8/10/00

Guidance HHS Needs to Provide to States that Choose Deeming

Limitations on How Deeming May Work

- Deeming does not apply to a wide range of federal programs including emergency Medicaid.
- Deeming in Medicaid and CHIP does not apply to immigrants with affidavits of support signed prior to December 19, 1997.
- Certain immigrants with the new affidavits of support are exempt from deeming: (for example: it does not apply to naturalized citizens, immigrants with 40 quarters, employment sponsored immigrant, paroles with affidavits or immigrants whose sponsor's are dead), domestic violence victims
- Deeming will not occur when the sponsor is a member of the sponsored immigrant's eligibility unit, i.e a parent-child or spouse relationship.
- Deeming does not apply when the sponsor or their family members are also participating in Medicaid or CHIP.
- Deeming only applies to current sponsors (in some cases immigrants enter under a joint affidavit of support and that is later amended to just a single sponsor.)
- Sponsor income may only be attributed to the sponsored immigrant and not to other family members who may be applying for benefits such as children (this is a proposal that USDA put forward in its February 29th regulations).
- Federal deeming rules need not apply to state-funded health benefits.

Flexibility in How to Structure Deeming at the State Level

- Under the flexibility provided in the TANF, Medicaid and CHIP statutes, states are permitted to disregard the income and assets of sponsors when determining if sponsored immigrants are eligible. existed previously.
- States should be permitted to establish a protected income level for sponsors. If the sponsor's family income falls below that level, deeming would not occur. This level could be set by a variety of options:

  - States could determine that deeming will not occur when the sponsor's family income would make them or their children Medicaid/CHIP eligible.
  - States may wish to consider using their community spouse Medicaid income protection rules
  - when determining this level, states could include the cost of providing private health insurance to the sponsored immigrant.

- States could be permitted to adopt different deeming rules for sponsored immigrants in need of long term care vs. those using regular Medicaid. This would be consistent with Medicaid eligibility rules.
- States should be permitted to determine how to collect and to verify sponsor income information. Sponsors need not be involved in the application process. For example, state wage data could be sufficient to determine income.

Information on How Sponsor Liability Rules Work

- States need only "seek reimbursement" (i.e. send a bill to a sponsor), but are not required to 'bring an action against a sponsor'. their precedent for this & longer suppositions. Fairness Different options
- States have latitude to determine the value of the benefit provided to the immigrant so long as it does not exceed the mechanism used by the state for other TANF, Medicaid and CHIP overpayments . States could value the claim owed by the sponsor to be no more than an insurance premium payment.
- States need not collect claims from sponsors, i.e. states should be permitted to compromise the claim prior to seeking repayment.
- States should not be permitted to retroactively seek reimbursement from sponsors if the claim written-off.

Public Charge Impact of Using Medicaid Under the Deeming Rules

- HHS must reiterate that if a sponsored immigrant is eligible for non-long term care Medicaid/CHIP and receives those benefits that they cannot be determined a public charge – even if their sponsor fails to reimburse the state for the value of those benefits.

Kids are protected if they use CHIP... public education - do early.

Medicaid and SCHIP Coverage of Noncitizen Immigrant Children

This table indicates the states using state funds to provide Medicaid or SCHIP services to noncitizen immigrant children, beyond those covered under federal rules. It is based on surveys of states and was current as of April 2000. Since that time, some states may have changed policies. Where we are aware of changes (e.g., Florida), updates are provided. Generally, the Medicaid rules also apply to Medicaid coverage of adults and pregnant women, although there are special exceptions in a few states (e.g., pregnant women in New York (also federally covered under *Lewis v. Grinker)* or those already residing in institutions in a few states). For more information or to update tables, please contact Jocelyn Guyer or Leighton Ku at the Center on Budget and Policy Priorities at (202) 408-1080.

LPRs: Lawful (or legal) permanent residents. In general, LPRs who arrived in the U.S. after August 22, 1996 do not have federal coverage for their first five years, although there are exemptions for certain groups, such as refugees, asylees, Amerasians, Cuban/Haitian entrants, veterans, etc.

PRUCOLs: Persons residing under color of law. This small group of immigrants lost federal coverage regardless of when they entered the U.S.

Some policy issues are still unresolved in many states, such as the use of sponsor deeming or covering people after the end of the five year bar.

	Medicaid (Including SCHIP Programs in Medicaid)			Separate SCHIP Programs (where applicable)		
	Cover LPRs Who Arrived After Aug. 1996	PRUCOLs		Cover LPRs Who Arrived After Aug. 1996	PRUCOLs	
		Cover if Arrived Before Aug. 96	Cover if Arrived After Aug. 96		Cover if Arrived Before Aug. 96	Cover if Arrived After Aug. 96
Alabama	NO	NO	NO	NO	NO	NO
Alaska	NO	YES	NO			
Arizona	NO	NO	NO	NO	NO	NO
Arkansas	NO	NO	NO			
California	YES	YES	YES	NO	NO	NO
Colorado	NO	NO	NO	NO	NO	NO
Connecticut	NO	NO	NO	YES	YES	YES
Delaware	YES	YES	YES	NO	NO	NO
District of Columbia	NO	NO	NO			
Florida	NO	NO	NO	No longer[1]	No longer	No longer
Georgia	NO	NO	NO	NO	NO	NO
Hawaii	NO	NO	NO			

[1] In June 2000, Florida decided to stop admitting noncitizen children to its SCHIP program, if they were not federally covered. But it would continue to cover the noncitizen children already on the program.

Idaho	NO	NO	NO			
Illinois	YES	NO	NO	YES	NO	NO
Indiana	NO	NO	NO			
Iowa	NO	NO	NO	NO	NO	NO
Kansas	NO	NO	NO	NO	NO	NO
Kentucky	NO	NO	NO	NO	NO	NO
Louisiana	NO	NO	NO			
Maine	YES	YES	YES	YES	YES	YES
Maryland	YES	NO	NO			
Massachusetts	YES	YES	YES	YES	YES	YES
Michigan	NO	NO	NO	NO	NO	NO
Minnesota	YES	YES	YES			
Mississippi	NO	YES	NO			
Missouri	NO	YES	YES			
Montana	NO	NO	NO	NO	NO	NO
Nebraska	NO	YES	NO			
Nevada	NO	NO	NO	NO	NO	NO
New Hampshire	NO	NO	NO	NO	NO	NO
New Jersey	NO	NO	NO	NO	NO	NO
New Mexico	NO	NO	NO			
New York	NO	NO	NO	YES	YES	YES
North Carolina	NO	NO	NO	NO	NO	NO
North Dakota	NO	YES	NO	NO	NO	NO
Ohio	NO	YES	NO			
Oklahoma	NO	NO	NO			
Oregon	NO	NO	NO	NO	NO	NO
Pennsylvania	YES	YES	YES	YES	YES	YES
Rhode Island	YES	YES	YES			
South Carolina	NO	NO	NO			
South Dakota	NO	NO	NO			
Tennessee	NO	NO	NO			
Texas	NO	NO	NO	YES	NO	NO

Utah	NO	NO	NO	NO	NO	NO
Vermont	NO	NO	NO			
Virginia	YES	YES	YES	NO	NO	NO
Washington	YES	YES	YES			
West Virginia	NO	NO	NO	N/A	N/A	N/A
Wisconsin	NO	NO	NO			
Wyoming[2]	NO	NO	NO	NO	NO	NO

[2] In addition, Wyoming is the only state in the nation that exercised the option to not cover legal permanent residents, even if they arrived before August 22, 1996.

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FAX COVER SHEET

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Name:	Christina Ho
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Subject:	deeming
Pages:	16 (including cover)
Date:	August 3, 2000
From:	Stacy Dean

Comments:

Christina,

Please find attached our paper describing the legal arguments on why sponsor deeming should be considered a state option. We had written this paper about 18 months ago, but it was after Catholic Charities sent it to Secretary Shalala in July of last year that the real process began to evaluate the merits of the argument.

In addition to this issue, there are several others that relate to deeming after the five year bar. They are:

1. If states deem after the five year bar, there are issues to consider both in what types of flexibilities one would want to allow to the states and what limitations could be imposed. What latitude do they have to design their own deeming formulas? Deeming as it applied under food stamps and SSI essentially worked as a bar. What guidance can HHS give to states to demonstrate that deeming need not work as a bar in Medicaid and CHIP.

Catholic
Charities
USA

August 9, 1999

The Honorable Donna Shalala
Secretary, Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Secretary Shalala:

As we continue to get the word out about the Administration's wise and helpful public charge guidance, I wanted to thank your for all of your efforts on that policy and to bring to your attention another important administrative issue affecting legal immigrants' access to Medicaid and TANF.

I am convinced that the Department of Health and Human Services has the legal authority to allow states to enroll post-1996 immigrants in Medicaid and TANF without "deeming" their sponsors' incomes as available to them.

As you know, section 421(a) of the 1996 welfare law provides for deeming of sponsors' income and resources when determining the eligibility for some public benefits of immigrants who entered the country with the new affidavits of support that went into use in December 1997. As a practical matter, the practice of deeming is likely to prevent the vast majority of sponsored immigrants from receiving TANF and Medicaid. Some sponsors may have enough income or resources to render immigrants ineligible but still not have enough to support the immigrants along with their own families. In particular, with individual health care coverage often unavailable except at the most exorbitant cost, many sponsors will have incomes that exceed the Medicaid eligibility limits without being able to provide alternative health care coverage to an immigrant family. In addition, even sponsors whose incomes and resources would not be enough to disqualify an immigrant family to whom they were deemed may nonetheless be unwilling to provide the detailed, on-going information on their finances that would be necessary for states to determine an immigrant family's eligibility under deeming.

As a result, unless the Administration acts to mitigate the effects of deeming, the great majority of immigrant families entering with the new affidavits of support will remain unable to get TANF and Medicaid long beyond the expiration of the five-year bar. Because immigrants entering with the new forms will, over time, become an increasing proportion of legal immigrants in this country, this problem threatens to

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undo much of the Administration's policy initiatives on benefits for new Americans. The Administration recognized this threat in 1995-96 by rejecting deeming for Medicaid in its own welfare proposals.

Until recently, we had assumed that new legislation would be necessary to address this problem. The attached analysis from the Center on Budget and Policy Priorities, however, has persuaded me that your Department has the authority to address this problem administratively. Specifically, the analysis focuses on section 402(b)(1) of the 1996 welfare law, which gives states the right to determine TANF and Medicaid eligibility rules for legal immigrants "[n]ot withstanding any other provision of law," except the five-year bar on new entrants. The Center argues that this provision authorizes states to reject deeming in these programs, and that if a state does elect to deem sponsors' income and resources, the TANF and Medicaid statutes give the state discretion to design their own deeming methodologies. In this way, a state could, for example, reduce or eliminate the amount of information immigrants must obtain from their sponsors or set disregards high enough that deeming would only apply where a sponsor clearly has the capacity to support or provide health care coverage for an immigrant family.

Recognizing that reasonable minds could differ about this interpretation, we believe that, as an important matter of policy, the Administration should adopt these interpretations to make deeming, and deeming methodologies, an option for states. Moreover, we believe it is important for the Administration to inform states now that the Department will grant them discretion in this area. As they complete activities for Y2K compliance, many states are beginning to program their computers to handle applications from immigrants who entered the country after August, 1996, and have been covered by the five-year bar. (In addition, they may already be dealing with small numbers of immigrant veterans and members of veterans' families, who are exempt from the five-year bar but potentially subject to deeming.) Without guidance that deeming is optional, states will surely incorporate deeming in their eligibility worker training and computer systems, and, even if the Department subsequently issues guidance that this is an option, may feel disinclined to change systems once they have been established.

We and some of the other immigrant advocacy groups would appreciate the opportunity to meet with you to discuss these issues. Thank you very much for your consideration.

