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42 U.S.C. § 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Enforcing Federal Rights Under Section 1983

Access to Public Benefits for Battered Immigrant Women and Children

by Leslye E. Orloff

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA) have substantially altered an immigrant's ability to receive public benefits.[1] These laws eliminated eligibility for most immigrants for Supplemental Security Income (SSI) and federal food stamps and gave states the discretion to determine whether immigrants can qualify for federal, state, and local public benefit programs. Subsequent laws, however, have restored access to SSI and food stamps for very limited numbers of immigrants.[2]

I. Introduction

Although the law currently denies public benefits to many immigrants, some immigrants, including some battered immigrants, remain eligible for certain critical public benefits. The PRA grants access to some federal benefits to "qualified aliens" (hereafter referred to as "qualified immigrants").[3] The guidance to the states issued by the U.S. Attorney General and the definition set forth by the Department of Health and Human Services (HHS) of "federal means-tested public benefits" narrowly construes the PRA to ensure that some public benefits remain available to some immigrants, including some battered immigrants.[4]

While the PRA and IIRAIRA significantly reduce access to federal public benefits for most immigrants, these laws also expand access to public benefits for some battered immigrants who had been previously ineligible for assistance. For example, undocumented and documented immigrants who are battered by their U.S. citizen or lawful permanent resident

[1] In preparing this article I had the assistance of Grace Huang, Deeana Jang, Rachel Little, Antoaneta Pavlova, Eun-gyoung Shin, and Sara Aird. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter PRA]. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 8 U.S.C. §§ 1101 *et seq.* (Supp. II. 1996) [hereinafter IIRAIRA].

[2] Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, § 2, 112 Stat. 2926.

[3] While the term used in the law is "qualified aliens," I will use the term "qualified immigrants" throughout this article except when quoting language contained in statutes. I strongly encourage attorneys working with battered immigrants to use the term "immigrants" rather than aliens and "undocumented immigrants" rather than "illegal aliens."

[4] Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61344 (Nov. 17, 1997) [hereinafter Interim Guidance].

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spouses or parents may apply for some public benefits if they have filed a Violence Against Women Act (VAWA) immigration case or a family-based visa petition with the Immigration and Naturalization Service (INS).[5]

IIRAIRA also exempts many battered immigrants from sponsor deeming rules. These rules previously made many battered immigrants economically ineligible for benefits because they were presumed to have full access to the income and assets of their abusers. As a result, many battered immigrants were ineligible for public benefits because their income exceeded the income guidelines of state and federal welfare programs.

When working with battered immigrant women and advising them about whether they may get public benefits, attorneys and service providers need to consider three different issues: the woman's immigration status, whether she is eligible for benefits, and whether she can apply for benefits for herself and her children in a manner safe from her being reported to INS.

II. Immigration Status and Public Benefits for Battered Immigrants

The law distinguishes among three kinds of immigrants: "qualified immigrants" who entered the United States before August 22, 1996; "qualified immigrants" who entered the United States on or after August 22, 1996; and immigrants who are not "qualified immigrants."

A. "Qualified Immigrants"

"Qualified immigrants" include lawful permanent residents (including conditional permanent residents); refugees; asylees; persons granted withholding of deportation or cancellation of removal; Cuban/Haitian entrants; veterans; persons granted conditional entry; Amerasians; persons paroled into the United States for a year or more; persons who have been battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident spouse or parent, with pending or approved VAWA cases or family-based petitions before INS; and persons whose children have been battered or subjected to extreme cruelty by the U.S. citizen or lawful permanent resident other parent, with pending or approved VAWA cases or family-based petitions before the INS.[6]

Originally many undocumented battered immigrants were not included in this definition. However, Congress recognized that certain immigrant women and children who were battered or subject to extreme cruelty needed access to public benefits if they were to escape abuse. Therefore the IIRAIRA expanded the definition of "qualified immigrants" to include immigrant women and children who were battered or subject to extreme cruelty and who had filed an application for relief under VAWA or a family-based petition with the INS.[7]

B. Battered Immigrants as "Qualified Immigrants"

Under IIRAIRA immigrant spouses or children who have been battered or subjected to extreme cruelty can be considered "qualified immigrants" under certain defined circumstances.[8] An interim guidance issued by the U.S. Attorney General in AG Order No. 2129-97 further explains eligibility and verification of "qualified immigrant" status under the PRA.[9]

Immigrant spouses or children can be granted "qualified immigrant" status if four

[5] The Violence Against Women Act (VAWA) case may be a self-petition for permanent residency, a cancellation of removal application, or a suspension of deportation application. Immigration and Nationality Act § 204(a)(1)(A)(iii), (A)(iv), (B)(ii), (B)(iii) (8 U.S.C. § 1154(a)(1)(A)(iii), (A)(iv), (B)(ii), (B)(iii)), § 240A(b)(2), 8 U.S.C. § 1229b(b)(2); or § 244(a)(3) (as in effect before the enactment of IIRAIRA) (8 U.S.C. § 1254(a)(3)).

[6] PRA, § 431(b), 8 U.S.C. § 1641(b).

[7] IIRAIRA, § 501, 110 Stat. 3009, 3670, *amending* the PRA by adding § 431(c), 8 U.S.C. § 1641(c).

[8] *Id.*

[9] Interim Guidance, *supra* note 4, 62 Fed. Reg. at 61344.

requirements are satisfied. First, INS or the Executive Office for Immigration Review (EOIR) must have approved a self-petition for permanent residency or a family-based visa petition for the applicant, granted cancellation of removal, granted suspension of deportation, or found that the applicant's pending petition or application sets forth a prima facie case for approval of the self petition or family-based visa application. When applying for benefits, the battered immigrant must give the public benefits agency a copy of her approval notice from INS, EOIR, or her notice of prima facie case determination.

Before the immigrant can qualify for benefits, a VAWA case or qualifying family-based visa petition must be filed with INS or EOIR. If the case has been filed but is not yet approved, INS or the immigration judge must have ruled that the pending petition or application filed sets forth a prima facie case.[10] To prove a prima facie case, the applicant must have presented in her petition at least some credible evidence that proves each required element of her VAWA case.[11]

Second, the immigrant or the immigrant's child must also have been battered or subjected to extreme cruelty in the United States by a U.S. citizen or lawful permanent resident spouse or parent, or by a member of the spouse's or parent's family residing in the same household (if the spouse or the parent consents to or acquiesces in such battery or cruelty and, in case of a battered child, if the immigrant did not actively participate in the battery or cruelty).[12]

"Battery or extreme cruelty" is defined as, but not limited to,

> being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.[13]

In order to have INS or EOIR approve their VAWA petitions or find that a prima facie determination was made, applicants under VAWA must show that they experienced such battery or extreme cruelty. They do not have to give the benefits-granting agency any additional evidence beyond their approved petition or prima facie determination letter.

Battered immigrants with family-based petitions filed by their spouse or parent must submit to the benefit agency proof of the battery or extreme cruelty

[10] *Id.* at 61366–71 (providing guidance for establishing a prima facie case).

[11] Immigration & Naturalization Serv., Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues (May 6, 1997). *See also* my PREPARING VAWA SELF-PETITIONS THAT MEET THE PRIMA FACIE EVIDENCE TEST REQUIRED FOR ACCESS TO PUBLIC BENEFITS AND WORK AUTHORIZATION (1998).

