Department of Health and Human Services Centers for Medicare and Medicaid Services "Questions and Answers on the Five-Year Bar,"

Q3. What is the statutory authority for the five-year bar, which prohibits certain immigrants from receiving Medicaid or State Children's Health Insurance Program (SCHIP) benefits for five years?

Section 403 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) provides that certain immigrants who enter the United States on or after August 22, 1996 are not eligible to receive federally-funded benefits, including Medicaid and the State Children's Health Insurance Program (SCHIP), for five years from the date they enter the country with a status as a "qualified alien."

Q4. Which immigrants are affected by the five-year bar?

The five-year bar only applies to qualified aliens who entered the United States on or after August 22, 1996. In addition, several categories of qualified aliens are exempt from the bar, regardless of their date of entry into the country. (The exemptions are discussed in question 5.) As a practical matter, the following qualified aliens are subject to the five-year bar to eligibility for both Medicaid and SCHIP (1) if the immigrant entered the United States on or after August 22, 1996 and (2) unless the immigrant qualifies for one of the exemptions discussed in question 5:

- Lawful permanent residents (LPRs);
- Aliens granted parole for at least one year;
- Battered aliens.

In addition, the following qualified aliens are subject to the five-year bar to eligibility for separate state programs under SCHIP, unless the immigrant qualifies for one of the exemptions discussed in question 5:

- Members of a Federally-recognized Indian tribe; and
- American Indians born in Canada to whom §289 of the INA applies.

Q5. Which immigrants are exempt from application of the five-year bar?

The following qualified aliens are exempt from the five-year bar to eligibility for both Medicaid and SCHIP:[1]

- Refugees;
- Asylees;
- Cuban and Haitian Entrants;
- Victims of a severe form of trafficking;
- Aliens whose deportation is being withheld;

[1] Note that aliens granted conditional entry under §203(a)(7) of the INA in effect before April 1, 1980 are not exempt from the five-year bar *per se*. However, as a practical matter the five-year bar never will apply to such aliens, since, by definition, they entered the United States and obtained qualified alien status prior to August 22, 1996.

This project was supported by Grant No. 2005-WT-AX-K005 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this web library and its publications are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

- Qualified aliens who also are (1) an honorably discharged veteran, (2) on active duty in the U.S. military or (3) the spouse (including a surviving spouse who has not remarried) or unmarried dependent child of an honorably discharged veteran or individual on active duty in the U.S. military;
- Aliens admitted to the country as an Amerasian immigrant;[2]
- Legal permanent residents who first entered the country under another exempt category (i.e. as a refugee, asylee, Cuban or Haitian entrant, trafficking victim, or alien whose deportation was being withheld) and who later converted to LPR status.

In addition, the five-year bar to eligibility for Medicaid only (including Medicaid expansion programs under SCHIP) does not apply to

- Members of a Federally-recognized Indian tribe, as defined in 25 U.S.C. 450b(e); and
- American Indians born in Canada to whom §289 of the Immigration and Nationality Act applies.

Q6. Does the five-year bar apply to immigrants who are applying for coverage of emergency treatment only?

No. The five-year bar never applies to immigrants who are applying for treatment of an emergency medical condition only. Thus, all immigrants – both qualified and non-qualified aliens as well those who are residing in the country in an undocumented status – may be eligible for treatment of an emergency medical condition only, provided that they otherwise meet the eligibility criteria for the state's Medicaid program.

Q7. Does the five-year bar apply to immigrants who entered the United States prior to August 22, 1996, but obtained qualified alien status on or after that date?

As a general rule, no. It is the date of entry into the United States which determines the operation of the five-year bar. Thus, the five-year bar generally does not apply to immigrants who entered the United States prior to August 22, 1996, but obtained qualified alien status on or after that date. The only exception is for immigrants who did not remain "continuously present" in the United States from their last date of entry into the United States prior to August 22, 1996 until the date they obtain qualified alien status. "Continuous presence" is discussed in question 9.

Q8. What about undocumented immigrants who entered the United States prior to August 22, 1996, but obtained qualified alien status after that date?