Sincerely yours,

Sharon M. Daly

Sharon Daly
Vice President for Social Policy

Cc: Cecilia Munoz
Nancy Wisdo
Diana Aviv
Raul Yzagirre

CENTER ON BUDGET AND POLICY PRIORITIES

July 21, 1998

STATE OPTIONS ON APPLYING SPONSOR DEEMING TO MEDICAID AND ASSISTANCE PROVIDED UNDER THE TANF BLOCK GRANT

I. Introduction

Three separate provisions of the 1996 welfare law,[1] as well as titles IV-A and XIX of the Social Security Act,[2] govern legal immigrants' eligibility for assistance under the Temporary Assistance for Needy Families (TANF) block grant and Medicaid.

- Section 402(b)[3] provides that "a State is authorized to determine the eligibility" of most legal immigrants for "designated federal programs," which are defined as TANF-funded assistance, Medicaid, and assistance under the Social Services Block Grant (SSBG).
- Section 403(a)[4] bars most legal immigrants newly entering the United States on or after the date the welfare law was enacted from receiving "federal means-tested public benefits" during their first five years in the country.
- Section 421(a)[5] provides for attributing a sponsor's income and resources to an immigrant "in determining the eligibility and amount of benefits of" that immigrant under a federal means-tested public benefit if the immigrant entered the United States with a new affidavit of support form that went into use December 19, 1997; this process is known as "sponsor deeming."

The interactions of these three provisions raise several important questions. For example, a state may wish to use its authority under section 402(b) to provide benefits to immigrants who would otherwise be disqualified under section 403(a)'s five-year bar or section 421(a)'s sponsor deeming rules. Also, section 421(a) provides no guidance

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[1] Public Law No. 104-193.

[2] 42 U.S.C. §§ 401 *et seq.* and 1396 *et seq.*

[3] 8 U.S.C. § 1612(b).

[4] 8 U.S.C. § 1613(a).

[5] 8 U.S.C. § 1631(a).

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for states as to *how* states are to go about deeming sponsors' incomes and resources when determining immigrants' eligibility and benefit levels under Medicaid, the TANF block grant, or other programs. This paper addresses these questions. It concludes that the law gives states substantial discretion in many, although not all, of these areas.

It should be noted that the question of whether sponsor deeming under section 421(a) is mandatory or optional in Medicaid and TANF will be important for a small number of immigrants almost immediately and a much larger group beginning in approximately five years.[6] The one group affected now will be immigrants who enter the United States for the first time now with the help of one of the new affidavits of support *and* who are active duty members of the U.S. armed forces, U.S. armed forces veterans, or the spouses or dependent children of service members and veterans. These very small groups of immigrants are exempt from the five-year bar on benefits for new entrants but are *not* exempt from sponsor deeming.[7] Other immigrants entering now with the new affidavits of support will be subject to the five-year ban and will generally be unable to receive Medicaid or benefits provided with federal TANF funds until late in the year 2002.[8] Thus, although it is necessary to decide what scope to give deeming now so states can handle the occasional military-related immigrant applying for benefits, these decisions will not begin to have significant effects for nearly five years.[9]

II. Competing Policies of the Welfare Law's Immigrants' Title: Restricting Eligibility v. Expanding State Flexibility

As much as any section of the 1996 welfare law, the immigrants' title represents an attempt to balance the goals of reducing the availability of means-tested benefits and expanded state flexibility. The legislative history of this title makes clear that Congress

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[6] Deeming does not apply to SSBG in any event since deeming applies only to a "federal means-tested public benefit program" and HHS has determined that SSBG is not such a program. 62 Fed. Reg. 45256 (August 26, 1997).

[7] *Compare* Pub. L. 104-193, § 403(b)(2) (8 U.S.C. § 1613(b)(2)) (exempting military-related veterans from the five-year ban) *with id.*, § 421(b) (8 U.S.C. § 1631(b)) (providing an exemption from sponsor deeming only for immigrants with credit for 40 quarters of work).

[8] New entrants can receive emergency Medicaid during this period. Providing emergency Medicaid to immigrants will not require states to decide on a policy concerning sponsor deeming because section 421(a) exempts emergency Medicaid from sponsor deeming requirements. *See* Pub. L. 104-193, §§ 421(a), 403(c)(2)(A) and 401(b)(1)(A) (8 U.S.C. §§ 1631(a), 1613(c)(2)(A) and 1611(b)(1)(A)).

[9] Although the first immigrants to arrive after the welfare law was signed will reach the end of section 403(a)'s five-year ban in about four years, none of these immigrants will have entered with the new affidavits of support that section 421 establishes. Only immigrants entering under the new affidavits are subject to sponsor deeming under section 421(a).

desired to restrict immigrants' eligibility for public benefits and strengthen sponsors' responsibility for the cost of assistance provided to immigrants. But the immigrants' title also reflects in numerous places the law's general preference for allowing states to make major policy decisions on eligibility for benefits they administer.

Congress sought to limit immigrants' access to means-tested benefits in three distinct ways: banning, deeming, and sponsor liability.

- Bans deny immigrants eligibility whether or not they had a sponsor able to assist them — indeed, whether or not they had a sponsor at all. Under the welfare law as enacted in August 1996, most legal immigrants were banned from receiving SSI and food stamps indefinitely, and new entrants were prohibited from receiving federal means-tested benefits for their first five years in the country.

- Deeming counts the income and resources of sponsors and their spouses as if they were available to the immigrant when the immigrant's financial eligibility for assistance is determined. Although in theory deeming would not deny assistance to an immigrant with a destitute sponsor, the reporting and paperwork requirements necessary to implement deeming have prevented the overwhelming majority of immigrants with sponsors from receiving benefits to which deeming rules applied, making deeming the practical equivalent of banning for most immigrants with living sponsors. Because deeming requires eligibility workers to collect and process information about the circumstances of both the immigrant's family and the sponsor's, some states have complained that it results in inordinate administrative burdens.

- Sponsor liability gives agencies that provide means-tested benefits to immigrants the right to recover their costs from the sponsors of those immigrants.[10] Although it does not directly affect immigrants' eligibility, it does give sponsors an incentive to assist immigrants. In practice, many immigrants' advocates believe sponsors will place great pressure on immigrants not to apply for benefits for which they are eligible even when the sponsor is not offering an adequate alternative source of support.

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[10] Pub. L. 104-193, § 423(a), *enacting* Immigration and Nationality Act § 213A(e) (8 U.S.C. § 1183a(e)).

All of the savings that the Congressional Budget Office "scored" from the immigrants' title of the welfare law were attributable to bans.[11] Nonetheless, the immigrant title's supporters placed considerable emphasis on the sponsor liability provisions of the new law, arguing that sponsors as a matter of principle should be made responsible for the cost of services to immigrants they helped bring to this country.

Congress made sponsors liable for the cost of all means-tested benefits received by immigrants they helped to enter the United States virtually without exception. It applied bans and deeming to programs more selectively, however, depending largely on the extent of federal funding for the program. Those programs with the greatest federal financial role saw the strictest policies and the least state flexibility, while states were given more discretion over programs in which they have greater financial responsibility. In the SSI and food stamp programs, where benefit dollars are entirely federal, Congress leaned toward restricting eligibility: these programs have broad prohibitions on immigrants' eligibility with little or no state discretion.[12] At the other end of the continuum, Part B of the immigrants' title in the welfare law gives states authority to determine immigrants' eligibility for state and local programs.[13] Sponsors are made liable for reimbursement of virtually all benefits provided to immigrants in state and local means-tested programs, but section 422 does not require states to undertake complicated deeming calculations in these programs.[14]

As state-administered programs whose benefit costs are shared between the federal and state government, TANF and Medicaid represent a middle ground between largely federal programs such as SSI and food stamps — for which Congress required both bans and deeming — and purely state-funded programs, over which states have full control. TANF and Medicaid accordingly received intermediate treatment: they are subject to the five-year ban on new entrants but otherwise states have flexibility to determine eligibility.

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[11] This is in significant part because the welfare law's deeming and sponsor liability provisions apply only to immigrants entering the country with new affidavits of support. Those affidavits went into use in December 1997, but the five-year ban on eligibility for immigrants entering in late 1997 will not end until after the close of the six-year budget "window" used to score the 1996 welfare law, which ran through fiscal year 2002.

[12] Even in the food stamp program, Congress readily approved bipartisan legislation in 1997 that allowed states the flexibility to purchase federal for distribution in food assistance programs for legal immigrants that are funded entirely with state dollars.

[13] Public Law 104-193, §§ 411 and 412; 8 U.S.C. §§ 1621 and 1622.

[14] 8 U.S.C. § 1632. Also, as noted above, Congress explicitly permitted states to spend maintenance- of-effort dollars assisting immigrants who could not receive TANF-funded assistance because of the five-year ban.

Whatever decisions the Administration, and the states, make about the scope and extent of deeming in TANF and Medicaid will have no effect on the sponsor liability provisions that made the law's fundamental philosophical statement: even if the effect of deeming is limited, with the result that a new entrant can receive benefits after five years, the immigrant's sponsor will nonetheless be liable to repay the cost of any such benefits. In addition, no decision on deeming will affect the savings that CBO scored for the immigrants' title during the law's six-year budget window.

III. The Scope of State Authority to Determine Immigrants' Eligibility for Medicaid and Assistance Funded under TANF

Determining the interrelationship among sections 402(b), 403(a), and 421(a) is complicated by the fact that each begins with the words "Notwithstanding any other provision of law." Section 402(b) helps to resolve this issue by providing that states' authority over immigrants' eligibility for TANF-funded assistance and Medicaid is limited by section 403(a)'s five-year bar.[15] Section 402(b) does not, however, contain any similar language subordinating states' authority over immigrants' eligibility for these programs to section 421(a)'s sponsor deeming procedures. This language in section 402(b) suggests that although states have no authority to disregard the five-year ban on new entrants receiving Medicaid and TANF-funded benefits, states' authority to "determine the eligibility of an" immigrant does empower them either to apply or to dispense with sponsor deeming.

A contrary interpretation, *requiring* states to apply deeming to Medicaid and TANF-funded benefits to these entrants, would raise legal problems. First, if section 402(b)'s authority for states to determine immigrants' eligibility is limited by section 421(a) without explicit statutory language to that effect, then section 402(b)'s clause subordinating the state's authority to determine immigrants' eligibility for TANF and Medicaid benefits to section 403(a) would be unnecessary and redundant. If Congress thought that section 421(a)'s "notwithstanding" clause was sufficient to override section 402(b), then the identical "notwithstanding" clause in section 403(a) would have the same effect; in that event, no special mention of section 403 would be needed in section 402(b), and the clause that does so would have no legal effect. The Supreme Court has held that "[i]t is our duty to give effect, if possible, to every clause and word of a statute."[16]

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15 States may, of course, spend state funds assisting immigrants subject to the five-year ban.

16 *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), *quoting Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1881). Similarly, section 46.06 of *Sutherland's Statutory Construction* notes that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."

This is particularly true in the case of statutory exceptions, such as the one section 402(b) makes for section 403. The leading treatise on statutory construction notes that "[w]here there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated."[17] Thus, the exception that Congress made to states' discretion when it wrote in the five-year ban in section 403 implies that no further exception should be inferred.

In addition, a cardinal canon of statutory construction is that the more specific provision controls.[18] On the question of states' authority to determine immigrants' eligibility for Medicaid and TANF-funded benefits, section 402(b) is more specific than section 421(a) since it governs only three programs (Medicaid, TANF, and SSBG) rather than "any Federal means-tested public benefits program," as section 421(a) does.[19] Moreover, allowing states to dispense with sponsor deeming does not vitiate section 421(a) with respect to these three programs: in any state that does not choose to override it, sponsor deeming would apply.

Finally, giving states discretion in this area is consistent with the welfare law's general approach. Sutherland notes that a "statute is passed as a whole and not in parts

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[17] 2A Singer, *Sutherland's Statutory Construction* § 47.11, p. 165 (1992) (footnotes omitted). Similarly, the "enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Id.*, § 47.23, p. 217.

[18] *See, e.g., Ohio Power Co. v. FERC*, 954 F. 2d 779 (D.C. Cir. 1992); *Aeron Marine Shipping Co. v. U.S.*, 695 F. 2d 567 (D.C. Cir. 1982); *EEOC v. Gilbarco, Inc.*, 615 F. 2d 985 (4th Cir. 1980).