[12] Offering access to benefits when the abuse is perpetrated by someone other than the victim's spouse or parent offers access to benefits for battered immigrant women whose spouse has filed a family-based petition for her but who is abused by another relative, including, e.g., her father-in-law or her husband's brother. This can be helpful in extended families where the abuse, including sexual abuse, may have been perpetrated by someone other than her spouse. It is also helpful in child abuse and child sexual abuse cases where the abuser is not the child's parent but another family member residing in the household.

[13] Interim Guidance, *supra* note 4, 62 Fed. Reg. 61369. This definition is parallel to the definition of battering and extreme cruelty contained in the immigration regulations governing VAWA self petitions and battered spouse waivers. This definition is broader than the definition of domestic or family violence contained in many state domestic violence statutes in that it includes emotional abuse that in many states would not lead to the issuance of a protection order. Attorneys assisting battered immigrants may need to educate state benefits–providing agency staff about this more inclusive definition.

(such as a protection order, police report, photographs, an affidavit from a battered women's advocate, a therapist's report or medical record) along with their approval notice or prima facie determination.

Third, the battered immigrant must demonstrate that a substantial connection exists between the battery or extreme cruelty and the need for the public benefit. As defined by the U.S. Attorney General, a number of different circumstances demonstrate this connection.[14] The battered immigrant may establish this connection by showing that she needs the public benefit in order to become self-sufficient following separation from the abuser; escape the abuser and/or the abuser's community; ensure her own safety, as well as the safety of her child or parent; compensate for the loss of financial support resulting from the separation; alleviate nutritional risk resulting from the abuse or following separation; provide medical care for a pregnancy resulting from the abusive relationship; or replace medical coverage or health care services lost following separation from the abuser.[15]

Sponsor deeming poses a grave problem for battered immigrants who received their lawful permanent residency through U.S. citizen or lawful permanent resident spouses.

She may also demonstrate a substantial connection by showing that she may need the public benefit because she lost her job or earns less because of the abuse or due to her involvement in legal proceedings relating thereto (child custody, divorce actions); because she had to leave her job for safety reasons; because she needs medical attention or mental health counseling or has become disabled; because she loses a dwelling or a source of income following separation; or because her fear of the abuser jeopardizes her ability to take care of her children.[16]

Fourth, the battered immigrant or child must no longer reside in the same household as the abuser. The Attorney General's Guidance notes that, "[a]lthough a qualified applicant is not a 'qualified alien' eligible for benefits until the battered applicant or child, or parent ceases residing with the batterer, applicants will generally need the assurance of the availability of benefits in order to be able to leave their batterer and survive independently."[17]

The Attorney General's Guidance suggests that, whenever possible, the state benefit provider complete the eligibility determination process and approve the applicant for benefits before she has separated from the batterer. This ensures that the applicant will be able to receive benefits as soon as she leaves her abuser. Evidence may include but is not limited to a protection order that removes the abuser from the home; an affidavit by witnesses that the victim and the abuser no longer reside together; or a statement from the landlord that the victim, but not her abuser, lives at her residence.

C. Before and After August 22, 1996

Immigrants who are or become "qualified immigrants" and who entered the United States before August 22, 1996, are generally eligible for the same federally funded financial aid, federal public benefits, and federal means-tested public benefits available to U.S. citizens, except SSI and food stamps.[18] States may restrict

[14] U.S. Department of Justice, Guidance on Standards and Methods for Determining Whether a Substantial Connection Exists Between Battery or Extreme Cruelty and Need for Specific Public Benefits (AG Order No. 2131-97), 62 Fed. Reg. 65285 (Dec. 11, 1997). The U.S. Attorney General's order on "substantial connection" describes broadly and in detail the types of circumstances under which battered immigrants may access benefits.

[15] *Id.* at 65285.

[16] *Id.* at 65286–87.

[17] Interim Guidance, *supra* note 4, at 61370.

[18] Immigrants who entered before August 22, 1996, are eligible for Supplemental Security Income only if they were qualified immigrants, were lawfully residing in the United States, and were receiving Supplemental Security Income on August 22, 1996.

some of the public benefits available to "qualified immigrants."

Immigrants who become "qualified immigrants" and who entered the United States on or after August 22, 1996, are barred from receiving federal means-tested benefits during the first five years after obtaining qualified status.[19] During this five-year period, however, they may receive federal public benefits not deemed to be "federal means-tested public benefits."[20] With respect to both federal public benefits and federal means-tested public benefits, most immigrants except battered immigrants are subject to income-deeming rules that may continue to make them ineligible for such benefits.[21]

A few groups of immigrants are exempt from this five-year bar. These include refugees, Amerasians, asylees, Cuban/Haitian entrants, veterans and immigrants on active military duty, immigrants granted withholding of deportation, and immigrants without sponsors.[22]

D. Sponsor Deeming

In order for any person to qualify to receive public benefits, the state benefit-granting agency must determine whether the applicant is "income eligible." Sponsor-deeming rules control how the income eligibility determination is made for many noncitizens who apply for public benefits. When immigrants' family members or employers sponsor them to receive lawful permanent residency in the United States, those sponsors must sign and file, with INS, affidavits of support stating that they are willing to be financially responsible for that immigrant.[23] When an immigrant who has a sponsor affidavit filed on her behalf applies for public benefits, sponsor-deeming rules require that the benefit-granting agency assume, for purposes of determining income eligibility, that the immigrant has full access to the income and assets of her sponsor.[24] These rules render the vast majority of immigrants with sponsor affidavits ineligible to receive public benefits.

Sponsor deeming poses a grave problem for battered immigrants who received their lawful permanent residency through U.S. citizen or lawful permanent resident spouses. In the past, deeming rules cut off many battered immigrant lawful permanent residents from public benefits when they fled their abusive sponsoring spouses. IIRAIRA, however, created an exemption to sponsor-deeming rules for qualified battered immigrant spouses and children, refugees, asylees, those granted withholding of deportation under Immigration and Nationality Act (INA) Section 243, lawful permanent residents who have earned or can be credited with 40 quarters of employment, and lawful permanent residents at risk of becoming hungry or homeless.

Immigration law now specifically exempts most battered immigrants from satisfying deeming requirements for 12 months if the battery or extreme cruelty took place in the United States; the abuser was a spouse, parent, or member of the spouse's or parent's family; there is a "substantial connection" between the battery or extreme cruelty and the need for the

[19] PRA § 403(a), 8 U.S.C. § 1613; Interim Guidance, *supra* note 4, at 61349.

[20] PRA § 401(a), 8 U.S.C. § 1611; *id.* § 431, 8 U.S.C. § 1641.

[21] In all other respects, the rights and limitations on post–August 1996 immigrants to receive public benefits do not differ from the rights and limitations of "qualified immigrants" who entered the United States before August 22, 1996. PRA § 421, 8 U.S.C. § 1631, as amended by IIRAIRA § 552, adding 8 U.S.C. § 1631(e) (indigence exception) and 1631(f) (battered immigrant exception).

[22] Catholic Legal Immigration Network & National Immigration Law Ctr., *Alien Eligibility of Federal Benefits in* IMMIGRATION & WELFARE RESOURCE MANUAL: 1998 Edition tab I at 11 (National Immigration Law Center ed., 1998) [hereinafter NILC MANUAL].

