that definition is determined by the federal agency overseeing the benefit program. For example, as discussed earlier, DHHS has issued a notice identifying which of its programs constitute federal public benefits and which do not.

If a benefit is a federal public benefit, the provider must determine whether the benefit falls within one of the exempt programs—that is, programs for which all immigrants continue to be eligible. For example, all immigrants continue to be eligible for emergency Medicaid. *If the benefit is part of an exempt program, the provider is not required and should not attempt to verify immigration status.* Only if the benefit falls within the definition of federal public benefit and is not an exempt program should the provider go to step 2. [. . .]

**Step 2: Determine whether the person who is to receive the benefit is eligible under the general eligibility requirements.**

Designed to minimize the intrusiveness of the verification procedure, this step supports the overall goal of the DOJ Guidance to ensure that verification of immigration status take place only when absolutely necessary to determine eligibility. The DOJ Guidance allows benefit providers to skip this step only if determining general eligibility would be more time-consuming and complex than verifying immigration status. The proposed INS regulations do not require benefit providers to take this step before verifying immigration status, but they do require that agencies make their decision about the timing of verification in a nondiscriminatory way.<sup>[16]</sup>

**Step 3: Verify that the person who is to receive the benefit is a U.S. citizen, a U.S. national, or a qualified alien.**

The DOJ Guidance explicitly states that *verification should not take place unless the benefits are contingent on status.* The reason, according to the DOJ Guidance, is that the verification procedure raises significant privacy concerns and the potential for discrimination. Further, the DOJ Guidance states that if an immigrant is applying for benefits on behalf of another person, *the benefit provider should verify only the status of the person who actually will be receiving the benefit.* For example, if a mother is applying for Medicaid or disability benefits under Supplemental Security Income on behalf of her child, the benefit provider should verify only the status of the child, not that of the mother.

If the benefit is contingent on the person’s status, the agency should take the following steps:

1. Ask the applicant for a written declaration, under penalty of perjury, that he or she is a U.S. citizen, a U.S. national, or a qualified alien. For definitions of “U.S. citizen” and “U.S. national” and an explanation of “qualified alien,” see “ABCs of Immigration Law and Policy,” [. . .]
2. Verify the applicant’s citizenship or immigration status. The DOJ Guidance states that the appropriate verification method will depend on the requirements and the needs of the program as well as a number of other factors. For example, if the agency provides a short-term benefit, a quick and simple verification procedure may be all that is necessary. The DOJ Guidance lists the types of documentation and methods that will prove citizenship or qualified alien status.<sup>[17]</sup>

If an applicant presents documentation that he or she is a U.S. citizen and the documentation appears valid on its face, such as a U.S. birth certificate or passport, the provider should accept it as conclusive evidence. The more complicated issue is what documentation will establish status as a qualified alien. The DOJ Guidance lists documents such as INS form I-551 (Alien Registration Receipt Card or “green card”) as acceptable proof of qualified status. However, there are different versions of this card, the most current one being called Permanent Residence Card. Other documentation that may be used as evidence of qualified status is INS form I-94 (a person’s arrival/departure record), but it establishes qualified status only if it bears certain codes, such as one showing a grant of asylum, or an unexpired temporary I-551 stamp.

The DOJ Guidance instructs providers not to delay, deny, or reduce benefits based on immigration status during the time it takes to complete the verification procedure unless they are instructed to do so by the federal agency administering the benefit.

#### **Step 4: Verify the potential recipient’s eligibility under the provisions of the Welfare Reform Act and other federal legislation relating to immigrants.**

If the person who is to receive the benefit is a U.S. citizen or a U.S. national, the verification procedure is complete because the benefit restrictions regarding immigrants do not apply. Likewise, if the benefit being requested is one for which all qualified aliens continue to be eligible, the verification procedure is complete. For example, all qualified aliens are eligible for higher education loans and grants if they otherwise meet the eligibility criteria for those benefits. [. . .]

If additional immigrant restrictions apply to the benefit, the provider will need to turn to the new eligibility rules. For example, lawful permanent residents, a subset of the new qualified alien category, are eligible for Medicaid only if they were in the United States and were granted legal permanent residence on or before August 22, 1996. To determine when a potential benefit recipient was granted legal permanent residence—and thus to determine the person’s eligibility for Medicaid and certain other benefits—the benefit provider will need to know how to read the various codes on the person’s I-551 form, or green card.

The DOJ Guidance specifically states that if at any time the benefit provider determines that verification of immigration status is unnecessary, the provider should not ask any additional questions about immigration status.