[19] Thus, section 421(a) would require deeming in the SSI and food stamp programs for military-related immigrants entering with the new affidavits of support since these programs are not covered by section 402(b)'s granting of authority to states to determine immigrants' eligibility for TANF, Medicaid, and SSBG. (Section 402(a)(2)(C) exempts these immigrants from the general ban on eligibility for SSI and food stamps, but section 421(a) does not exempt them from deeming.) Section 421(a) also would apply to federal funds expended for health insurance coverage under the new State Child Health Insurance Program (CHIP) that the Balanced Budget Act of 1997 (BBA) establishes as a new title XXI of the Social Security Act. (Section 421(a) would not, however, apply in the same fashion to money provided under the BBA that states chose to spend on Medicaid expansions under section 2101(a)(2) of the CHIP statute. For CHIP funds applied to Medicaid expansion, HCFA guidance of October 10, 1997, confirms that "applicable requirements of the Medicaid law must be met" in lieu of those under CHIP. Thus section 402(b)'s grant to states of authority to "determine the eligibility" of legal immigrants for Medicaid would apply to children where Medicaid coverage is supported with CHIP funds to the same extent that it would apply to any other classes of Medicaid beneficiaries. In other words, states could decide whether to apply sponsor deeming to these children on Medicaid just as they could decide this matter for other Medicaid beneficiaries.)

Moreover, section 421(a) would apply to all other federal means-tested public benefits that Congress may establish in the future.

or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed so as to produce a harmonious whole."[20] As discussed in part II above, the consistent theme throughout the welfare law was to expand states' flexibility in determining eligibility for the programs they operate. For example, the AFDC program was repealed and replaced with the TANF block grant; eligibility for TANF-funded assistance is left largely up to the states.[21] Expanded state flexibility is a theme that so permeates the structure and legislative history of the welfare law that any ambiguity between sections 402(b) and 421(a) should be resolved in favor of states' right to decide whether to undertake deeming.[22]

IV. State Discretion to Design Deeming Rules

When states do apply sponsor deeming in determining eligibility for TANF and Medicaid — either because the state chooses to do so or because it believes, contrary to the analysis set forth above, that section 421(a) compels deeming — several important questions remain. Section 421(a) directs agencies providing federal means-tested public benefits to count sponsors' income and resources; it does not say *how* states are to do this. In the absence of specific statutory direction, all such agencies would appear to have substantial discretion. In the cases of TANF and Medicaid, however, state discretion appears particularly broad. TANF has no federal income rules at all, and the Medicaid statute gives states broad authority to implement methodologies for determining financial eligibility.

A. Deeming under the TANF Block Grant

TANF has no statutory definition of income or resources. States are free to adopt their own policies, which can include substantial exclusions designed for ease of administration or to serve other state policies. Connecticut's TANF program, for example, disregards all earned income up to the federal poverty line. Many states exclude vehicles from resource determinations out of recognition that households' ability to secure and retain employment often depends on access to reliable transportation. States that deem in TANF thus have broad discretion to establish their own exclusions, disregards, and counting rules for sponsors' income and resources.

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[20] 2A Singer, *Sutherland's Statutory Construction* § 46.05, p. 103 (1992) (footnote omitted).

[21] The welfare law expands states' flexibility in administering other programs. For example, numerous provisions of the food stamp title of the law create new state options.

[22] Sutherland also notes that even where a statute expressly regulates a governmental entity, a narrow interpretation is appropriate to assure respect for states' sovereignty. 3 Singer, *Sutherland's Statutory Construction* § 62.01, p. 205 (1992); *see Langford v. United States*, 101 U.S. 341 (1879).

Section 417 of the statute authorizing TANF block grants underlines this point. It provides that "[n]o officer or employee of the Federal Government may regulate the conduct of States under this part . . . except to the extent expressly provided in this part."[23] Nothing in the TANF statute authorizes federal regulation of states' implementation of section 421(a)'s deeming provisions or imposes any penalties on states that follow one approach to deeming rather than another. (Similarly, nothing in law authorizes the federal government to regulate states' implementation of a separate option that the Balanced Budget Act created under which states may apply deeming in TANF during an immigrant's first three years in the country for an immigrant who arrived with one of the old, non-binding affidavits of support.[24]) Nor does anything in the welfare law's immigrants' title provide the federal government with regulatory authority in this area. Therefore, interpretation and application of section 421(a) is committed to the sole discretion of the states.

This gives states that apply section 421(a) to programs supported with TANF funds considerable flexibility to simplify the administration of sponsor deeming or to adopt disregards that minimize deeming's impact on those immigrants a state believes most need assistance. A state could certainly continue the deeming policy that existed under the former AFDC statute or adopt the deeming procedures in section 5(i) of the Food Stamp Act. Both of those laws disregard an amount of sponsors' income and resources equal to the programs' eligibility limits to reflect the needs of the sponsors'

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[23] Social Security Act § 417; 42 U.S.C. § 617, *as added by* Pub. L. 104-193, § 103(a)(1).

[24] 7 U.S.C. § 2014(i). Section 5505(e) of the Balanced Budget Act of 1997 gives states the option to impose deeming in TANF on immigrants during their first three years in the United States if they arrived with one of the affidavits of support that were in use prior to December 1997. Social Security Act, § 408(f)(1); 42 U.S.C. § 608(f)(1). This provision contains some specific procedures for deeming but does not authorize enforcement of the provisions by any federal agency (or confer upon any federal agency any regulatory authority related to how this provision of the Balanced Budget Act should be implemented). As a result, states have broad discretion over how to interpret and implement this provision. States that choose to apply deeming under section 421(a) to immigrants with the *new* affidavits of support could apply some or all of the same rules to those immigrants that the Balanced Budget Act authorizes for immigrants with the old affidavits.

The deeming option that the Balanced Budget Act establishes with regard to persons seeking assistance under TANF-funded programs primarily affects immigrants who entered the country before the welfare law was enacted, since almost all immigrants who arrive on or after August 22, 1996, are ineligible for TANF-funded assistance during their first five years here. By the time the five-year ban has expired, the three-year deeming period authorized under section 5505(e) of the Balanced Budget Act will be long since over. Therefore, in states that select this option, deeming will have largely ended by August 21, 1999, when the last immigrants to enter before enactment of the welfare law reach their third anniversary in this country. States then will have more than three years before the five-year ban expires for the first significant numbers of immigrants with the new affidavits of support that took effect in December 1997. This will give states plenty of time to adjust their deeming policies as they see fit.

own families. States also could adopt their own disregards to avoid the burden of deeming trivial sums to immigrants; deeming would then apply to the extent that the amount of deemable income or resources exceeded such state-established thresholds.

States also could elect to limit deeming in cases where sponsors were refusing to support the immigrants they helped enter the country until a support action could be brought against the sponsor. This would assure that immigrants are not disqualified because of the income and resources of a sponsor who is failing to provide support. Where a sponsor who has signed a new affidavit of support has the financial means to help the immigrant he or she has sponsored but refuses to do so, the welfare law allows states to sue for reimbursement of the cost of assistance provided to the immigrants. A state therefore could elect to focus primarily on the amounts a sponsor actually provides to an immigrant, deeming only limited types of additional income and resources, and to sue the sponsor for the value of the assistance the state provided due to the lack of adequate support by the sponsor.[25]

B. Deeming under Medicaid

Where a state applies sponsor deeming to its Medicaid program, deeming will be part of the process of determining individuals' incomes and resources. As such, deeming will be subject to provisions of the Medicaid statute that govern the methodologies that states may employ in determining financial eligibility. These include both provisions that govern the eligibility determination process in general and those that

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[25] This option makes sound policy sense only because the new affidavits of support are legally enforceable against sponsors; otherwise sponsors could withdraw support and rely on the state to assist the immigrants they helped to enter this country. Although technically an individual immigrant as well as a state agency could sue to enforce the affidavit of support, as a practical matter few immigrants will have the resources necessary to prosecute such a suit successfully.

States accustomed to the pre-welfare law affidavits of support, which were *not* enforceable, may wish to rethink their policies because of this important change and apply different deeming policies to new entrants than they did to those arriving before the welfare law was enacted. For persons arriving before December 1997 with the old affidavits of support, the state could not establish a policy based on suing sponsors for failure to provide support since the old affidavits were not legally enforceable.

This does not mean that eligibility workers would be required simultaneously to implement two separate sets of deeming rules. Deeming under the former affidavits was limited to an immigrants' first three years in the country in the AFDC program and is similarly limited in TANF-funded programs if a state elects to apply deeming in these programs to immigrants with the old affidavits of support. Persons entering the country before the new affidavits were implemented will be well beyond their first three years in the country before the immigrants entering under the new affidavits complete their five-year disqualification period. Thus, states can discard the former deeming rules built around non-enforceable affidavits before implementing deeming procedures based on the new, enforceable affidavits go into effect.

specify the relationship between methodologies for determining Medicaid eligibility and those for determining financial eligibility for SSI and the former AFDC program.

Section 1902(a)(17) of the Medicaid statute provides general standards for calculating applicants' and recipients' incomes and resources. This section requires that all Medicaid eligibility decisions be made under "reasonable standards . . . for determining eligibility for and the extent of medical assistance which . . . are consistent with the objectives of [the Medicaid statute and] provide for reasonable evaluation of any such income or resources . . . ."[26] To the extent that deeming is required in Medicaid, section 421(a) would override other provisions of section 1902(a)(17) that limit which third parties' income and resources can be considered in determining Medicaid eligibility. These methodological provisions, however, would affect the manner in which deeming is conducted rather than the fact of deeming itself. For example, a "reasonable standard" that is "consistent with the objectives of" Medicaid could disregard from sponsors' income and resources an amount reflecting the needs of the sponsor and his or her family, just as deeming rules always did in AFDC, SSI and food stamps.

Two other sections of the Medicaid statute require that in establishing Medicaid eligibility criteria, states must apply methods no more restrictive than those that the SSI program and the former AFDC program applied.[27] These provisions also give states broad flexibility to adopt more liberal methods in making Medicaid income and resource determinations than those applied in SSI or the former AFDC program.

- Section 1902(r)(2) of the Medicaid statute[28] gives states broad flexibility in establishing methodologies for determining financial eligibility for most major Medicaid categories. (See box on page 13.) It permits states to determine eligibility for any of these categories using methodologies that are "less restrictive" than those applied in the SSI program or those applied in the state's AFDC program on July 16, 1996. Section 1902(r)(2) also prohibits states from applying more restrictive methodologies than those employed in SSI or in the state's former AFDC program as of July 16, 1996. Specifically, the state may not determine the incomes or resources of elderly or disabled people in these categories under methodologies that make any person worse off than he or she would under SSI

26 Social Security Act § 1902(a)(17)(A) and (C); 42 U.S.C. § 1396a(a)(17)(A) and (C).

27 Section 421 contains no methodological instructions other than a requirement that, where deeming takes place, information on sponsors' income and resources be updated with each reapplication. Thus there is no conflict between section 421 and these two sections of the Medicaid statute, and section 421(a)'s "notwithstanding any other provision of law" proviso does not invalidate these two provisions.

28 42 U.S.C. § 1396a(r)(2); *see* 42 C.F.R. §§ 435.601(d), 435.602(c), 435.901, and 435.902.

methodologies. Similarly, for children and pregnant women, the state may not apply a methodology that is in any way more restrictive than that in force in the state's AFDC program on July 16, 1996.

- Section 1931(b)(2)(C)[29] contains language similar to that in section 1902(r)(2). Section 1931 provides Medicaid eligibility for families that would have received Medicaid by virtue of receipt of AFDC under the old AFDC program rules. Families that meet the income, resource and other eligibility requirements for the state's AFDC program, as those requirements stood on July 16, 1996, are eligible for Medicaid whether or not those families receive assistance under the TANF block grant that replaced AFDC.[30] States may apply methodologies that differ from those they applied in the AFDC program but only to the extent that those methodologies are "less restrictive than the methodologies used [in AFDC] as of July 16, 1996."