[23] Immigration and Nationality Act § 212(a)(4)(C)–(D), 8 U.S.C. § 1182(a)(4)(C)–(D); *id.* § 213(a)(1), 8 U.S.C. § 1183a(a)(1).

[24] PRA § 421, 8 U.S.C. § 1631.

public benefit; and if the victim no longer resides with the abuser.[25]

The following groups of battered immigrants are exempt for 12 months from meeting the deeming requirements: VAWA self-petitioners; VAWA cancellation of removal or suspension of deportation applicants; battered immigrants with approved I-130 petitions; children with a battered immigrant parent who qualifies for benefits due to VAWA or an approved family-based visa petition; lawful permanent residents and any dependent children who obtained their status through a family-based visa petition and were battered before and/or after obtaining lawful permanent residency; and certain indigent immigrants who, according to a benefits provider, are unable to obtain food and shelter without assistance.[26]

Notably IIRAIRA recently created a new type of affidavit of support (the I-864) with much harsher income-deeming rules than previous affidavits. However, battered immigrants with I-864 affidavits of support submitted after December 5, 1997, are exempted from these deeming rules for one year.[27] After the one-year exemption expires, a battered immigrant applicant may continue to be exempt from the deeming requirements if she can demonstrate that an order of a judge or a prior INS determination has recognized the battery or cruelty and that there is a substantial connection between the abuse and battery suffered and the need for the benefits sought.[28]

However, subsequent immigration legislation, aimed at preserving access to greater benefits for persons who received lawful permanent residency before IIRAIRA may have undermined the deeming exemption for battered immigrant women.[29] Whether battered lawful permanent residents with old I-134 affidavits of support are exempt from deeming is now unclear. Generally the battered immigrant exemption to deeming requirements applies to all battered immigrants who qualify for benefits. However, this issue is not fully settled. In the meantime, attorneys and service providers working with battered immigrants should determine whether an I-134 or I-864 was filed for a battered immigrant. In states that have adopted the Family Violence Option (FVO) battered immigrants with old affidavits of support, I-134, may succeed in getting the state welfare agency to use the FVO to waive deeming.[30]

E. Forty Quarters of Work Credit

An immigrant who can prove 40 quarters of work credit may be eligible to receive public benefits that would otherwise be unavailable to him or her. For example, persons with 40 quarters of work credit may receive food stamps and SSI for which they would not otherwise qualify. Similarly persons with 40 quarters of work credit can avoid state restrictions on benefits to immigrants. However, if a battered immigrant, the battered immigrant applicant's spouse, or the battered immigrant's parents lived and/or worked in this country for ten years or less, the immigrant cannot meet the requirement of 40 quarters of work credit.[31]

[25] Interim Guidance, *supra* note 4, at 61371. After the first 12 months battered immigrants may continue to be exempt from deeming if there has been a finding by or in a judicial or administrative proceeding as to the fact of the abuse and if there continues to be a substantial connection between the need for benefits and the abuse. Such judicial determination may be made as part of a protection order, custody, criminal, or immigration case. IIRAIRA § 552, 8 U.S.C. § 1631(D)(D)(B). See also *id.* § 501, amending PRA § 431; 8 U.S.C. § 1641(c).

[26] *Id.* § 552, *amending* PRA § 421; 8 U.S.C. § 1631(e)–(f).

[27] *Id.* § 552, *amending* PRA § 421; 8 U.S.C. § 1631(f).

[28] *Id.* § 552, *amending* PRA § 421(D)(D)(B), 8 U.S.C. § 1631.

[29] Balanced Budget Act of 1997 § 5505(e), Pub. L. No. 105-33, 111 Stat. 603, 611, codified at 42 U.S.C. § 608(f).

[30] For a complete up-to-date list of the states that have adopted the Family Violence Option contact Jody Rafael, Taylor Institute, 773.342.5540; fax 773.342.0149; taylorinstitute@worldnet.att.net.

[31] *Id.*

If a person has worked for ten years or more, for each year worked the immigrant must have worked four "qualifying quarters." Up to four quarters of credit may be earned yearly. A qualifying quarter calculates how much a person earns in a calendar year. Each year the required amount is determined by the Social Security Administration. All work done in the United States is counted toward qualifying quarter credits. One does not necessarily have to work during all four calendar quarters. Instead the Social Security Administration counts qualifying quarters solely based on the total amount earned. For example, in 1997 a qualifying quarter was credited for every $670 earned.[32] This amount changes yearly with inflation. Any work done by a parent, prior to the applicant's 18th birthday, may be counted. Similarly, if the immigrant is married or widowed, any work done by the spouse during the marriage may be counted toward establishing a qualifying quarter. However, after divorce immigrant spouses lose the ability to count quarters earned by their spouses during the marriage.

If the legal permanent resident first entered the United States after August 22, 1996, and is subject to the five-year bar on receipt of benefits, after five years he or she may count work during those five years to establish qualifying quarters. An immigrant may even count work done in the United States without authorization. However, when an immigrant wishes to count quarters in which he or she worked illegally, the immigrant may have to share information with both INS and the Internal Revenue Service and risk tax and immigration consequences.

Battered qualified immigrants who first entered the United States before August 22, 1996, may receive public benefits without the five year bar and are exempt for one year from deeming requirements. However, if they are required to satisfy deeming requirements after the one year period, they, like other legal permanent residents, may count the qualifying quarters earned by their spouse or parent in order to qualify for benefits.

A word of caution: battered immigrants who rely on their husbands' 40 quarters of work credit may use these quarters only if they are still married when they apply for benefits. If they divorce after qualifying for benefits, they will be able to continue receiving benefits only until they are required to recertify their ongoing qualification for benefits. At recertification they may no longer count their husbands' 40 quarters.

III. Available Benefits

U.S. citizens and noncitizen "qualified immigrants" may receive federal public benefits. Only certain benefits are defined as "federal public benefits" under the PRA.[33] The statutory definition includes U.S. agency–provided or –funded grants, contracts, loans, and professional or commercial licenses; and U.S. agency–provided or –funded benefits for retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, and unemployment.

A program is considered a federal public benefit only when payment is made or assistance provided directly to an individual, a household, or a family eligibility unit. If federal funds are paid to a state in the form of block grant money, to a shelter, to a hospital, or to other entities, these payments are not considered "federal public benefits" and are not subject to restrictions on immigrant access.[34] The U.S. Attorney General's Guidance clarifies this:

> Although the Act prohibits certain aliens from receiving nonexempted "federal public benefits," it does not prohibit governmental or private entities from receiving federal public benefits that they might then use to provide assistance to aliens, so long as the benefit ultimately provid-

[32] Interim Guidance, *supra* note 4, at 61413.

[33] PRA § 401(a), 8 U.S.C. § 1611a.

[34] *Id.*

ed to the non-qualified alien does not itself constitute a "federal public benefit."[35]

Thus, if a local agency receives a "grant" to provide shelter to domestic violence victims, fire protection, crime victim counseling, or services which are not "federal public benefits," these services may be provided to any person regardless of immigration status because the alien restrictions would not apply.[36] This is true even when the federal program funds would be deemed a federal public benefit if the grant was made to an individual, household, or family unit.