#### **Reporting Requirements**

The Welfare Reform Act expanded the circumstances under which federal agencies must report to the INS people applying for benefits. The principal change was to make three additional federal agencies subject to the reporting requirements. Previously, only agencies administering the Food Stamp program had to report. The other agencies now required to report are those responsible for Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), and some public housing agencies. On a quarterly basis (or more often if requested by the INS), these agencies must provide the INS with the names, addresses, and other identifying information concerning people who are “known to be not lawfully present in the United States.”[\[18\]](#)

As yet, neither the DOJ nor the INS has defined the phrase “known to be not lawfully present in the United States.” Nor have they issued any guidance telling agencies what and when they are to report. In the absence of specific federal rules, the safest course for agencies to follow is to look to the Food Stamp program for guidance. Food Stamp agencies must report people who are “present in the United States in violation of the Immigration and Nationality Act.”[\[19\]](#) This phrase has been interpreted narrowly to apply only to people with final orders of deportation from the INS. In addition, Food Stamp agencies have not been required to report or verify the immigration status of household members who are not applying for food stamps for themselves.[\[20\]](#)

The Welfare Reform Act did not impose any new reporting requirements on other agencies. It did, however, include a set of “anti-confidentiality rules,” which have created some confusion about benefit providers’ obligations. The anti-confidentiality rules were designed to counter any remaining “sanctuary” ordinances, which were being used in some places to prevent state or local agencies from cooperating with INS enforcement efforts. Under the anti-confidentiality

rules, federal, state, or local laws may not prohibit state or local government entities from exchanging information with the INS regarding a person's immigration status. In addition, federal, state, or local government entities may not be restricted from maintaining records on immigration status or exchanging information about immigration status with other federal, state, or local governmental entities.[\[21\]](#)

*The anti-confidentiality rules do not require any agency to turn information over to the INS. Nor do they impose an affirmative duty to collect information about immigration status.* They do prevent agencies from assuring that immigration information will be kept completely confidential. An agency must report a person's immigration status to the INS *only* to the extent that it is subject to the reporting requirements discussed earlier.[\[22\]](#) To ensure equal access to services, and to prevent discriminatory treatment of applicants, agencies should establish procedures that minimize the collection of information about immigration status.

## Exceptions and Limitations

### Special Verification Rules for Battered Spouses and Children

Certain battered spouses (victims of domestic violence) and children are included within the definition of "qualified aliens" and therefore continue to be eligible for certain benefits.[\[23\]](#) For these people the documentation requirements are not as stringent. The proposed INS regulations also would modify the SAVE procedures for this category of qualified aliens.[\[24\]](#) The INS has centralized in one office the handling of most applications from battered immigrants for lawful status, thereby making it easier to verify their status as qualified aliens.

### Exemption for Nonprofit Charitable Organizations

Nonprofit charitable organizations are exempt from having to verify immigration status—even if they provide a federal, state, or local public benefit—and they may not be penalized for not verifying immigration status.[\[25\]](#) Further, state and local governments may not impose verification requirements on such organizations.[\[26\]](#) To be exempt, an organization must be both nonprofit and charitable. The DOJ Guidance defines "nonprofit organization" as one that "is organized and operated for purposes other than making gains or profits for the organization, its members, or its shareholders, and is precluded from distributing any gains or profits to its members or shareholders." It defines "charitable organizations" to include organizations "dedicated to relief of the poor and distressed or underprivileged, as well as religiously affiliated organizations and educational organizations."[\[27\]](#)

## Conclusion

Many of the issues related to the new verification and reporting requirements are still unclear, including exactly which benefits fall under the definition of federal public benefit; when TANF, SSI, and public housing agencies will be required to report applicants to the INS; and how all the requirements will be implemented at the state and local levels. These unresolved issues are adding to the confusion in the immigrant community and among benefit providers. The situation offers an opportunity, however, for benefit providers and local immigrant advocates to work together to clarify the new rules and ensure that immigrants continue to receive appropriate benefits.

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## Notes

[1.](#) Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

[2.](#) Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter Immigration Reform Act), Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

[3.](#) Gillian Dutton, "The Effect of Welfare Reform on Immigrant Children," *Clearinghouse Review* 32 (Jan.–Feb. 1999): 504, citing Wendy Zimmerman and Michael Fix, *Declining Immigrant Applications for Medi-Cal and Welfare Benefits in L.A. County* (Washington, D.C.: Urban Institute, July 1998).

[4.](#) Sheri A. Brady, *One in Ten: Protecting Children's Access to Federal Public Benefits under the New Welfare and*

*Immigration Laws* (Washington, D.C.: National Association of Child Advocates, 1998).