These two sections of the welfare law give states that apply sponsor deeming to new entrants under the Medicaid program broad discretion to liberalize income and resource deeming rules when evaluating the eligibility of sponsored immigrants under virtually all major Medicaid eligibility categories. By prohibiting more restrictive methodologies than those the state employed in its AFDC program on July 16, 1996, these provisions suggest if a state applies deeming to immigrants who entered the United States on or after August 22, 1996, and who have been here at least five years, the state's deeming rules must at least apply the same exclusions from deeming that the AFDC program did on July 16, 1996, when determining the Medicaid eligibility of immigrant pregnant women, children, and families with children. AFDC rules in effect on that date excluded from a sponsor's income an amount equal to the state's standard of need for a family of the sponsor's size plus an amount equal to the same work expenses that AFDC recipients could claim.[31] Those rules also excluded $1,500 from sponsors' countable resources and did not consider resources the AFDC program otherwise

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[29] 42 U.S.C. § 1396u-1(b)(2)(C).

[30] Social Security Act § 1931(a); 42 U.S.C. § 1396u-1(a).

[31] Social Security Act § 415(b)(1); 42 U.S.C. § 615(b)(1) (1996); *see also* 45 C.F.R. § 233.51 (1996). In providing this exclusion now, the state initially would apply the standard of need in effect on July 16, 1996. If the state had taken the option under section 1931(b)(2)(B) (42 U.S.C. § 1396u-1(b)(2)(B)) to increase its standard of need, the new, higher standard would presumably be the amount the state would disregard.

This section of the AFDC statute also excluded amounts that the sponsor (or his or her spouse) paid to dependents living apart from them and any child support or alimony payments. Social Security Act § 415(b)(1)(B)(III) and (IV); 42 U.S.C. § 615(b)(1)(B)(III) and (IV) (1996); 45 C.F.R. § 233.51(b)(1)(ii)(B) and (C) (1996).

did not count.[32] As noted, section 1931 generally disallows Medicaid eligibility rules that are more restrictive than former AFDC rules, regardless of whether the state's current TANF eligibility rules are less generous in some respects than the former AFDC rules were.

In addition, section 1902(r)(2) also appears to require a state that chooses to apply deeming to elderly and disabled legal immigrants who arrived here on or after August 22, 1996, and have been in the country for at least five years to determine the eligibility of such immigrants applying the same disregards found in the SSI statute.[33]

Finally, these two sections of the Medicaid law permit states to apply methodologies in making eligibility determinations under these categories that are *less restrictive* than those under the state's AFDC program of July 16, 1996, or those under SSI. This could include a more generous exclusion from the sponsor's income or resources than SSI provides or than the state's AFDC program provided.

V. Conclusion

Different sections of the 1996 welfare law give states broad discretion to determine immigrants' eligibility for TANF-funded benefits and Medicaid on the one hand while providing for a five-year ban on new entrants and sponsor deeming in most federal means-tested benefit programs on the other hand. States' discretion does not allow them to override the five-year ban, but a close reading of statute indicates that it does allow them to decide whether or not to impose sponsor deeming. Regardless of whether states count sponsors' incomes and resources when determining immigrants' eligibility, however, sponsors remain financially liable for any benefits. Finally, where states choose to impose sponsor deeming in TANF and Medicaid, the law gives them broad discretion about what methodologies to follow in considering how to count sponsors' incomes and resources.

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[32] Social Security Act § 415(b)(2); 42 U.S.C. § 615(b)(2) (1996); *see also* 45 C.F.R. § 233.51(b)(2) (1996).

[33] *See* Social Security Act § 1621; 42 U.S.C. § 1382j; 20 C.F.R. § 416.1166a. This issue is somewhat confusing because two separate deeming requirements apply to SSI, one in its statute and the other in section 421(a) of the welfare law. As discussed above, section 421(a) contains no methodologies. The provision in the SSI statute does, however, provide a detailed methodology, with an exclusion from the sponsor's income of an amount equal to the federal SSI payment level for a family of the same size as the sponsor's family and a comparable exclusion from the sponsor's resources. *Id.*, § 1621(b); 42 U.S.C. § 1382j(b). This methodology also excludes the income and resources of the sponsor of an immigrant who became disabled after entering the United States. *Id.*, § 1621(f)(1); 42 U.S.C. § 1382j(f)(1).

MEDICAID CATEGORIES TO WHICH SECTION 1902(r)(2) APPLIES

- Pregnant women and infants up to age one whose incomes do not exceed 133 percent of the poverty line (or, at the option of the state, a higher income limit) and pregnant women who meet most of the requirements of their state's AFDC program as those rules existed on July 16, 1996.[34]
- Children aged one to five whose incomes do not exceed 133 percent of the poverty line.[35]
- Children under age 19 whose family's income does not exceed the federal poverty line, and children born after September 30, 1983, whose family meets the income and resource requirements of the state's AFDC program as those requirements existed on July 16, 1996.[36]
- Qualified Medicare Beneficiaries (QMBs).[37]
- Most optional categories of Medicaid beneficiaries.[38]

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[34] *See* Social Security Act §§ 1902(a)(10)(i)(A)(III) and (IV), 1902(l), 1905(n)(1), and 1931(a); 42 U.S.C. §§ 1396a(a)(10)(A)(i)(III) and (IV), 1396a(l), 1396d(n)(1), and 1396u-1(a). Although the law nominally limits the income standard for these women and children to 185 percent of the poverty line, in practice some states have applied section 1902(r)(2) to raise the effective income limit above that level. Pregnant women who seek to qualify based on the rules of the state's AFDC program as it existed in 1996 can qualify under the rules that AFDC applied to unemployed parents (AFDC-UP) even if their state did not have such a program that would have applied to them in 1996. These women's eligibility is determined as if the children they are carrying were born and living with them. Under section 1931 of the Social Security Act, states can liberalize the financial rules applied in making these determinations beyond the old AFDC levels. This category, however, is now rarely used because 133 percent of the poverty line is a more liberal standard.

[35] *See* Social Security Act §§ 1902(a)(10)(A)(i)(VI) and 1902(l); 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VI) and 1396a(l). Some states have applied section 1902(r)(2) to raise the effective income limit for these children above 133 percent of poverty.

[36] *See* Social Security Act §§ 1902(a)(10)(A)(i)(III) and (VII), 1902(l), 1905(n)(2), and 1931(a); 42 U.S.C. §§ 1396a(a)(10(A))(i)(III) and (VII), 1396a(l), 1396d(n)(2), and 1396u-1(a). Some states have applied section 1902(r)(2) to raise the effective income limit for these children above the poverty line.

The income and resource standards in effect in states' former AFDC programs on July 16, 1996, are used to determine eligibility for a steadily shrinking number of older children. This is true for two reasons. First, with each passing year, the proportion of poor children under age 19 who were born after September 30, 1983, increases; these children are covered under Medicaid eligibility categories that apply regardless of whether their family's income is below the state's AFDC standards in effect on July 16, 1996. Second, a growing number of states are acting to accelerate the phase-in of Medicaid eligibility for older children and to cover immediately all children with incomes below the poverty line, including older teenage children.

[37] *See* Social Security Act §§ 1905(p); 42 U.S.C. § 1396d(p). A Qualified Medicare Beneficiary is an elderly or disabled person whose income does not exceed the federal poverty line. States must pay premiums and deductibles for Medicare on behalf of QMBs but need not provide any further Medicaid coverage for these individuals.

[38] *See* Social Security Act § 1902(a)(10)(A)(ii) and (C)(i)(III), 1902(f), and 1905(a); 42 U.S.C. § 1396a(a)(10)(A)(ii) and (C)(i)(III), 1396a(f), and 1396d(a). These categories include the medically needy, certain elderly and disabled people in "209(b)" states, and various groups whose incomes and resources are near or below those in the state's AFDC plan as of July 16, 1996. *See id.*, § 1931(a); 42 U.S.C. § 1396u-1(a).

The Houston Chronicle

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BYLINE: U.S. REP. SHELIA JACKSON LEE, STATE SEN. RODNEY ELLIS, STATE REP. GARNET COLEMAN, GLEN BOUDREAUX, JEFFREY BURK, DAN BARTLEY, LESLIE CHAURRO

BODY:

Civil rights actions now

We have preliminarily reviewed the draft report of the Department of Education Office of Civil Rights Issues Committee regarding Texas Southern University and Prairie View A&M University and are cautiously optimistic about the recommended course the committee has charted. We appreciate the hard work of the committee on this challenging issue.

Given the history of "big plans and broken promises" when it comes to issues of discrimination, however, we are skeptical about getting any results.

The plan - if it is implemented - represents a modest start toward ensuring Texas Southern and Prairie View A&M achieve a level of quality that will enhance educational opportunities and improve the lives of many Texans.

It is a modest downpayment, however, for solving such a major, historical problem. This is the fourth plan drafted in the past 20 years to address vestiges of discrimination in Texas higher education, yet little progress has been made to date.

In fact, it has been nearly three decades since the Department of Education's Office of Civil Rights first found that discrimination continued to haunt Texas' colleges and universities. We have not seen much progress over the years, so it is hard to get too excited about yet another plan.

In our view, several questions remain unanswered. Because the OCR played such a small role in the actual drafting of this report, do its Issues Committee's recommendations go far enough to ensure that Texas finally meets the minimum requirements mandated by Title VI of the 1964 Civil Rights Act?

Have federal officials given Texas assurance that this plan takes the necessary steps to eliminate vestiges of discrimination in higher education and to ensure that African-Americans and other persons of color have adequate opportunity to receive a college education?

How soon will an official report from this committee be released and has Texas actually given any assurance that it will enact these recommendations and provide this minimal level of funding?

Because of the record, we believe prudence demands our skepticism.

Overall, the report represents a first step toward ensuring TSU and Prairie View are provided the resources needed to overcome past discrimination in order to compete in the 21st century.

We look forward to working with the OCR Issues Committee, education leaders across Texas and the Legislature to take the next step and implement these policies. But this should only be considered the "next phase," not the end of efforts to eliminate vestiges of discrimination in Texas higher education.

We can no longer accept broken promises on this issue.

U.S. Rep. Shelia Jackson Lee, state Sen. Rodney Ellis, and state Rep. Garnet Coleman, Houston

Tobacco juries in judgment

Regarding Robert Adams' May 1 Viewpoints letter, "No compensation is due," as a smoker of 30-plus years, I agree that we should bear the risk of our habit. But Adams seems to approve of tobacco settlements with the various states ("This would jeopardize the already negotiated payments to many states, including Texas"), while decrying the awards to individuals.

In other words, the judicial system is OK if he is a recipient of the award (as a Texas taxpayer), but it is not OK for an individual to be compensated. This contradiction is fairly typical of many who whine about our judicial system.

Adams makes no mention of the historical fact that the tobacco companies had

Date: 5/8/00

FAX

Health Division

Office of Management and Budget
Executive Office of the President
Washington, DC 20503

To: Irene Bueno
Fax: X6 5581

From: Jeff Farkas

Number of Pages (excluding cover): 5

Subject: HHS opinion on deeming

Voice Numbers:

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Health Programs & Services Branch	202/395-4926
Health Financing Branch	202/395-4930

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COMMENTS : Here is the legal opinion you discussed with Harriet Rabb. Please call me if you have any questions. I will not be in the office all day Monday or Tuesday morning.

cc: Jeanne Lambrew – fax 395-5631
Jeff Farkas – fax 395-7840

NUMBER OF PAGES INCLUDING COVER SHEET: 5

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FROM : Laura Canfield

DATE : May 5, 2000

DEPARTMENT OF HEALTH & HUMAN SERVICES OFFICE OF THE SECRETARY

The General Counsel
Washington DC 20201

May 5, 2000

Paul Oetken
Associate Counsel to the President
White House Counsel's Office
Old Executive Office Building
Room 128
Washington, D.C. 20502

Dear Paul:

As you and I discussed earlier this week, in HHS' view, title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), as amended, would allow states to choose whether to require that the income and resources of an alien's sponsor be "deemed," which means that the income and resources are deemed to be available to the applicant, in determining the eligibility of that alien for any federal means-tested public benefits program.