No overarching regulations defining "federal public benefits" have been issued. Each federal agency will publish its own list of programs deemed federal public benefits.[37] The lists will probably include all the major federal benefit programs—social security, Temporary Assistance for Needy Families (TANF), nonemergency Medicaid, postsecondary education loans and grants, subsidized public and assisted housing programs, Title XX social service block grants, SSI, and food stamps.[38]

Federal means-tested public benefits are generally the most difficult to access. The term "federal means-tested" has been defined by HHS to apply only to mandatory HHS spending programs.[39] HHS considers a program "means tested" if eligibility for the program's benefits, or the amount of such benefits, or both, are determined on the basis of the income or resources of the applicant seeking the benefit. Medicaid and TANF constitute "Federal means-tested public benefits" under the PRA.[40]

A. In the United States Before August 22, 1996

An immigrant must be a "qualified immigrant" to receive federal, state, or local public benefits. Immigrants who entered the United States before August 22, 1996, and who are or later become "qualified immigrants" are eligible for federal public benefits to the same extent as U.S. citizens (except for SSI and federal food stamp benefits), subject to deeming rules and state restrictions.[41] Federal public benefits open to all qualified battered immigrants who entered the United States before August 22, 1996 are listed in table 1.

B. In the United States After August 22, 1996

Notwithstanding certain exceptions described below, an applicant who entered the United States on or after August 22, 1996, and later attained "qualified immigrant" status; or who entered the United States before August 22, 1996, and obtained "qualified immigrant" status after that date but did not remain continuously present in the United States from the latest date of entry before August 22, 1996, is ineligible for all federal means-tested benefits during the first five years after he or she obtained "qualified immigrant" status.[42] These "qualified immigrants" become eligible for federal means-

[35] Interim Guidance, *supra* note 4, at 61361.

[36] *Id.*

[37] The U.S. Department of Health and Human Services published a list of its programs that are considered federal public benefits. [PRA]; Interpretation of "Federal Public Benefit," 63 Fed. Reg. 41658, 41660 (July 27, 1998).

[38] National Immigration Law Ctr., *Alien Eligibility for Federal Benefits in* NILC MANUAL, *supra* note 22, tab 4, Federal Implementation, at 18.

[39] Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45256, 45257 (Aug. 21,1997).

[40] *Id.*

[41] Immigrants who entered the United States before August 22, 1996, are subject to pre–August 22, 1996, deeming rules, which, however, do not apply to VAWA-eligible battered immigrants and battered immigrants with pending spouse-based petitions or battered immigrants who obtained lawful permanent residency status through a VAWA self- petition or a spouse-based petition.

[42] PRA § 403(a), 8 U.S.C. § 1613; *see also* Interim Guidance, *supra* note 4, at 61414–15.

Table 1.—Federal Means-Tested Public Benefits Available to Qualified Battered Immigrants

Temporary Assistance for Needy Families

Persons who first entered the United States on or after August 22, 1996, are barred for the first five years after they become "qualified immigrants" unless "exempt."[1]

Medicaid

Persons who first entered the United States on or after August 22, 1996, are barred for the first five years after they become "qualified immigrants" from all nonemergency Medicaid including parental care and children's health, unless "exempt."[2]

Food Stamps

Available only to those qualified immigrants who entered the United States before August 22, 1996, and who are "exempt." However, any children who entered the United States before August 22, 1996, and who are or become qualified aliens are eligible to receive food stamps.[3]

Persons who first entered the United States on or after August 22, 1996, are barred for the first five years after they become "qualified immigrants" unless "exempt."

Supplemental Security Income

Open only to those qualified immigrants who entered the United States before August 22, 1996, and who are "exempt." However, persons receiving Supplemental Security Income on August 22, 1996, are grandfathered regardless of their current immigration status and may continue receiving these benefits for which they qualified under prior law.[4]

Persons who first entered the United States on or after August 22, 1996, are barred for the first five years after they become "qualified immigrants" unless "exempt."

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[1] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRA]: Interpretation of Federal Means-Tested Public Benefits, 62 Fed. Reg. 45256 (Aug. 21, 1997). Exempt groups include veterans and active-duty military personnel and their spouses, unremarried surviving spouses or children, refugee categories, persons who have one of the following immigration statuses—refugee, asylee, withholding or removal/deportation, Amerasian immigrants, and Cuban and Haitian Entrants; individuals who meet the 40-quarters exemption and who are now lawfully admitted for permanent residence or are qualified aliens who entered the United States before August 22, 1996 (qualified immigrants who entered the United States after August 22, 1996, and became qualified immigrants after that date are barred from access to benefits for five years after becoming qualified aliens); and Native Americans born outside the United States. National Immigration Law Center, Immigrant Eligibility for Public Benefits (chart) (Dec. 1998).

[2] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 401, Pub. L. No. 104-193, 110 Stat. 2105, 2261, 8 U.S.C. 1611 (Aug. 22, 1996).

[3] Agriculture Research, Extension, and Education Reform Act of 1998, tit. V, Pub. L. No. 105-185, 112 Stat. 523. Under this amendment, when battered immigrants and their children are both qualified aliens eligible to receive federal public benefits only qualified alien children may receive food stamps.

[4] Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, § 2, 112 Stat. 2926, 2926.

tested public benefits at the end of the five years, unless a state adds restrictions on immigrant access to the benefits.

"Qualified immigrants" who entered the United States after August 22, 1996, may, however, receive benefits from programs not deemed federal means-tested benefits while they are subject to the five-year bar. The federal public benefits that "qualified immigrants" who entered the United States on or after August 22, 1996, may receive include ones listed in table 2.

C. State and Local Public Benefits

The PRA significantly restricted the ability of states and local governments to provide benefits to immigrants who do not fall into one of the following cate-

Table 2.—Federal Public Benefits and Community Programs Available to All Qualified Immigrants

Federal Public Benefits[1]

Medicaid
Subsidized housing program
Social security
Head Start
Elementary and secondary school education
Postsecondary education loans and grants
Social services block grants
State Child Health Insurance Program
Administration on Developmental Disabilities
Independent living program
Low-Income Home Energy Assistance program
Title XX Block Grant funds
Immunizations, testing, and treatment of communicable diseases
Short-term noncash disaster relief
School lunch and breakfast programs
Child nutrition programs
Title IV foster care and adoption assistance payments (if parents are "qualified immigrants")
Job Opportunities for Low-Income Individuals

Community Programs

Community Programs that do not condition assistance on income/resources and are necessary to protect life and safety.

[1] Other federal public benefits include Adult Programs/Payments to Territories, Agency for Health Care Policy and Research Dissertation Grants, Child Care and Development Fund, Clinical Training Grant for Faculty Development in Alcohol and Drug Abuse, Health Profession Education and Training Assistance, Mental Health Clinical Training Grants, Native Hawaiian Loan Program, Refugee Cash Assistance, Refugee Medical Assistance, Refugee Prevention Health Services Program, Refugee Social Services Formula Program, Refugee Social Services Discretionary Program, Refugee Unaccompanied Minors Program, Refugee Voluntary Agency Matching Group Program, Repatriation Program, and Residential Energy Assistance Challenge Option. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRA]: Interpretation of "Federal Public Benefit," 63 Fed. Reg. 41658, 41660 (July 27, 1998).

gories: "qualified immigrants," nonimmigrant as defined by the INA, or parolees for less than one year under section 212(d)(5) of the INA.[43]

Prior to the PRA, local governments could grant access to general assistance and state-funded benefit programs to battered undocumented immigrants who were not qualified to receive federal benefits. As a result of PRA, states may grant benefits to undocumented or other not qualified immigrants only if the state legislature passes a post-August 22, 1996, law authorizing immigrant access to these benefits.[44] States that had such laws in place before August 22, 1996, may not rely on preexisting laws to provide state benefits to immigrants.