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[2] Amerasian immigrants are not identified in the statute as a distinct group of qualified aliens. Rather, an Amerasian immigrant is, by definition, a legal permanent resident and therefore also a qualified alien. Thus, an LPR who also is an Amerasian immigrant is exempt from the five-year bar. The exemption from the five-year bar for Amerasian immigrants was added to PRWORA by §5306 of the Balanced Budget Act of 1997, P.L. 105-33. Note that Amerasians not admitted for permanent residence – e.g. students and tourists – are not qualified aliens and therefore are not eligible for any means-tested benefits.

Based on interim guidance issued by the U.S. Department of Justice (DOJ), immigrants who entered the country without proper documents as well as those who overstayed their visa are treated the same as those who entered and remain in the country with valid immigration documents. Thus, all immigrants who (1) entered the country prior to August 22, 1996 and (2) remained continuously present in the United States until becoming a qualified alien, are eligible for Medicaid immediately upon obtaining qualified alien status, provided that they otherwise are eligible for coverage under your state plan. See Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Act of 1996 62 *Federal Register* 61344 at 61414-61416 (November 17, 1997).

Q9. What does it mean to be remain "continuously present" in the United States?

To avoid application of the five-year bar, immigrants who entered the United States before August 22, 1996, but who obtain qualified alien status on or after that date, must remain "continuously present" in the country from their last date of entry into the United States prior to August 22, 1996 until they obtain qualified alien status. Any single absence from the United States of more than 30 days, or a total aggregate of absences of more than 90 days, is considered to interrupt "continuous presence." Once an immigrant obtains qualified alien status, he or she does not have to remain continuously present in the United States in order to avoid application of the five-year bar. "Continuous presence" is discussed in more detail in DOJ's Interim Guidance at 62 *Federal Register* 61415.

Immigrants who (1) entered the United States at some point prior to August 22, 1996 and (2) obtained qualified alien status on or after that date, but (3) did not remain continuously present in the United States from their last date of entry into the country prior to August 22, 1996 until they become a qualified alien, are not considered as having entered the United States prior to August 22, 1996. Accordingly, such immigrants are subject to the five-year bar.

Q10. When does the clock on the five-year bar begin to run?

If the five-year bar applies -- i.e. the immigrant does not meet one of the exemptions discussed in question 5 and entered the country on or after August 22, 1996 -- the clock on the five-year bar begins to run from the date the immigrant obtains qualified alien status.

Note that, once it is determined that the five-year bar applies, the immigrant's date of entry – whether in a documented or undocumented status – is irrelevant. Thus, unlike the determination of whether or not the five-year bar applies in the first place, the date on which the bar begins to run is not related to the date on which an immigrant first entered the United States.

Q11. How can states verify whether or not an immigrant is exempt from the five-year bar?

Exemptions from the five-year bar are discussed in question 5. Depending on the exemption claimed, states will need to follow different verification procedures.

Exemptions based on immigration status. Five of the exemptions from the five-year bar apply to immigrants in a specific immigration status: refugees, asylees, Cuban and Haitian entrants, aliens whose deportation is being withheld and Amerasian immigrants. Immigrants in any of these groups should possess an immigration document establishing their status, which can be verified with the INS in accordance with the procedure generally followed by the state to verify immigration status. Verification of immigration status is discussed in §3212 of the State Medicaid Manual.

Exemption based on veteran or active duty status. As discussed in question 5, also exempt from the five-year bar are veterans with an honorable discharge and immigrants on active duty as well as the spouse and dependent children of veterans and active duty personnel. Verification of honorable discharge status or active duty requires presentation of an original or notarized copy of the veteran's discharge certificate or current orders showing "Honorable" discharge from or active duty in the Army, Navy, Air Force, Marine Corps or Coast Guard. Neither discharge "Under Honorable Conditions" nor service in the National Guard satisfies this exemption. States should contact the local Veterans Affairs (VA) regional office if an applicant presents (1) documentation showing honorable discharge from, or active duty in, any other branch of the military; (2) documentation showing any other type of duty (e.g. "active duty for training") or (3) the state has any other reason to question whether or not an applicant satisfies the requirements for this exemption. Verification of veteran or active duty status is discussed in §3212.5 of the State Medicaid Manual. States may also consult Exhibit B to Attachment 6 of the Interim Guidance at 62 *Federal Register* 61413-61414.