We reach that conclusion based on an analysis of three sections of title IV: section 402(b), section 403(a) and section 421(a) [8 U.S.C.§§ 1612(b), 1613(a) and 1631(a)]. In lay language, the statute provides that only "qualified aliens" may become eligible for federal public benefits.[1] Section 401(a). Moreover, states have the flexibility to narrow even this group's eligibility for certain federal benefits (Temporary Assistance for Needy Families [TANF], Medicaid or Social Services Block Grant [SSBG]) by electing not to allow them to be eligible on a state-by-state basis for these mixed federal/state programs. Section 402(b). However, the statute is clear that states do not have the flexibility to expand some of these aliens' eligibility for benefits from TANF or Medicaid during their first five years in this country. Section 403(a). Where the statute is not clear and, in our view, is open to more than one interpretation, is on the issue of whether states have the flexibility to choose whether to deem a sponsor's income in the TANF and Medicaid eligibility determination process or whether they are required to do so. We believe that the former is a legally permissible reading of the statute.

[1] For the definition of "qualified alien," see § 431 (8 U.S.C. § 1641).

When PRWORA was enacted, HHS sought to define ambiguous terms as narrowly as possible so that aliens would not be barred from receiving benefits from federal programs. As one means to that end, HHS published a notice in the Federal Register (62 F.R. 45256 (August 26, 1997)) interpreting the term "Federal means-tested public benefit" to include only mandatory federal spending programs in which eligibility for benefits is means tested. These are the benefits that newly arrived qualified aliens are prohibited from receiving during their first five years in this country. At HHS, the benefit programs that fall within this definition and are not otherwise dealt with separately in § 403(c) are TANF, Medicaid and the State Children's Health Insurance Program (SCHIP). HHS now would like to publish a notice in the Federal Register interpreting the statute to provide states with the flexibility to determine whether or not to deem a sponsor's income.

Now we turn to the legal analysis that grounds the foregoing analysis. Section 402(b) provides:

> Notwithstanding any other provision of law and except as provided in section 403 and paragraph (2), a State is authorized to determine the eligibility of an alien who is a qualified alien . . . for any designated Federal program [TANF, Medicaid, and SSBG].

Section 403(a) provides:

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

Section 421 provides, in pertinent part:

> (a) Notwithstanding any other provision of law, in determining the eligibility and the amount of benefits of an alien for any Federal means-tested public benefits program . . . , the income and resources of the alien shall be deemed to include the following:

(1) The income and resources of any person who executed an affidavit of support pursuant to section 213A . . . on behalf of such alien .

(2) The income and resources of the spouse (if any) of the person.

(b) Subsection (a) of this section shall apply with respect to an alien until such time as the alien –

(1) achieves United States citizenship through naturalization . . . ; or

(2) . . . has worked 40 qualifying quarters of coverage . . . .

Thus, § 402(b) provides states with the flexibility to determine the eligibility of certain qualified aliens for TANF, Medicaid and SSBG benefits. Section 403 bars most qualified aliens entering the U.S. on or after August 22, 1996 (hereinafter referred to as "newly arrived qualified aliens"), from receiving federal means-tested public benefits (TANF, Medicaid and SCHIP) during their first five years in the U.S. Finally, § 421(a) provides that the income and resources of an alien "shall be deemed" to include the income and resources of the alien's sponsor if the sponsor has executed one of the new, legally-binding affidavits of support.

Each of these provisions begins with the phrase "Notwithstanding any other provision of law". The "notwithstanding" phrase in § 402(b) contains an exception which specifically mentions the interaction of § 402(b) and § 403 by clarifying that States do not have the authority to determine the eligibility for "federal means-tested public benefits" of newly arrived qualified aliens because § 403 bars them from getting such benefits. However, there is no explicit exception to this state authority to determine eligibility with respect to deeming, since there is no specific mention of the interaction of § 402(b) with § 421.

Given that all three of the provisions at issue use the introductory phrase "notwithstanding any other provision of law" and that § 402(b) limits the authority of states to determine a newly arrived qualified alien's eligibility during the first five years by expressly referring to § 403, we believe that it is legally permissible to conclude that states have the authority to decide whether to implement sponsor deeming as part of their eligibility decisions under TANF, Medicaid and SCHIP Medicaid expansion programs[2].

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[2]Sponsor deeming as a state option would not apply to SCHIP under title XXI of the Social Security Act, because § 402(b) of PRWORA provides states only with the authority to

If a state were to choose to deem in any of these programs, it would be required to follow the rules in § 421 which require, among other things, that the income and resources of the sponsor be deemed and that deeming be continued until the alien naturalizes or works 10 years.

We certainly do not conclude that this is the only reading of the statute. We do believe, however, that the conclusion that states may opt whether or not to deem a sponsor's income is a legally permissible interpretation of these provisions.

Please feel free to contact Laura Canfield at 690-8005 if you would like to discuss this matter further.

Sincerely,

Harriet S. Rabb
Laura Canfield

by:

cc: Jeanne Lambrew

---

determine eligibility for Medicaid, which includes SCHIP Medicaid expansion programs but not separate SCHIP programs. Thus, if a state opts not to deem under Medicaid, but it operates a separate state SCHIP program, the state would be required by § 421 to deem in the SCHIP program.

Deeming is optional for States

US Department of Health and Human Services
Office of the Assistant Secretary for Planning and Evaluation

DEPARTMENT OF HEALTH & HUMAN SERVICES · USA

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mtg next wk

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Date 1/6/00

From Colleen Rathgeb To Irene Bueno

Division HSP Agency

Phone # 401-6639 Phone # 456-6558

Fax # Fax # 456-5581

Number of pages + cover 21

Comments: Irene - Following is (1) the Charities letter, (2) Center on Budget Legal Analysis, (3) Dear State Medicaid Director letter and (4) Excerpt from the Affadavit of Support Interim Reg Preamble. Also we met (Andy, Tom Perez) with Charities + the Center a few weeks ago to discuss this issue. Look forward to hearing your thoughts — Colleen

Catholic Charities USA

99 AUG 11 PM 1:30

August 9, 1999

The Honorable Donna Shalala
Secretary, Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Secretary Shalala:

As we continue to get the word out about the Administration's wise and helpful public charge guidance, I wanted to thank your for all of your efforts on that policy and to bring to your attention another important administrative issue affecting legal immigrants' access to Medicaid and TANF.

I am convinced that the Department of Health and Human Services has the legal authority to allow states to enroll post-1996 immigrants in Medicaid and TANF without "deeming" their sponsors' incomes as available to them.

As you know, section 421(a) of the 1996 welfare law provides for deeming of sponsors' income and resources when determining the eligibility for some public benefits of immigrants who entered the country with the new affidavits of support that went into use in December 1997. As a practical matter, the practice of deeming is likely to prevent the vast majority of sponsored immigrants from receiving TANF and Medicaid. Some sponsors may have enough income or resources to render immigrants ineligible but still not have enough to support the immigrants along with their own families. In particular, with individual health care coverage often unavailable except at the most exorbitant cost, many sponsors will have incomes that exceed the Medicaid eligibility limits without being able to provide alternative health care coverage to an immigrant family. In addition, even sponsors whose incomes and resources would not be enough to disqualify an immigrant family to whom they were deemed may nonetheless be unwilling to provide the detailed, on-going information on their finances that would be necessary for states to determine an immigrant family's eligibility under deeming.

As a result, unless the Administration acts to mitigate the effects of deeming, the great majority of immigrant families entering with the new affidavits of support will remain unable to get TANF and Medicaid long beyond the expiration of the five-year bar. Because immigrants entering with the new forms will, over time, become an increasing proportion of legal immigrants in this country, this problem threatens to

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undo much of the Administration's policy initiatives on benefits for new Americans. The Administration recognized this threat in 1995-96 by rejecting deeming for Medicaid in its own welfare proposals.

Until recently, we had assumed that new legislation would be necessary to address this problem. The attached analysis from the Center on Budget and Policy Priorities, however, has persuaded me that your Department has the authority to address this problem administratively. Specifically, the analysis focuses on section 402(b)(1) of the 1996 welfare law, which gives states the right to determine TANF and Medicaid eligibility rules for legal immigrants "[n]ot withstanding any other provision of law," except the five-year bar on new entrants. The Center argues that this provision authorizes states to reject deeming in these programs, and that if a state does elect to deem sponsors' income and resources, the TANF and Medicaid statutes give the state discretion to design their own deeming methodologies. In this way, a state could, for example, reduce or eliminate the amount of information immigrants must obtain from their sponsors or set disregards high enough that deeming would only apply where a sponsor clearly has the capacity to support or provide health care coverage for an immigrant family.

Recognizing that reasonable minds could differ about this interpretation, we believe that, as an important matter of policy, the Administration should adopt these interpretations to make deeming, and deeming methodologies, an option for states. Moreover, we believe it is important for the Administration to inform states now that the Department will grant them discretion in this area. As they complete activities for Y2K compliance, many states are beginning to program their computers to handle applications from immigrants who entered the country after August, 1996, and have been covered by the five-year bar. (In addition, they may already be dealing with small numbers of immigrant veterans and members of veterans' families, who are exempt from the five-year bar but potentially subject to deeming.) Without guidance that deeming is optional, states will surely incorporate deeming in their eligibility worker training and computer systems, and, even if the Department subsequently issues guidance that this is an option, may feel disinclined to change systems once they have been established.

We and some of the other immigrant advocacy groups would appreciate the opportunity to meet with you to discuss these issues. Thank you very much for your consideration.

Sincerely yours,

Sharon Daly

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Vice President for Social Policy

Cc: Cecilia Munoz
Nancy Wisdo
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CENTER ON BUDGET AND POLICY PRIORITIES

July 21, 1998

STATE OPTIONS ON APPLYING SPONSOR DEEMING TO MEDICAID AND ASSISTANCE PROVIDED UNDER THE TANF BLOCK GRANT

I. Introduction

Three separate provisions of the 1996 welfare law,[1] as well as titles IV-A and XIX of the Social Security Act,[2] govern legal immigrants' eligibility for assistance under the Temporary Assistance for Needy Families (TANF) block grant and Medicaid.

- Section 402(b)[3] provides that "a State is authorized to determine the eligibility" of most legal immigrants for "designated federal programs," which are defined as TANF-funded assistance, Medicaid, and assistance under the Social Services Block Grant (SSBG).
- Section 403(a)[4] bars most legal immigrants newly entering the United States on or after the date the welfare law was enacted from receiving "federal means-tested public benefits" during their first five years in the country.
- Section 421(a)[5] provides for attributing a sponsor's income and resources to an immigrant "in determining the eligibility and amount of benefits of" that immigrant under a federal means-tested public benefit if the immigrant entered the United States with a new affidavit of support form that went into use December 19, 1997; this process is known as "sponsor deeming."

The interactions of these three provisions raise several important questions. For example, a state may wish to use its authority under section 402(b) to provide benefits to immigrants who would otherwise be disqualified under section 403(a)'s five-year bar

1 Public Law No. 104-193.

2 42 U.S.C. §§ 401 *et seq.* and 1396 *et seq.*

3 8 U.S.C. § 1612(b).

4 8 U.S.C. § 1613(a).

5 8 U.S.C. § 1631(a).

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or section 421(a)'s sponsor deeming rules. Also, section 421(a) provides no guidance for states as to *how* states are to go about deeming sponsors' incomes and resources when determining immigrants' eligibility and benefit levels under Medicaid, the TANF block grant, or other programs. This paper addresses these questions. It concludes that the law gives states substantial discretion in many, although not all, of these areas.

It should be noted that the question of whether sponsor deeming under section 421(a) is mandatory or optional in Medicaid and TANF will be important for a small number of immigrants almost immediately and a much larger group beginning in approximately five years.[6] The one group affected now will be immigrants who enter the United States for the first time now with the help of one of the new affidavits of support *and* who are active duty members of the U.S. armed forces, U.S. armed forces veterans, or the spouses or dependent children of service members and veterans. These very small groups of immigrants are exempt from the five-year bar on benefits for new entrants but are *not* exempt from sponsor deeming.[7] Other immigrants entering now with the new affidavits of support will be subject to the five-year ban and will generally be unable to receive Medicaid or benefits provided with federal TANF funds until late in the year 2002.[8] Thus, although it is necessary to decide what scope to give deeming now so states can handle the occasional military-related immigrant applying for benefits, these decisions will not begin to have significant effects for nearly five years.[9]

II. Competing Policies of the Welfare Law's Immigrants' Title: Restricting Eligibility v. Expanding State Flexibility

As much as any section of the 1996 welfare law, the immigrants' title represents an attempt to balance the goals of reducing the availability of means-tested benefits and

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[6] Deeming does not apply to SSBG in any event since deeming applies only to a "federal means-tested public benefit program" and HHS has determined that SSBG is not such a program. 62 Fed. Reg. 45256 (August 26, 1997).