[43] PRA § 411(a), 8 U.S.C. § 1621(c).
[44] *Id.* § 411(d), 8 U.S.C. § 1621(d).

The PRA definition of state benefits is similar to that of federal public benefits. However, the terms "federal public benefits" and "state public benefits" are mutually exclusive. State public benefits are defined as benefits provided by an agency of a state or local government (or by appropriated funds of a state or local government) to an individual, household, or family eligibility unit.[45] A state public benefit may be a grant or loan; a contract; a professional or commercial license; public or assisted housing; postsecondary education; food assistance; or a retirement, welfare, health, disability, or unemployment benefit; or any other similar benefit.

The following "qualified aliens" are eligible to receive any state public benefit, and the state may not impose any immigration restrictions:[46]

- Refugees, asylees, and those granted withholding of deportation under INA section 243 for the first five years after their date of admission (Medicaid is provided for the first seven years)
- Permanent resident immigrants who have worked for 40 quarters as defined by the Social Security Act and their spouses or children who may use the lawful permanent resident's 40 quarters to qualify
- Immigrants who are veterans, or on active duty, or their spouses or dependent children
- Spouses and children of U.S. citizens who may use their U.S. citizen spouses' or parents' 40 quarters to qualify

D. Supplemental Security Income

After the PRA was enacted, an otherwise eligible person could be denied SSI cash assistance solely on the basis of her immigration status. The Balanced Budget Act of 1997 restored eligibility for most categories of immigrants eligible before August 22, 1996, to receive SSI.[47] The only battered immigrants currently eligible to receive SSI are those who were lawful permanent residents and were receiving SSI on August 22, 1996, and those who fit into one of the other categories of eligible immigrants. This is a very small number of cases.

The best chance most battered immigrants may have to obtain SSI is if they can qualify for the category of 40 quarters work credit. They would qualify only if they, their spouses, or their parents have worked for 40 quarters (see sec. II). Some states have created state programs to provide state benefits to immigrants who are no longer eligible to receive SSI.[48]

E. Food Programs

Food stamp eligibility for most noncitizens was eliminated by the PRA as of August, 22, 1996. The subsequent Balanced Budget Act restored the program for a small number of qualified immigrants. As with SSI, very few battered immigrant women qualify for food stamps. The best chance for battered immigrants to receive food stamps is to qualify for the 40-quarters category.

Both qualified and nonqualified immigrants retain eligibility for emergency food assistance. States can choose to provide state-funded food stamps to immigrants made ineligible by the welfare law. Sixteen states have chosen to do so (California, Colorado, Illinois, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Rhode Island, Texas, Washington, and Wisconsin). Some states restored benefits to immigrants who meet all the eligibility requirements for food stamps except for their immigration status. Others chose to provide food assistance for specified categories of immigrants—children, elderly, or the disabled—or chose to provide benefits to immigrants at a lower benefit level. Some states purchase federal food stamp coupons for legal immigrants (California, Florida, Maryland,

[45] *Id.* § 411(c)(1), 8 U.S.C. § 1621(c)(1).

[46] *Id.* § 412(b), 8. U.S.C. § 1622(b).

[47] Pub. L. No. 105-33, 110 Stat. 251; *Summary of the Immigrant Provisions of the Balanced Budget Act*, *in* NILC MANUAL, *supra* note 22, tab 1 at 1.

[48] Tanya Broder, *State and Local Policies on Immigrants and Public Benefits—Responses to the 1996 Welfare Law*, *in* NILC MANUAL, *supra* note 22, tab 2 at 1–42.

Nebraska, New Jersey, New York, Rhode Island, Washington). Other states run their own food stamp programs.[49]

E. TANF

TANF provides cash payments, vouchers, social services, and other types of assistance to families in need. The PRA gives states the option to grant TANF to immigrant families. Most states have decided to provide assistance to qualified immigrants who were in the United States before August 22, 1996, and many are also providing access to TANF for those who entered after August 22, 1996, following the expiration of the five-year bar.[50] Other states are offering state-funded TANF to certain categories of immigrants or battered immigrants who would otherwise have no access to benefits regardless of immigration status.[51]

Battered immigrants who were not required to file affidavits of support because they are self-petitioners and battered immigrants with new I-864 affidavits of support are exempt from deeming. Other immigrants who apply for TANF and other public benefits are subjected to "deeming restrictions"; this may make them ineligible for benefits until they become U.S. citizens or have worked for 40 quarters. Some battered immigrants are among the immigrant groups exempted from deeming (see sec. II.D).

The FVO in the PRA permits states to grant "good-cause waivers" of certain TANF program requirements.[52] Under the FVO states are required to identify victims of violence, conduct individual assessments, and develop temporary safety and service plans in order to protect battered immigrants from "immediate dangers" and to "stabilize their living situations and explore avenues for overcoming dependency."[53] State authorities are required to maintain the confidentiality of the victims. These FVO waivers are to be temporary in nature, but the actual length is defined broadly as "so long as necessary."[54] This definition gives welfare administrators the discretion to determine the period the waiver will apply and renew the waiver on a case-by-case basis.[55]

Advocates should work to ensure that their states adopt the FVO. Under HHS regulations, states that adopt the FVO do not have to pay penalties if they do not meet work targets or exceed time limitations because of waivers granted to battered women.[56] Only states that formally choose the FVO will be allowed to eliminate cases of battered women from the calculations states must submit to the federal government on work requirements and time limitations. The state must include the FVO in its state TANF plan to avoid penalties.

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[49] *See* Food Research & Action Ctr., *State Strategies to Assist Legal Immigrants Losing Federal Food Stamp Benefits*, *in* NILC MANUAL, *supra* note 22, tab 3A at 19–22.

[50] Immigration Policy Project, National Conference of State Legislatures, *Temporary Assistance for Needy Families: Welfare Reform and Immigrants*, *in* NILC MANUAL, *supra* note 22, tab 3E-1.

[51] Pre-PRA, those who were permanently residing in the United States under color of law (PRUCOLs) were eligible to receive federal public benefits. This group consisted of immigrants whom the Immigration and Naturalization Service (INS) knew were in the United States. The PRA cut off access to federal public benefits for this group of immigrants, but several states have passed laws providing access to state-funded Temporary Assistance for Needy Families (TANF) for PRUCOLs. *See States Providing Benefits to Immigrants Under 1996 Welfare & Immigration Laws—State Responses*, *in* NILC MANUAL, *supra* note 22, tab 2 at 1, 14.

[52] PRA § 402(a)(7), 8 U.S.C. § 1612(a)(7).

[53] Temporary Assistance for Needy Families Program, 62 Fed. Reg. 62124, 62128 (1997) (to be codified at 40 C.F.R. pts. 270-75) (proposed Nov. 20, 1997).

[54] 42 U.S.C. § 607(a)(7).

[55] Temporary Assistance for Needy Families Program, 62 Fed. Reg. at 62131 (to be codified at 45 C.F.R. § 270.30).