Exemption for certain Native Americans. For purposes of Medicaid eligibility, American Indians born in Canada to whom §289 of the INA applies and members of a Federally-recognized tribe also are exempt from the five-year bar. Some American Indians born in Canada to whom §289 of the INA applies may have documentation establishing legal permanent residence status, which can be verified in accordance with the procedure generally followed by the state to verify immigration status. Alternatively, an applicant claiming to fall under this exemption could present a letter or other tribal document certifying at least 50% Indian blood, as required by §289 of the INA, combined with a birth certificate or other evidence of birth in Canada.

Applicants can establish membership in a Federally-recognized tribe by presenting a membership card or other tribal document demonstrating membership in an Indian tribe. If the applicant has no documentation, the state can verify membership by contacting the tribe in question.

Verifying Native American status is discussed in §3212.6 of the State Medicaid Manual as well as in §104.62 and §104.63 of the proposed regulations published by the Department of Justice on August 4, 1998 at 63 *Federal Register* 41685.

Victims of Trafficking. The Office of Refugee Resettlement (ORR) of the U.S. Department of Health and Human Services has been given authority to certify that an individual is a victim of a severe form of trafficking. ORR issues a letter to all individuals so certified. Thus, to verify an immigrant's status as a victim of a severe form of trafficking, so as to establish an exemption from the five-year bar, the immigrant should present a certification letter from ORR. The letter will contain a certification date,

which can be treated as the date of entry for eligibility purposes, as well as an expiration date. Additional information on the eligibility of trafficking victims for benefits can be found in a letter on the Trafficking Victims Protection Act of 2000 from the ORR dated May 3, 2001.

Q12. How can states verify an immigrant's date of entry into the United States?

States have discretion to establish reasonable verification procedures for determining an immigrant's date of entry into the United States. However, providing documentation can be difficult for some immigrants – e.g. battered aliens -- and we encourage states to design verification processes that can accommodate the difficulty such immigrants may encounter in providing documentation. Following are ways states may be able to verify an immigrant's date of entry into the United States.

a. Reliance on Immigrant's Immigration Document. Most immigrants legally present in the United States must carry an immigration document issued by the Immigration and Naturalization Service (INS), which also generally will contain the date an immigrant entered the country or adjusted to the immigration status reflected by the document. States often will be able to rely upon the date found on the individual's immigration document to establish the date of entry. Sometimes, however, states will need to pursue additional verification, as discussed in paragraph b, below.

As explained in answer to question 4, four groups of immigrants are potentially subject to the five-year bar: (1) certain legal permanent residents (LPRs); (2) aliens granted parole for at least one year; (3) certain battered aliens, as well as the parents and/or child of certain battered aliens; and (4) certain non-citizen Native Americans.

Most LPRs possess INS form I-551 (a "green card"). LPRs who have recently arrived in the United States and who have not yet received their green card will have a temporary I-551 stamp either in their passport or on INS Form I-94. Aliens granted parole for at least one year possess INS Form I-94, which will show the date of entry, a grant of parole under §212(d)(5) of the Immigration and Nationality Act, and a "date admitted to" being at least one year after the date of entry which is stamped on the I-94. (The "date admitted to" refers to the date on which the immigrant's legal status as a parolee terminates. The immigrant should either have left the country by that date, or have obtained another legal status.)

American Indians to whom §289 of the INA applies may have either a green card with the code S13 or a temporary I-551 stamp in a Canadian passport or on INS Form I-94, but others may not have any immigration documents. Similarly, battered aliens may or may not have a valid immigration document.

For immigrants with valid immigration documents, the date on the immigrant's immigration document often represents the immigrant's first date of entry into the United States. In the case of LPRs who obtained such status at the time of their admission into the United States, for example, the date on their green card or on the I-551 stamp in their passport or I-94 usually will reflect their date of entry.

In some cases, however, an immigrant may be present in the United States, but not as an LPR, depart to be issued an immigrant visa at a consulate overseas and then return to the

United States in LPR status. For these immigrants, the date on their green card or on the I-551 stamp will reflect the date of entry into the United States in LPR status, not the immigrant's original date of entry. Similarly, for LPRs who adjusted to LPR status sometime after entering the United States, the date on their green card reflects the date the adjustment of status was approved, not the original date of entry.