[7] *Compare* Pub. L. 104-193, § 403(b)(2) (8 U.S.C. § 1613(b)(2)) (exempting military-related veterans from the five-year ban) *with id.*, § 421(b) (8 U.S.C. § 1631(b)) (providing an exemption from sponsor deeming only for immigrants with credit for 40 quarters of work).

[8] New entrants can receive emergency Medicaid during this period. Providing emergency Medicaid to immigrants will not require states to decide on a policy concerning sponsor deeming because section 421(a) exempts emergency Medicaid from sponsor deeming requirements. *See* Pub. L. 104-193, §§ 421(a), 403(c)(2)(A) and 401(b)(1)(A) (8 U.S.C. §§ 1631(a), 1613(c)(2)(A) and 1611(b)(1)(A)).

[9] Although the first immigrants to arrive after the welfare law was signed will reach the end of section 403(a)'s five-year ban in about four years, none of these immigrants will have entered with the new affidavits of support that section 421 establishes. Only immigrants entering under the new affidavits are subject to sponsor deeming under section 421(a).

expanded state flexibility. The legislative history of this title makes clear that Congress desired to restrict immigrants' eligibility for public benefits and strengthen sponsors' responsibility for the cost of assistance provided to immigrants. But the immigrants' title also reflects in numerous places the law's general preference for allowing states to make major policy decisions on eligibility for benefits they administer.

Congress sought to limit immigrants' access to means-tested benefits in three distinct ways: banning, deeming, and sponsor liability.

- Bans deny immigrants eligibility whether or not they had a sponsor able to assist them — indeed, whether or not they had a sponsor at all. Under the welfare law as enacted in August 1996, most legal immigrants were banned from receiving SSI and food stamps indefinitely, and new entrants were prohibited from receiving federal means-tested benefits for their first five years in the country.

- Deeming counts the income and resources of sponsors and their spouses as if they were available to the immigrant when the immigrant's financial eligibility for assistance is determined. Although in theory deeming would not deny assistance to an immigrant with a destitute sponsor, the reporting and paperwork requirements necessary to implement deeming have prevented the overwhelming majority of immigrants with sponsors from receiving benefits to which deeming rules applied, making deeming the practical equivalent of banning for most immigrants with living sponsors. Because deeming requires eligibility workers to collect and process information about the circumstances of both the immigrant's family and the sponsor's, some states have complained that it results in inordinate administrative burdens.

- Sponsor liability gives agencies that provide means-tested benefits to immigrants the right to recover their costs from the sponsors of those immigrants.[10] Although it does not directly affect immigrants' eligibility, it does give sponsors an incentive to assist immigrants. In practice, many immigrants' advocates believe sponsors will place great pressure on immigrants not to apply for benefits for which they are eligible even when the sponsor is not offering an adequate alternative source of support.

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[10] Pub. L. 104-193, § 423(a), *enacting* Immigration and Nationality Act § 213A(e) (8 U.S.C. § 1183a(e)).

All of the savings that the Congressional Budget Office "scored" from the immigrants' title of the welfare law were attributable to bans.[11] Nonetheless, the immigrant title's supporters placed considerable emphasis on the sponsor liability provisions of the new law, arguing that sponsors as a matter of principle should be made responsible for the cost of services to immigrants they helped bring to this country.

Congress made sponsors liable for the cost of all means-tested benefits received by immigrants they helped to enter the United States virtually without exception. It applied bans and deeming to programs more selectively, however, depending largely on the extent of federal funding for the program. Those programs with the greatest federal financial role saw the strictest policies and the least state flexibility, while states were given more discretion over programs in which they have greater financial responsibility. In the SSI and food stamp programs, where benefit dollars are entirely federal, Congress leaned toward restricting eligibility: these programs have broad prohibitions on immigrants' eligibility with little or no state discretion.[12] At the other end of the continuum, Part B of the immigrants' title in the welfare law gives states authority to determine immigrants' eligibility for state and local programs.[13] Sponsors are made liable for reimbursement of virtually all benefits provided to immigrants in state and local means-tested programs, but section 422 does not require states to undertake complicated deeming calculations in these programs.[14]

As state-administered programs whose benefit costs are shared between the federal and state government, TANF and Medicaid represent a middle ground between largely federal programs such as SSI and food stamps — for which Congress required both bans and deeming — and purely state-funded programs, over which states have full control. TANF and Medicaid accordingly received intermediate treatment: they are

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[11] This is in significant part because the welfare law's deeming and sponsor liability provisions apply only to immigrants entering the country with new affidavits of support. Those affidavits went into use in December 1997, but the five-year ban on eligibility for immigrants entering in late 1997 will not end until after the close of the six-year budget "window" used to score the 1996 welfare law, which ran through fiscal year 2002.

[12] Even in the food stamp program, Congress readily approved bipartisan legislation in 1997 that allowed states the flexibility to purchase federal for distribution in food assistance programs for legal immigrants that are funded entirely with state dollars.

[13] Public Law 104-193, §§ 411 and 412; 8 U.S.C. §§ 1621 and 1622.

[14] 8 U.S.C. § 1632. Also, as noted above, Congress explicitly permitted states to spend maintenance-of-effort dollars assisting immigrants who could not receive TANF-funded assistance because of the five-year ban.

subject to the five-year ban on new entrants but otherwise states have flexibility to determine eligibility.

Whatever decisions the Administration, and the states, make about the scope and extent of deeming in TANF and Medicaid will have no effect on the sponsor liability provisions that made the law's fundamental philosophical statement: even if the effect of deeming is limited, with the result that a new entrant can receive benefits after five years, the immigrant's sponsor will nonetheless be liable to repay the cost of any such benefits. In addition, no decision on deeming will affect the savings that CBO scored for the immigrants' title during the law's six-year budget window.

III. The Scope of State Authority to Determine Immigrants' Eligibility for Medicaid and Assistance Funded under TANF

Determining the interrelationship among sections 402(b), 403(a), and 421(a) is complicated by the fact that each begins with the words "Notwithstanding any other provision of law." Section 402(b) helps to resolve this issue by providing that states' authority over immigrants' eligibility for TANF-funded assistance and Medicaid is limited by section 403(a)'s five-year bar.[18] Section 402(b) does not, however, contain any similar language subordinating states' authority over immigrants' eligibility for these programs to section 421(a)'s sponsor deeming procedures. This language in section 402(b) suggests that although states have no authority to disregard the five-year ban on new entrants receiving Medicaid and TANF-funded benefits, states' authority to "determine the eligibility of an" immigrant does empower them either to apply or to dispense with sponsor deeming.

A contrary interpretation, *requiring* states to apply deeming to Medicaid and TANF-funded benefits to these entrants, would raise legal problems. First, if section 402(b)'s authority for states to determine immigrants' eligibility is limited by section 421(a) without explicit statutory language to that effect, then section 402(b)'s clause subordinating the state's authority to determine immigrants' eligibility for TANF and Medicaid benefits to section 403(a) would be unnecessary and redundant. If Congress thought that section 421(a)'s "notwithstanding" clause was sufficient to override section 402(b), then the identical "notwithstanding" clause in section 403(a) would have the same effect; in that event, no special mention of section 403 would be needed in section 402(b), and the clause that does so would have no legal effect. The Supreme Court has

[18] States may, of course, spend state funds assisting immigrants subject to the five-year ban.

held that "[i]t is our duty to give effect, if possible, to every clause and word of a statute."[16]

This is particularly true in the case of statutory exceptions, such as the one section 402(b) makes for section 403. The leading treatise on statutory construction notes that "[w]here there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated."[17] Thus, the exception that Congress made to states' discretion when it wrote in the five-year ban in section 403 implies that no further exception should be inferred.

In addition, a cardinal canon of statutory construction is that the more specific provision controls.[18] On the question of states' authority to determine immigrants' eligibility for Medicaid and TANF-funded benefits, section 402(b) is more specific than section 421(a) since it governs only three programs (Medicaid, TANF, and SSBG) rather than "any Federal means-tested public benefits program," as section 421(a) does.[19]

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[16] *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), *quoting Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1881). Similarly, section 46.06 of *Sutherland's Statutory Construction* notes that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."

[17] 2A Singer, *Sutherland's Statutory Construction* § 47.11, p. 165 (1992) (footnotes omitted). Similarly, the "enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Id.*, § 47.23, p. 217.

[18] *See, e.g., Ohio Power Co. v. FERC*, 954 F. 2d 779 (D.C. Cir. 1992); *Aeron Marine Shipping Co. v. U.S.*, 695 F. 2d 567 (D.C. Cir. 1982); *EEOC v. Gilbarco, Inc.*, 615 F. 2d 985 (4th Cir. 1980).

[19] Thus, section 421(a) would require deeming in the SSI and food stamp programs for military-related immigrants entering with the new affidavits of support since these programs are not covered by section 402(b)'s granting of authority to states to determine immigrants' eligibility for TANF, Medicaid, and SSBG. (Section 402(a)(2)(C) exempts these immigrants from the general ban on eligibility for SSI and food stamps, but section 421(a) does not exempt them from deeming.) Section 421(a) also would apply to federal funds expended for health insurance coverage under the new State Child Health Insurance Program (CHIP) that the Balanced Budget Act of 1997 (BBA) establishes as a new title XXI of the Social Security Act. (Section 421(a) would not, however, apply in the same fashion to money provided under the BBA that states chose to spend on Medicaid expansions under section 2101(a)(2) of the CHIP statute. For CHIP funds applied to Medicaid expansion, HCFA guidance of October 10, 1997, confirms that "applicable requirements of the Medicaid law must be met" in lieu of those under CHIP. Thus section 402(b)'s grant to states of authority to "determine the eligibility" of legal immigrants for Medicaid would apply to children where Medicaid coverage is supported with CHIP funds to the same extent that it would apply to any other classes of Medicaid beneficiaries. In other words, states could

(continued...)

Moreover, allowing states to dispense with sponsor deeming does not vitiate section 421(a) with respect to these three programs: in any state that does not choose to override it, sponsor deeming would apply.

Finally, giving states discretion in this area is consistent with the welfare law's general approach. Sutherland notes that a "statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed so as to produce a harmonious whole."[20] As discussed in part II above, the consistent theme throughout the welfare law was to expand states' flexibility in determining eligibility for the programs they operate. For example, the AFDC program was repealed and replaced with the TANF block grant; eligibility for TANF-funded assistance is left largely up to the states.[21] Expanded state flexibility is a theme that so permeates the structure and legislative history of the welfare law that any ambiguity between sections 402(b) and 421(a) should be resolved in favor of states' right to decide whether to undertake deeming.[22]

IV. State Discretion to Design Deeming Rules

When states do apply sponsor deeming in determining eligibility for TANF and Medicaid — either because the state chooses to do so or because it believes, contrary to the analysis set forth above, that section 421(a) compels deeming — several important questions remain. Section 421(a) directs agencies providing federal means-tested public benefits to count sponsors' income and resources; it does not say *how* states are to do this. In the absence of specific statutory direction, all such agencies would appear to have substantial discretion. In the cases of TANF and Medicaid, however, state discretion appears particularly broad. TANF has no federal income rules at all, and the

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[19] (...continued)
decide whether to apply sponsor deeming to these children on Medicaid just as they could decide this matter for other Medicaid beneficiaries.)

Moreover, section 421(a) would apply to all other federal means-tested public benefits that Congress may establish in the future.

[20] 2A Singer, *Sutherland's Statutory Construction* § 46.05, p. 103 (1992) (footnote omitted).