[56] *Id.*

G. Medicaid

Immigrants who previously received Medicaid under the Aid to Families with Dependent Children program as of July 16, 1996, retain Medicaid eligibility. The Health Care Financing Administration of HHS further confirms that an "immigrant who loses SSI cash benefits would continue to be eligible for Medicaid until the State conducts a Medicaid eligibility redetermination . . . and has found that the individual does not qualify for Medicaid by any other means."[57] Thus immigrants who lose SSI benefits due to restrictions based on their immigration status may also ultimately be denied Medicaid.

A state may choose to deny Medicaid to qualified immigrants who were in the United States before August 22, 1996.[58] To do so, the state must file a state plan amendment with the Health Care Financing Administration.[59] However, most states have continued offering Medicaid benefits to qualified immigrants who entered the United States before August 22, 1996. A few states provide full medical services to immigrants. Others have funded medical assistance for specific purposes, including prenatal care, nursing home care, child care, and long-term care or residential facility care.[60] Only Wyoming has chosen to file an amendment stating that it will deny Medicaid to qualified immigrants who entered the United States before August 22, 1996.[61] States may not use Medicaid funds for immunizations or for testing and treatment of communicable diseases for nonqualified immigrants. To determine whether an immigrant is eligible for TANF or Medicaid, attorneys need to know their particular state's laws concerning these benefits.

H. Public Housing

Battered immigrant women who are or become "qualified immigrants" are eligible to receive public or assisted housing.[62]

However, while the PRA and IIRAIRA clearly grant access to publicly assisted housing for "qualified immigrants," including battered immigrants, the U.S. Department of Housing and Urban Development has not yet amended its regulations to reflect these laws. Since the department does not directly administer its programs on a state or local level, local housing administrators may be unaware that certain battered immigrants are newly eligible for housing benefits. Attorneys or trained advocates need to accompany battered "qualified immigrant" applicants to housing interviews to ensure that they are granted access to this public benefit.

An immigrant with a pending VAWA application may have problems reserving a place on a housing waiting list if she does not have a social security number. Public housing authorities frequently use social security numbers to reserve a place in the waiting line for a housing unit. Women can obtain an Internal Revenue Service taxpayer number, which can be used in place of a social security number. The rules of the relevant state housing department state whether this step is necessary.[63]

Some battered immigrant women already receiving public or assisted housing benefits on August 22, 1996, may be able to continue receiving housing benefits. The PRA affects only new applicants requesting benefits after August 22, 1996. Some battered immigrants may be living

[57] Letter from U.S. Dep't of Health & Human Servs., Health Care Fin. Admin., to State Medicaid Directors (Oct. 4, 1996).

[58] PRA § 402(b)(1), (3), 8 U.S.C. § 1621(b)(1), (3).

[59] *Id.* § 402(b), 8 U.S.C. § 1612. Catholic Legal Immigration Network & National Immigration Law Center, *supra* note 22, *in* NILC MANUAL tab 1 at 16.

[60] Broder, *supra* note 48, *in* NILC MANUAL tab 2 at 5–6, 27–41.

[61] Catholic Legal Immigration Network & National Immigration Law Ctr., *supra* note 22, *in* NILC MANUAL tab 1 at 16.

[62] 8 U.S.C. § 1641(c)(2)(A).

[63] Conversation with Patty Grogan, Refugee Project Policy Coordinator, State of Florida (Apr. 22, 1999).

MARILYN NOLT

in public or assisted housing with their abusers, and the battered immigrant woman's actions in a domestic violence case may affect her continued access to public or assisted housing.

A battered immigrant woman who is qualified for public or assisted housing apart from her abuser may continue to receive public or assisted housing because she is a qualified immigrant under the PRA and she already lives in the unit. If she is residing in that unit with her abuser, she should obtain a protection order removing her abuser from the public or assisted housing unit. After the abuser is removed, attorneys can work with local housing authorities to transfer the unit to the battered immigrant's name if she is a "qualified immigrant." This prevents her from having to reapply for public housing.

If a battered immigrant woman who is not a qualified immigrant is living with her abuser and another qualified family member who is a member of her family, the battered immigrant woman should be able to remain in the housing unit. She should also be able to obtain a protection order removing her abuser from the family home, provided that the other qualified immigrant will allow her to continue living there. If the other qualified immigrant is her family member, this should not be a problem. If that family member is a relative of the abuser, this may be problematic. Battered immigrants who are dependent on their abuser or their abuser's family to remain in public or assisted housing may consider obtaining a protection order allowing him to reside there but prohibiting him from physically abusing her.

An undocumented battered immigrant woman living with and married to a U.S. citizen or a lawful permanent resident abuser may wish to consider preparing and submitting a VAWA application setting forth a prima facie VAWA case. Once she has received a prima facie determination making her a "qualified immigrant," she should obtain a protection order removing her abuser from the public or assisted housing unit she shares with him. If the parties are not married and are cohabiting, the undocumented battered immigrant would be required to leave the housing unit and seek alternate housing.

IV. Not-Qualified Immigrants

Generally "not qualified immigrants" are not eligible for federal or state public benefits.[64] Unfortunately some battered immigrants who are legally entitled under VAWA to access public benefits face procedural barriers due to how INS has been processing VAWA applications. Groups of battered immigrants who may not be able to access public benefits include

[64] The definition of which programs are considered "federal, state, or local public benefits" has not been settled. Until then, attorneys are encouraged to urge benefit providers to follow the letter of the law narrowly.

- battered immigrant self-petitioners who filed VAWA cases at their local INS district office or regional service center before May 1997[65]

- battered immigrant self petitioners who filed self petitions with the Vermont Service Center before June 1, 1997[66]

- battered immigrant self petitioners who filed self-petitions with the Vermont Service Center without the assistance of an attorney or trained advocate and failed to include sufficient evidence in their self-petition to be awarded a prima facie determination[67]

- battered immigrants who qualify only for VAWA cancellation of removal but who have been unable to file for this relief because INS has not placed them in removal (also known as deportation) proceedings.

Both undocumented battered immigrants who do not qualify to file a self-petition to attain lawful permanent residency or do not qualify to file for cancellation of removal through VAWA and battered immigrants who qualify for VAWA protection but who face procedural barriers to access to public benefits are still eligible to receive a limited set of services and benefits funded by state and federal governments.

A. Programs and Benefits

Several federal public benefits are not subject to restrictions on the basis of immigration status and are therefore available to all immigrants. Examples include emergency Medicaid; short term, in kind emergency disaster relief programs; public health assistance for immunizations and for testing and treatment of communicable diseases; school lunch and breakfast programs; programs and services at the community level necessary for the protection of life and safety; and programs for housing or community development assistance to the extent that the immigrant is receiving such assistance as of August 22, 1996.[68]

Furthermore, all immigrants have access to benefits provided by organizations that are both nonprofit and charitable. These organizations are exempt from immigration status verification and reporting even if they receive federal, state, or local funding.[69] Amending the PRA, IIRAIRA eliminated the requirement that nonprofit charitable organizations either seek an applicant's confirmation that she is a qualified immigrant or have a separate entity verify the applicant's status before providing federal, state, or local benefits.[70] Thus nonprofit charitable organizations providing federal, state, or local public benefits are not required to deter-

[65] Since all cases have been transferred to the INS Vermont Service Center as of spring 1999, applicants in this category should request a prima facie determination from the Vermont Service Center.