- [5.](#) Brady, *One in Ten*, citing “Outreach to Medicaid Eligible Children,” in *Chartbook on Children’s Health Insurance Status* (GAO/HEHS 98-93), General Accounting Office for U.S. Department of Health and Human Services (Washington, D.C.: Dec. 1997). In North Carolina the CHIP is called North Carolina Health Choice.
- [6.](#) Another issue that deters immigrant households from accessing benefits relates to the “public charge” ground of inadmissibility to the United States. Under the Immigration and Nationality Act of 1952, as amended, an immigrant’s application for legal permanent residence or entry into the United States may be denied if the INS examiner finds that the person is likely to become a public charge or likely to need public benefits to support self or family. § 2R(a)(4), 8 U.S.C. §§ 1101–1537. This issue was recently addressed in guidelines from the U.S. Department of Justice. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689–93 (May 26, 1999).
- [7.](#) Welfare Reform Act § 432. Section 504 of the Immigration Reform Act expanded the verification requirements further by requiring verification of citizenship, not just immigration status.
- [8.](#) 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 Fed. Reg. 61,344 (Nov. 17, 1997) (hereinafter DOJ Guidance).
- [9.](#) Verification of Eligibility for Public Benefits: INS Proposed Rule, 63 Fed. Reg. 41,662 (Aug. 4, 1998) (hereinafter INS Proposed Rule).
- [10.](#) Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41,657 (Aug. 4, 1998).
- [11.](#) DOJ Guidance, 62 Fed. Reg. 61,345.
- [12.](#) Four types of agencies must report information about a person’s immigration status to the INS. The new reporting requirements are discussed on page 32. In the narrow circumstances when these agencies must report to the INS, it is unclear how the SAVE privacy protections apply.
- [13.](#) DOJ Guidance, 62 Fed. Reg. 61,346.
- [14.](#) Welfare Reform Act § 432(a). *See also* 42 U.S.C. § 1320b-7(d).
- [15.](#) DOJ Guidance, 62 Fed. Reg. 61,346–50. Unless noted otherwise, the discussion in this part is drawn from the DOJ Guidance.
- [16.](#) INS Proposed Rule, 63 Fed. Reg. 41,662.
- [17.](#) The DOJ Guidance lists the following as relevant factors in determining the extent of documentation required: the nature of the benefit to be provided; the need to provide the benefit in an expedited manner; the length of time the benefit will be provided; the cost of the benefit; and the time and the cost of the chosen verification procedure. 62 Fed. Reg. 61,347. *See also* DOJ Guidance, attachments 4 and 5, 62 Fed. Reg. 61,362–409.
- [18.](#) Welfare Reform Act § 404(b).
- [19.](#) 7 U.S.C. § 2020(e)(17).
- [20.](#) 7 C.F.R. § 273.4(e)(2).
- [21.](#) Welfare Reform Act § 434.
- [22.](#) As a final point, the scope of these anti-confidentiality rules seems to be limited, for the DOJ already has clarified that existing confidentiality rules still apply in some circumstances. For example, it recently announced that census

information will remain confidential. The Effect of 8 U.S.C.A. § 1373(a) on Requirements Set Forth in 13 U.S.C. § 9(a) That Census Officials Keep Covered Census Information Confidential, Memo from Office of Legal Counsel, U.S. Department of Justice (May 18, 1999).

[23.](#) Immigration Reform Act § 501. To be eligible for benefits, the battered immigrant must establish that he or she either is the beneficiary of a spousal visa petition or has filed a self-petition under the Violence against Women Act (VAWA). In addition, he or she may no longer be residing with the abuser. The battered immigrant also must show a “substantial connection” between the domestic violence and the need for public benefits. The U.S. attorney general has issued guidelines on when agencies should find that this substantial connection exists. The guidelines broadly define the circumstances under which the substantial connection may be found. Guidance on Standards and Methods for Determining Whether a Substantial Connection Exists between Battery or Extreme Cruelty and Need for Specific Public Benefits, 62 Fed. Reg. 65,285 (Dec. 11, 1997).

[24.](#) INS Proposed Rule, 63 Fed. Reg. 41,662.

[25.](#) Immigration Reform Act § 508; DOJ Guidance, 62 Fed. Reg. 61,346.

[26.](#) INS Proposed Rule, 63 Fed. Reg. 41,662.

[27.](#) DOJ Guidance, 62 Fed. Reg. 61,345–46. The proposed INS regulations likewise exclude nonprofit charitable organizations from the verification requirements, stating that they do not come within the definition of “benefit granting agencies.” INS Proposed Rule, 63 Fed. Reg. 41,662.

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