[21] The welfare law expands states' flexibility in administering other programs. For example, numerous provisions of the food stamp title of the law create new state options.

[22] Sutherland also notes that even where a statute expressly regulates a governmental entity, a narrow interpretation is appropriate to assure respect for states' sovereignty. 3 Singer, *Sutherland's Statutory Construction* § 62.01, p. 205 (1992); *see Langford v. United States*, 101 U.S. 341 (1879).

Medicaid statute gives states broad authority to implement methodologies for determining financial eligibility.

A. Deeming under the TANF Block Grant

TANF has no statutory definition of income or resources. States are free to adopt their own policies, which can include substantial exclusions designed for ease of administration or to serve other state policies. Connecticut's TANF program, for example, disregards all earned income up to the federal poverty line. Many states exclude vehicles from resource determinations out of recognition that households' ability to secure and retain employment often depends on access to reliable transportation. States that deem in TANF thus have broad discretion to establish their own exclusions, disregards, and counting rules for sponsors' income and resources.

Section 417 of the statute authorizing TANF block grants underlines this point. It provides that "[n]o officer or employee of the Federal Government may regulate the conduct of States under this part . . . except to the extent expressly provided in this part."[23] Nothing in the TANF statute authorizes federal regulation of states' implementation of section 421(a)'s deeming provisions or imposes any penalties on states that follow one approach to deeming rather than another. (Similarly, nothing in law authorizes the federal government to regulate states' implementation of a separate option that the Balanced Budget Act created under which states may apply deeming in TANF during an immigrant's first three years in the country for an immigrant who arrived with one of the old, non-binding affidavits of support.[24]) Nor does anything in the welfare

[23] Social Security Act § 417; 42 U.S.C. § 617, *as added by* Pub. L. 104-193, § 103(a)(1).

[24] 7 U.S.C. § 2014(l). Section 5505(e) of the Balanced Budget Act of 1997 gives states the option to impose deeming in TANF on immigrants during their first three years in the United States if they arrived with one of the affidavits of support that were in use prior to December 1997. Social Security Act, § 408(f)(1); 42 U.S.C. § 608(f)(1). This provision contains some specific procedures for deeming but does not authorize enforcement of the provisions by any federal agency (or confer upon any federal agency any regulatory authority related to how this provision of the Balanced Budget Act should be implemented). As a result, states have broad discretion over how to interpret and implement this provision. States that choose to apply deeming under section 421(a) to immigrants with the *new* affidavits of support could apply some or all of the same rules to those immigrants that the Balanced Budget Act authorizes for immigrants with the old affidavits.

The deeming option that the Balanced Budget Act establishes with regard to persons seeking assistance under TANF-funded programs primarily affects immigrants who entered the country before the welfare law was enacted, since almost all immigrants who arrive on or after August 22, 1996, are ineligible for TANF-funded assistance during their first five years here. By the time the five-year ban has expired, the three-year deeming period authorized under section 5505(e) of the Balanced Budget Act (continued...)

law's immigrants' title provide the federal government with regulatory authority in this area. Therefore, interpretation and application of section 421(a) is committed to the sole discretion of the states.

This gives states that apply section 421(a) to programs supported with TANF funds considerable flexibility to simplify the administration of sponsor deeming or to adopt disregards that minimize deeming's impact on those immigrants a state believes most need assistance. A state could certainly continue the deeming policy that existed under the former AFDC statute or adopt the deeming procedures in section 5(i) of the Food Stamp Act. Both of those laws disregard an amount of sponsors' income and resources equal to the programs' eligibility limits to reflect the needs of the sponsors' own families. States also could adopt their own disregards to avoid the burden of deeming trivial sums to immigrants; deeming would then apply to the extent that the amount of deemable income or resources exceeded such state-established thresholds.

States also could elect to limit deeming in cases where sponsors were refusing to support the immigrants they helped enter the country until a support action could be brought against the sponsor. This would assure that immigrants are not disqualified because of the income and resources of a sponsor who is failing to provide support. Where a sponsor who has signed a new affidavit of support has the financial means to help the immigrant he or she has sponsored but refuses to do so, the welfare law allows states to sue for reimbursement of the cost of assistance provided to the immigrants. A state therefore could elect to focus primarily on the amounts a sponsor actually provides to an immigrant, deeming only limited types of additional income and resources, and to sue the sponsor for the value of the assistance the state provided due to the lack of adequate support by the sponsor.[25]

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[24] (...continued)
will be long since over. Therefore, in states that select this option, deeming will have largely ended by August 21, 1999, when the last immigrants to enter before enactment of the welfare law reach their third anniversary in this country. States then will have more than three years before the five-year ban expires for the first significant numbers of immigrants with the new affidavits of support that took effect in December 1997. This will give states plenty of time to adjust their deeming policies as they see fit.

[25] This option makes sound policy sense only because the new affidavits of support are legally enforceable against sponsors; otherwise sponsors could withdraw support and rely on the state to assist the immigrants they helped to enter this country. Although technically an individual immigrant as well as a state agency could sue to enforce the affidavit of support, as a practical matter few immigrants will have the resources necessary to prosecute such a suit successfully.

States accustomed to the pre-welfare law affidavits of support, which were *not* enforceable, may wish to rethink their policies because of this important change and apply different deeming policies to new entrants than they did to those arriving before the welfare law was enacted. For persons arriving
(continued...)

B. Deeming under Medicaid

Where a state applies sponsor deeming to its Medicaid program, deeming will be part of the process of determining individuals' incomes and resources. As such, deeming will be subject to provisions of the Medicaid statute that govern the methodologies that states may employ in determining financial eligibility. These include both provisions that govern the eligibility determination process in general and those that specify the relationship between methodologies for determining Medicaid eligibility and those for determining financial eligibility for SSI and the former AFDC program.

Section 1902(a)(17) of the Medicaid statute provides general standards for calculating applicants' and recipients' incomes and resources. This section requires that all Medicaid eligibility decisions be made under "reasonable standards . . . for determining eligibility for and the extent of medical assistance which . . . are consistent with the objectives of [the Medicaid statute and] provide for reasonable evaluation of any such income or resources . . . ."[26] To the extent that deeming is required in Medicaid, section 421(a) would override other provisions of section 1902(a)(17) that limit which third parties' income and resources can be considered in determining Medicaid eligibility. These methodological provisions, however, would affect the manner in which deeming is conducted rather than the fact of deeming itself. For example, a "reasonable standard" that is "consistent with the objectives of" Medicaid could disregard from sponsors' income and resources an amount reflecting the needs of the sponsor and his or her family, just as deeming rules always did in AFDC, SSI and food stamps.

Two other sections of the Medicaid statute require that in establishing Medicaid eligibility criteria, states must apply methods no more restrictive than those that the SSI

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[25] (...continued)
before December 1997 with the old affidavits of support, the state could not establish a policy based on suing sponsors for failure to provide support since the old affidavits were not legally enforceable.

This does not mean that eligibility workers would be required simultaneously to implement two separate sets of deeming rules. Deeming under the former affidavits was limited to an immigrants' first three years in the country in the AFDC program and is similarly limited in TANF-funded programs if a state elects to apply deeming in these programs to immigrants with the old affidavits of support. Persons entering the country before the new affidavits were implemented will be well beyond their first three years in the country before the immigrants entering under the new affidavits complete their five-year disqualification period. Thus, states can discard the former deeming rules built around non-enforceable affidavits before implementing deeming procedures based on the new, enforceable affidavits go into effect.

[26] Social Security Act § 1902(a)(17)(A) and (C); 42 U.S.C. § 1396a(a)(17)(A) and (C).

program and the former AFDC program applied.[27] These provisions also give states broad flexibility to adopt more liberal methods in making Medicaid income and resource determinations than those applied in SSI or the former AFDC program.

- Section 1902(r)(2) of the Medicaid statute[28] gives states broad flexibility in establishing methodologies for determining financial eligibility for most major Medicaid categories. (See box on page 13.) It permits states to determine eligibility for any of these categories using methodologies that are "less restrictive" than those applied in the SSI program or those applied in the state's AFDC program on July 16, 1996. Section 1902(r)(2) also prohibits states from applying more restrictive methodologies than those employed in SSI or in the state's former AFDC program as of July 16, 1996. Specifically, the state may not determine the incomes or resources of elderly or disabled people in these categories under methodologies that make any person worse off than he or she would under SSI methodologies. Similarly, for children and pregnant women, the state may not apply a methodology that is in any way more restrictive than that in force in the state's AFDC program on July 16, 1996.

- Section 1931(b)(2)(C)[29] contains language similar to that in section 1902(r)(2). Section 1931 provides Medicaid eligibility for families that would have received Medicaid by virtue of receipt of AFDC under the old AFDC program rules. Families that meet the income, resource and other eligibility requirements for the state's AFDC program, as those requirements stood on July 16, 1996, are eligible for Medicaid whether or not those families receive assistance under the TANF block grant that replaced AFDC.[30] States may apply methodologies that differ from those they applied in the AFDC program but only to the extent that those methodologies are "less restrictive than the methodologies used [in AFDC] as of July 16, 1996."

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[27] Section 421 contains no methodological instructions other than a requirement that, where deeming takes place, information on sponsors' income and resources be updated with each reapplication. Thus there is no conflict between section 421 and these two sections of the Medicaid statute, and section 421(a)'s "notwithstanding any other provision of law" proviso does not invalidate these two provisions.

[28] 42 U.S.C. § 1396a(r)(2); *see* 42 C.F.R. §§ 435.601(d), 435.602(c), 435.901, and 435.902.

[29] 42 U.S.C. § 1396u-1(b)(2)(C).

[30] Social Security Act § 1931(a); 42 U.S.C. § 1396u-1(a).

These two sections of the welfare law give states that apply sponsor deeming to new entrants under the Medicaid program broad discretion to liberalize income and resource deeming rules when evaluating the eligibility of sponsored immigrants under virtually all major Medicaid eligibility categories. By prohibiting more restrictive methodologies than those the state employed in its AFDC program on July 16, 1996, these provisions suggest if a state applies deeming to immigrants who entered the United States on or after August 22, 1996, and who have been here at least five years, the state's deeming rules must at least apply the same exclusions from deeming that the AFDC program did on July 16, 1996, when determining the Medicaid eligibility of immigrant pregnant women, children, and families with children. AFDC rules in effect on that date excluded from a sponsor's income an amount equal to the state's standard of need for a family of the sponsor's size plus an amount equal to the same work expenses that AFDC recipients could claim.[31] Those rules also excluded $1,500 from sponsors' countable resources and did not consider resources the AFDC program otherwise did not count.[32] As noted, section 1931 generally disallows Medicaid eligibility rules that are more restrictive than former AFDC rules, regardless of whether the state's current TANF eligibility rules are less generous in some respects than the former AFDC rules were.

In addition, section 1902(r)(2) also appears to require a state that chooses to apply deeming to elderly and disabled legal immigrants who arrived here on or after August 22, 1996, and have been in the country for at least five years to determine the eligibility of such immigrants applying the same disregards found in the SSI statute.[33]

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[31] Social Security Act § 415(b)(1); 42 U.S.C. § 615(b)(1) (1996); *see also* 45 C.F.R. § 233.51 (1996). In providing this exclusion now, the state initially would apply the standard of need in effect on July 16, 1996. If the state had taken the option under section 1931(b)(2)(B) (42 U.S.C. § 1396u-1(b)(2)(B)) to increase its standard of need, the new, higher standard would presumably be the amount the state would disregard.

This section of the AFDC statute also excluded amounts that the sponsor (or his or her spouse) paid to dependents living apart from them and any child support or alimony payments. Social Security Act § 415(b)(1)(B)(III) and (IV); 42 U.S.C. § 615(b)(1)(B)(III) and (IV) (1996); 45 C.F.R. § 233.51(b)(1)(ii)(B) and (C) (1996).

[32] Social Security Act § 415(b)(2); 42 U.S.C. § 615(b)(2) (1996); *see also* 45 C.F.R. § 233.51(b)(2) (1996).