[66] *Id.*

[67] Current procedures do not allow for the submission of additional evidence and having the prima facie determination made once denied at the initial review of the petition. Applicants must wait until the self-petition is finally adjudicated. In cases in which the prima facie determination is denied INS usually issues a notice to the applicant that additional evidence is needed to support the self-petition. The applicant has 90 days to submit additional evidence along with a copy of the notice of action; the submission must be received by the INS office specified in the notice by the INS Vermont Service Center. Attorneys should not assume that a continuance is granted unless they receive written evidence of the continuance. If these rules are not strictly followed, the self-petition may be denied for the self-petitioner's failure to pursue the application actively. After submission of the evidence, INS rules on the self-petition.

[68] PRA § 401(b), 8 U.S.C. § 1611(b). Emergency medical assistance must be provided to all immigrants regardless of their status. Emergency Medicaid is available in all cases where the patient needs treatment for medical conditions with acute symptoms that could jeopardize the patient's health, impair bodily functions, or cause dysfunction of any bodily organ or part. 42 U.S.C. § 1396b(v)(3). This definition includes all labor and delivery.

[69] Interim Guidance, *supra* note 4, at 61345–46; National Immigration Law Ctr., *Verification, Reporting and Confidentiality*, *in* NILC MANUAL, *supra* note 22, tab 4F at 1–2.

[70] IIRAIRA § 508, Pub. L. No. 104-208, 110 Stat. 3009, 3673, 8 U.S.C. § 1642(d).

mine, verify, or otherwise require proof of an applicant's eligibility for such benefits on the basis of the applicant's citizenship or immigration status.[71] Nonprofit entities may not be penalized for failing to verify citizenship or status or for providing federal public benefits to an individual who is not a U.S. citizen, U.S. noncitizen national, or qualified immigrant.[72] Nonprofit service agencies are barred from providing services that are defined as "federal public benefits" only when an agency that is not exempt from verification requirements (such as a state government agency) has performed verification for benefits being provided by the nonprofit agency.[73]

States may also opt under certain nutrition programs to assist any documented or undocumented immigrant without regard to immigration status.[74]

B. Attorney General's List

The PRA authorized the U.S. Attorney General to designate particular programs that are open to all persons without regard to immigration status. To be exempt from immigration restrictions, the programs designated by the U.S. Attorney General must be in-kind services, provided at the community level, not based on the individual's income or resources, and necessary to protect life or safety.[75]

The U.S. Attorney General has designated the following programs as available to all without regard to immigration status: crisis counseling and intervention programs; services and assistance relating to child protection; adult protective services; violence and abuse prevention; victims of domestic violence or other criminal activity; treatment of mental illness or substance abuse; short-term shelter for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children; programs to help individuals during periods of adverse weather conditions; soup kitchens; community food banks; senior nutrition programs and other nutritional programs for persons requiring special assistance; medical and public health services and mental health disability or substance abuse assistance necessary to protect life and safety; and activities designed to protect the life and safety of workers, children, and youths or community residents.[76]

Furthermore, states have the option to choose to offer state-funded benefits to persons who are not qualified immigrants.[77] After August 22, 1996, several states have passed laws that authorize state-funded benefit programs for certain categories of immigrants. Access to these public benefits is important for battered immigrants who may not qualify for immigration relief under VAWA. Many states that do offer access to these benefits do so with restrictions.

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[71] However, if an organization required to verify eligibility presents verification to the nonprofit charitable organization about the not-qualified immigration status of an undocumented person, the nonprofit charitable organization may not continue providing federal public benefits to that undocumented individual. Service to that immigrant would have to be provided with other funds. That attorneys carefully interview immigrant clients to determine eligibility before accompanying them to apply for any public benefits is very important because benefits-granting agencies must verify the applicant's status. If your client is applying for benefits for her child, only the immigration status of the child is to be verified. Verification of Eligibility for Public Benefits, 63 Fed. Reg. 41662, 41664 (to be codified at 8 C.F.R. pt. 104) (proposed Aug. 4, 1998).

[72] Interim Guidance, *supra* note 4, at 61346.

[73] *Id.* at 61345–46.

[74] PRA § 742, 8 U.S.C. § 1615.

[75] Interim Guidance, *supra* note 4, at 61344.

[76] This definition for medical and health services includes immunizations for children and adolescents; AIDS and HIV services and treatment; tuberculosis services; and sexually transmitted diseases. See Claudia Schlosberg, *Not Qualified Immigrants' Access to Health Services After the Welfare Law*, *in* NILC MANUAL, *supra* note 22, tab 3B at 13.

[77] PRA § 411(d), 8 U.S.C. § 1621(d). See discussion of state-funded benefits above.

C. Verification Procedures

The U.S. Attorney General requires federal public benefit providers (such as state TANF agencies) to adopt a four step procedure for verifying eligibility for public benefits under the PRA.[78] This procedure facilitates access to benefits for those who qualify while protecting immigrants against discrimination and disclosure of immigration status when disclosure is not specifically required by law. By becoming familiar with these procedures, attorneys for battered immigrants can ensure that their clients safely obtain the benefits that they and their children need while ensuring that the law and this four-step process are followed.

Although benefits are supposed to be available to certain battered immigrants (including VAWA self-petitioners), few welfare office staff are knowledgeable about battered women's rights to receive benefits. Many are not familiar with the U.S. Attorney General Guidance. Battered immigrants need the assistance of skilled advocates if they are to obtain benefits. Attorneys who assist battered immigrants applying for benefits on behalf of their U.S. citizen or qualified immigrant children must be able to protect immigrant mothers from divulging unnecessary immigration-status information about themselves. Battered immigrants should also be advised that accessing public benefits may affect their immigration case.[79]

First, a federal public benefit provider must determine whether the benefit program (or agency) actually provides a "federal public benefit" subject to PRA's verification requirement.[80] The federal agency must consider whether the benefit comes within the statutory definition of "federal public benefit" and whether it falls within one of the PRA's enumerated exceptions.[81] If the federal program does not provide a "federal public benefit," or is exempt from verification requirements, that program is not required to verify an applicant's citizenship or status and should not conduct such verification.[82]

Second, after confirming that the program offers a federal public benefit, the benefit provider must determine whether the applicant is otherwise eligible for benefits under general program requirements.[83] The benefit provider must make all other program eligibility determinations before verifying immigration status. The agency may move on to verification of immigration status only after determining that the applicant is otherwise eligible for the benefit.[84] If the applicant does not otherwise qualify, there is no need to verify status.

Third, the federal public benefit provider must verify the applicant's immigration status.[85] To comply with nondiscrimination laws, verification should not be sought unless the benefits are contingent upon it. Verification should be made only of the person who will actually be receiving benefits. If a person is applying on behalf of another applicant (mother for child applicant), citizenship or status verification under federal law should be undertaken only for the person who will actually be receiving the benefits (child applicant).[86]

[78] Immigration & Naturalization Serv., Verification of Eligibility for Public Benefits, AG Order No. 2170-98, 63 Fed. Reg. 149 (Aug. 4, 1998); Interim Guidance, *supra* note 4, at 61346 *et seq.*

[79] See discussion of public charge below.