[33] *See* Social Security Act § 1621; 42 U.S.C. § 1382j; 20 C.F.R. § 416.1166a. This issue is somewhat confusing because two separate deeming requirements apply to SSI, one in its statute and the other in section 421(a) of the welfare law. As discussed above, section 421(a) contains no methodologies. The provision in the SSI statute does, however, provide a detailed methodology, with an exclusion from the sponsor's income of an amount equal to the federal SSI payment level for a family of the same size as the sponsor's family and a comparable exclusion from the sponsor's resources. *Id.*, § 1621(b); 42 U.S.C. § 1382j(b). This methodology also excludes the income and resources of the sponsor of an immigrant who (continued...)

Finally, these two sections of the Medicaid law permit states to apply methodologies in making eligibility determinations under these categories that are *less restrictive* than those under the state's AFDC program of July 16, 1996, or those under SSI. This could include a more generous exclusion from the sponsor's income or resources than SSI provides or than the state's AFDC program provided.

V. Conclusion

Different sections of the 1996 welfare law give states broad discretion to determine immigrants' eligibility for TANF-funded benefits and Medicaid on the one hand while providing for a five-year ban on new entrants and sponsor deeming in most federal means-tested benefit programs on the other hand. States' discretion does not allow them to override the five-year ban, but a close reading of statute indicates that it does allow them to decide whether or not to impose sponsor deeming. Regardless of whether states count sponsors' incomes and resources when determining immigrants' eligibility, however, sponsors remain financially liable for any benefits. Finally, where states choose to impose sponsor deeming in TANF and Medicaid, the law gives them broad discretion about what methodologies to follow in considering how to count sponsors' incomes and resources.

[38] (...continued)
became disabled after entering the United States. *Id.*, § 1621(f)(1); 42 U.S.C. § 1382j(f)(1).

MEDICAID CATEGORIES TO WHICH SECTION 1902(r)(2) APPLIES

- Pregnant women and infants up to age one whose incomes do not exceed 133 percent of the poverty line (or, at the option of the state, a higher income limit) and pregnant women who meet most of the requirements of their state's AFDC program as those rules existed on July 16, 1996.[34]
- Children aged one to five whose incomes do not exceed 133 percent of the poverty line.[35]
- Children under age 19 whose family's income does not exceed the federal poverty line, and children born after September 30, 1983, whose family meets the income and resource requirements of the state's AFDC program as those requirements existed on July 16, 1996.[36]
- Qualified Medicare Beneficiaries (QMBs).[37]
- Most optional categories of Medicaid beneficiaries.[38]

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[34] *See* Social Security Act §§ 1902(a)(10)(i)(A)(III) and (IV), 1902(l), 1905(n)(1), and 1931(a); 42 U.S.C. §§ 1396a(a)(10)(A)(i)(III) and (IV), 1396a(l), 1396d(n)(1), and 1396u-1(a). Although the law nominally limits the income standard for these women and children to 185 percent of the poverty line, in practice some states have applied section 1902(r)(2) to raise the effective income limit above that level. Pregnant women who seek to qualify based on the rules of the state's AFDC program as it existed in 1996 can qualify under the rules that AFDC applied to unemployed parents (AFDC-UP) even if their state did not have such a program that would have applied to them in 1996. These women's eligibility is determined as if the children they are carrying were born and living with them. Under section 1931 of the Social Security Act, states can liberalize the financial rules applied in making these determinations beyond the old AFDC levels. This category, however, is now rarely used because 133 percent of the poverty line is a more liberal standard.

[35] *See* Social Security Act §§ 1902(a)(10)(A)(i)(VI) and 1902(l); 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VI) and 1396a(l). Some states have applied section 1902(r)(2) to raise the effective income limit for these children above 133 percent of poverty.

[36] *See* Social Security Act §§ 1902(a)(10)(A)(i)(III) and (VII), 1902(l), 1905(n)(2), and 1931(a); 42 U.S.C. §§ 1396a(a)(10(A))(i)(III) and (VII), 1396a(l), 1396d(n)(2), and 1396u-1(a). Some states have applied section 1902(r)(2) to raise the effective income limit for these children above the poverty line.

The income and resource standards in effect in states' former AFDC programs on July 16, 1996, are used to determine eligibility for a steadily shrinking number of older children. This is true for two reasons. First, with each passing year, the proportion of poor children under age 19 who were born after September 30, 1983, increases; these children are covered under Medicaid eligibility categories that apply regardless of whether their family's income is below the state's AFDC standards in effect on July 16, 1996. Second, a growing number of states are acting to accelerate the phase-in of Medicaid eligibility for older children and to cover immediately all children with incomes below the poverty line, including older teenage children.

[37] *See* Social Security Act §§ 1905(p); 42 U.S.C. § 1396d(p). A Qualified Medicare Beneficiary is an elderly or disabled person whose income does not exceed the federal poverty line. States must pay premiums and deductibles for Medicare on behalf of QMBs but need not provide any further Medicaid coverage for these individuals.

[38] *See* Social Security Act § 1902(a)(10)(A)(ii) and (C)(i)(III), 1902(f), and 1905(a); 42 U.S.C. § 1396a(a)(10)(A)(ii) and (C)(i)(III), 1396a(f), and 1396d(a). These categories include the medically needy, certain elderly and disabled people in "209(b)" states, and various groups whose incomes and resources are near or below those in the state's AFDC plan as of July 16, 1996. *See id.*, § 1931(a); 42 U.S.C. § 1396u-1(a).

DEPARTMENT OF HEALTH HUMAN SERVICES

Health Care Financing Administral

Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

JUN 10 1998

Dear State Medicaid Director:

The purpose of this letter is to make you aware of statutory provisions enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208) and described in interim regulations published by the Immigration and Naturalization Service (INS) on October 20, 1997. In brief, this provision authorizes States to recover from immigrants' sponsors the unreimbursed costs of Medicaid benefits paid on behalf of certain immigrants.

This letter informs you of these provisions and explains their relationship to other rules regarding sponsors of aliens and Medicaid recoveries. For reasons described below, the rules at issue in this letter will have a limited impact on Medicaid. Nonetheless, we felt States should be alerted to the implications of this new law.

In the interest of clarity, we wish to emphasize that the policies contained in this letter pertain only to recoveries from immigrants' sponsors, and do not change the prohibitions against recoveries from the immigrants themselves, as described in our letter of December 17, 1997 to you. (We have enclosed a copy of that letter for your information). The only circumstances under which you may seek to recover for legitimate Medicaid expenditures related to immigrants are those described in the subsequent portion of this letter, where the recovery is from a sponsor who has an obligation under immigration law to pay. The prohibitions described in our earlier letter relate to recoveries from the immigrants themselves for Medicaid benefits they or a family member legitimately received.

As explained in the October 20, 1997 interim INS rule, th- new provisions are effective for immigrants who file with the INS on or after December 19, 1997, for an immigrant visa, for admission as an immigrant, or for adjustment of status, who are applying as: a) an immediate relative, b) a family-based immigrant, or c) an employment-based immigrant, and who, in order to be admissible, are required to have a sponsor who signs an affidavit of support under section 213A of the INS Act. States will be able to obtain information about sponsorship from the INS.

In signing such an affidavit, the sponsor agrees to provide financial support to the immigrant, and also agrees to reimburse any agencies which provide means-tested public benefits (e.g., Medicaid) to a sponsored immigrant. After the State applies the sponsor-to-alien deeming criteria, should the sponsored immigrant obtain any Medicaid benefits, the agency may sue the sponsor in Federal or State court to recover any unreimbursed Medicaid costs for those benefits, except for emergency services which are excluded from recovery. Procedural requirements that you must follow in doing this are more fully described in the October 20, 1997 INS rule.

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We believe that the impact on Medicaid would be limited for three reasons. First, most persons filing for admission as an immigrant on or after the effective date of this new rule are banned from receiving non-emergency Medicaid services for five years under section 403(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Therefore, in most cases, there should be no Medicaid expenditures to recover in the first place.

Second, those groups of immigrants who would be eligible for the full Medicaid benefit package are not populous. Veterans and persons on active duty in the U.S. military, their spouses and dependent children and their unremarried surviving spouses are exempt from the 5 year ban. Refugees, asylees, aliens whose deportation is being withheld, immigrants who are Cuban or Haitian entrants, and certain Amerasian immigrants are also exempt. Consequently, the number of newly admitted permanent residents in these categories who receive Medicaid benefits who will subsequently acquire sponsors that are subject to the affidavit of support and from whom recoveries may be pursued is small.

Third, even when the five year ban is not at issue, States will be required to attribute the income and assets of the sponsor when determining the immigrant's eligibility for Medicaid. The sponsor-to-alien deeming rule continues for as long as the sponsor is obliged under INS rules to provide support, in most cases until the immigrant becomes a citizen. A separate SMD letter is being developed and will be issued soon to explain the HCFA policy to be applied when a sponsored alien is subject to the deeming of the sponsor income and resources.

If you have any questions about this issue, you can contact either Mark Ross on (410) 786-5855, or Robert Tomlinson on (410) 786-4463.

Sincerely,

Sally K. Richardson
Director
Center for Medicaid and State Operations

Enclosure

cc:
All Regional Administrators
All Associate Regional Administrators
for Medicaid and State Operations
Jennifer Baxendell, NGA
Joy Wilson, NCSL
Lee Partridge, APWA

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significant economic impact on the Federal Government in excess of $100 million.

Under provisions included in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, most immigrants are barred from receiving SSI benefits and food stamps until they become U.S. citizens or can be credited with 40 quarters of work. This restriction applies to most newly arriving immigrants, and to any aliens who were already admitted as immigrants, but whose eligibility for benefits was not preserved under the Balanced Budget Act of 1997, Public Law 105-33. Most immigrants are also barred from most other Federal means-tested public benefits for their first 5 years in the United States. Veterans and persons on active duty in the U.S. military, their spouses and dependent children and their unremarried surviving spouses are exempt from the 5-year ban. Refugees, asylees, aliens whose deportation or removal is being withheld, immigrants who are Cuban-Haitian entrants and certain Amerasian immigrants are also exempt. American Indians born in Canada referred to in section 289 of the Act are exempt from the 5-year ban with respect to SSI and Medicaid benefits only. The number of newly admitted permanent residents in these categories who are subject to the **affidavit** of **support** requirement in section 213A of the Act is small.

This regulation implements provisions of the Personal Responsibility Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 which require that all family-based and certain employment-based immigrants be sponsored through legally enforceable affidavits of **support**. If a sponsored immigrant applies for Federal means-tested public benefits, all of the income and resources of the sponsor and the sponsor's spouse will be deemed to be available to the sponsored immigrant in determining eligibility for the benefit. In most cases this would make the sponsored immigrant ineligible for the benefit sought. Affidavits of **support** will be enforceable against sponsors by any agency providing Federal, State, or local means-tested benefits, with certain

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exceptions (notably emergency medical care, disaster relief, school lunches, foster care, student loans, and Head Start benefits) to sponsored immigrants until the sponsored immigrants become U.S. citizens or can be credited with 40 quarters of work.

Significant savings due to deeming of the income and resources of sponsors and their spouses to sponsored immigrants will accrue only after the fifth anniversary of welfare and illegal immigration reform implementation. Before that time, savings would be minimal since very few new immigrants would be exempt from the bar to receiving benefits, and only a small fraction of that group would be expected to apply for Federal means-tested benefits, resulting in the deeming of sponsors' income and resources.

Estimates of cost savings due to the deeming of sponsors' incomes to immigrants who seek benefits made in early 1996 during consideration of illegal immigration reform legislation are not applicable because they could not take into account the enactment of welfare reform in August 1996 which preempted the impacts of sponsor deeming by making most permanent resident aliens, with or without sponsors, ineligible for Federal means-tested public benefits for 5 years, and potentially longer for SSI and food stamps.

Because of the 5-year ban on immigrant access to means-tested public benefits, the Congressional Budget Office has projected that savings due to the deeming of sponsor's income will not begin to be realized until the first immigrants who arrived after the enactment of welfare reform are no longer subject to the 5-year ban. According to the Congressional Budget Office, the greatest savings to the Federal Government will be realized in the Medicaid program since most permanent residents will remain ineligible for SSI and food stamp