[80] Interim Guidance, *supra* note 4, at 61346.

[81] *Id.*

[82] *Id.* at 61344, 61346, 61349.

[83] *Id.* at 61346–47.

[84] *Id.* at 61346–47. Only in the relatively rare instances in which verification of program eligibility would be considerably more complex and time-consuming than verification of immigration status may the order be reversed. If an agency routinely reverses the order of the inquiry, it risks violating antidiscrimination laws.

[85] *Id.* at 61347–49.

[86] *Id.* at 61347.

Fourth, the provider must verify the applicant's eligibility for benefits under the PRA.[87] A number of federal public benefits impose more stringent immigrant eligibility requirements. Each of these programs requires immigrants to meet additional tests to receive assistance. Attorneys for battered immigrant women should review specific agency regulations for these programs as they become available.[88]

Benefit-granting agencies are required to process all applications by asking these eligibility questions in this order. When this procedure is followed, the benefits worker may never ask questions about the immigration status of an applicant until the worker has determined that the applicant is applying for a "federal public benefit" and that, absent any issues of immigration status, the applicant otherwise qualifies for the public benefit. Benefit workers may never inquire into the immigration status of any immigrant who is not seeking benefits on his or her own behalf.

V. "Public Charge" Concerns

Since Congress expressly included in IIRAIRA provisions that make battered immigrant women eligible for public benefits, these persons should not be simultaneously denied lawful permanent residency status because they used the very benefits Congress authorized them to access. If battered women need to rely temporarily on public benefits to escape abuse, self-petitioners, when they adjust their status or seek admission to the United States, should not be penalized for using the benefits necessary to protect their health and safety. Advocates for battered immigrants have sought from INS a ruling clarifying that battered immigrants will not be subjected to "public charge" determinations when they apply for lawful permanent residency. Battered immigrants with an approved INS self-petition should be entirely exempt from the public charge ground of inadmissibility. Any other interpretation would be inconsistent with congressional intent and would frustrate the VAWA immigration provision and IIRAIRA welfare provision goals.

On May 26, 1999, INS issued proposed regulations on the issue of public charge.[89] While these regulations are helpful to a certain extent for some battered immigrants, the Clinton Administration is still considering whether battered immigrants who apply for relief under VAWA will be exempt from or subject to a public charge determination.[90] Until its decision attorneys representing battered immigrants should become familiar with the public charge proposed regulations that apply to all immigrants.

The proposed regulation clarifies the circumstances under which a noncitizen can receive public benefits without becoming a public charge. Noncash benefits and special purpose cash benefits that are not intended for income maintenance are not to be considered in making a public charge determination.[91] Although some of these programs may provide cash benefits, they are not relevant to the public charge determination if the purpose of such benefits is not to maintain income but to avoid the need for ongoing cash assistance. Examples of benefits not relevant to public charge include but are not limited to food stamps, Medicaid, nutrition programs, housing benefits, child care services, transportation vouchers, and job training programs.[92]

The rule also states that an alien's mere receipt of cash assistance for income maintenance, or institutionalization for long term care, among the criteria for

[87] *Id.* at 61349–50.

[88] National Immigration Law Ctr., *supra* note 69, *in* NILC MANUAL tab 4F at 1–2.

[89] Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28675 (1999) (to be codified at 8 C.F.R. pts. 212, 237) (proposed May 26, 1999).

[90] Immigration & Naturalization Serv., Questions and Answers—Public Charge, Question 32 <www.Ins.usdoj.gov/public_affairs/news_releases/public_cqa.htm>.

[91] Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. at 28681–82 (1999) (to be codified at 8 C.F.R. § 212.102, 212.103(c), 212.05) (proposed May 26, 1999).

[92] *Id.* at 28682 (to be codified at 8 C.F.R. § 212.105).

being deemed a public charge, does not automatically make him or her inadmissible, ineligible to adjust status to legal permanent resident, or deportable on public charge grounds. Temporary reliance on public benefits does not necessarily result in a determination that the battered immigrant is a public charge.[93]

The law requires that INS and the consular offices of the U.S. Department of State consider additional issues including the totality of the applicant's circumstances, the duration and circumstances under which the benefits were received, whether the immigrant's spouse, parent, or child received public benefits.[94] Cash benefits received by a child or other relative is not attributed to a battered immigrant or other immigrant unless the benefits represent the sole support for the family.[95] Each determination is made on a case-by-case basis. Before an immigrant can be denied admission to the United States or denied adjustment of status to legal permanent residency for public charge reasons, INS or the immigration judge must determine that the person is likely to become a public charge. Factors such as age, health, family status, assets, resource and financial status, and education and skills must be considered.[96]

Although self-petitioning battered immigrant women are exempt from the requirement of providing an affidavit of support, until INS issues further regulations that specifically address public charge in the cases of battered immigrant women, they may be required to show that they are not likely to become a public charge in the future. Under the proposed rule, they need to show that they have not become or are not likely to become "primarily dependent on the government for subsistence as demonstrated by receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense."[97]

Until the Justice Department issues further regulations on public charge and battered immigrants, attorneys working with battered immigrants who cannot clearly meet the exceptions to the public charge definition set out in the proposed public charge rule should help them use benefits and move off welfare as quickly as possible. Once the client's self-petition has been approved by INS, the battered immigrant should move quickly to obtain work authorization and employment by the date of her adjustment interview. Battered immigrants who received cash benefits for themselves in order to flee their abuser or who received for their children public benefits as the sole source of household support should, if possible, delay filing for adjustment of status until they have secured employment. If this is not possible, battered immigrants on public benefits should be prepared to demonstrate that their use of benefits is temporary and has been necessary to help them become self-reliant apart from their abusers. Attorneys should present evidence that the battered immigrant's dependence on public benefits is tempo-

If battered women need to rely temporarily on public benefits to escape abuse, self-petitioners, when they adjust their status or seek admission to the United States, should not be penalized for using the benefits necessary to protect their health and safety.

[93] *Id.* at 28683 (to be codified at 8 C.F.R. § 212.10(b)).

[94] *Id.* at 28678, 28682–83 (to be codified at 8 C.F.R. § 212.10(), 212.10(b), 212.10(a)). Benefits provided to a family member will not make an immigrant inadmissible unless the evidence shows that the immigrant individually is likely to become a public charge.

[95] *Id.* at 28683, 28686 (to be codified at 8 C.F.R. §§ 212.10(b), 237.18(b)).

[96] Immigration and Nationality Act § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B).

[97] Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. at 28677 (1999) (proposed May 26, 1999).

rary and that the battered immigrant will not be a public charge in the future.[98]

VI. Conclusion

Affording battered women access to the welfare safety net is understood to be essential to fulfilling VAWA's original intent. Battered immigrant spouses and children will be free to cooperate in their abuser's prosecution and take action to protect themselves and their children from ongoing abuse only if they can meet their basic living needs after fleeing from their abuser's economic control. To access critical public benefits, battered immigrants need assistance from knowledgeable advocates who can help them file applications for VAWA immigration benefits, document the abuse they have suffered, and help them safely apply for public benefits for themselves and their children.

[98] *See* Gail Pendleton, *Immigration Relief for Women and Children Suffering Abuse, Chapter VII*, *in* MINTY SIU CHUNG ET AL., DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 81–82 (Deena Jang et al. eds., 1997).