For purposes of determining the applicability of the five-year bar, states can assume that the date on the immigrant's immigration document represents the date of entry if either:

- Such date is prior to August 22, 1996; or
- The immigrant states that such date is the date on which he or she first entered the country.[3]

b. Further verification required. If (1) the individual does not possess an immigration document or (2) the date on the immigrant's immigration document is on or after August 22, 1996 and the immigrant states that he or she entered the country prior to August 22, 1996, alternative verification is required. States can verify the initial date of entry into the United States by submitting to the Immigration and Naturalization Service INS Form G-845 and Form G-845 Supplement.[4]

States which verify immigration status through use of the INS' Systematic Alien Verification of Eligibility (SAVE) system as well as those that do not utilize SAVE can file the requisite forms with INS. Alternatively, states can provide immigrants with an opportunity to submit evidence of their claimed date of entry, such as pay stubs, a letter from an employer, or a lease or utility bill in the immigrant's name.

Q13. How can states verify whether an immigrant has been "continuously present" in the United States?

For most legal entrants, the INS maintains a record of arrivals to and departures from the country. Accordingly, states can verify continuous presence for most legal entrants by filing INS Form G-845 and Form G-845-Supplement with the INS. For some legal entrants, such as Canadian and Mexican border crossers, for whom the INS does not maintain an arrival and departure record, as well as for illegal entrants, states will have to develop an alternative method to verify continuous presence. For example, states could require such immigrants to provide documentation showing proof of continuous presence, such as a letter from an employer or a series of pay stubs or utility bills in the immigrant's name and spanning the period of time in question.

Q14. At the end of the five-year bar, are states required to cover the affected qualified aliens?

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[3] States must verify the authenticity and accuracy of the alien's immigration status with the INS through SAVE or the state's alternative immigration verification process, approved under a waiver granted by the Secretary of the U.S. Department of Health and Human Services.

[4] For most legal entrants, INS will have a record of the alien's initial date of entry. For some lawful entrants, such as legal Mexican or Canadian border crossers, and for illegal entrants, INS relies on self-reported information, requested when the alien applies for legal status.

The answer to this question differs for Medicaid (including Medicaid expansion programs under SCHIP) versus separate child health programs under SCHIP.

a. Medicaid and Medicaid expansion programs. Under PRWORA, states are required to provide Medicaid to certain qualified aliens who otherwise meet the eligibility criteria of the state's Medicaid program, unless subject to the five-year bar. The qualified aliens for whom coverage is mandatory include:

- Lawful permanent residents to whom 40 qualifying quarters of Social Security coverage can be credited;[5]
- Refugees, until 7 years after their date of entry into the United States;
- Asylees, until 7 years after the grant of asylum;
- Cuban and Haitian entrants, for 7 years after grant of that status;
- Victims of a severe form of trafficking;
- Individuals whose deportation is being withheld by the INS, for the first 7 years after grant of deportation withholding;
- Aliens admitted to the country as an Amerasian immigrant, for 7 years from the immigrant's entry into the United States;[6]
- Honorably discharged U.S. military veterans, active duty military personnel, and their spouses and unmarried dependent children;

In addition, as discussed in question 5, non-citizen Native Americans born outside of the United who either (1) were born in Canada and are at least 50% American Indian blood or (2) are members of a Federally-recognized tribe are eligible for Medicaid regardless of qualified alien status.

Coverage of all other qualified aliens is optional under Medicaid, including Medicaid expansion programs under SCHIP. Note, however, that states must provide Medicaid coverage either to all qualified aliens whose coverage is optional (and who otherwise meet the eligibility criteria of their Medicaid program) or to none; states cannot extend coverage only to some of the optional qualified aliens.

Thus, if a state has opted to cover optional qualified aliens under its Medicaid program, then, following expiration of the five-year bar, the state must extend coverage to any qualified alien who had been subject to that bar. If a state has not opted to extend Medicaid coverage to optional qualified aliens, then, following expiration of the five-year bar, the state must extend coverage to only to qualified aliens for whom coverage is otherwise mandatory.

b. Separate child health programs under SCHIP. Regulations governing separate child health programs at 42 CFR § 457.320(b)(6) prohibit states from denying eligibility to any child based on citizenship or nationality, to the extent that the child is a U.S. citizen, national or qualified alien. Thus, once the five-year bar expires, states must provide coverage to all otherwise eligible qualified aliens.

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[5] An LPR cannot be credited for any quarter worked after December 31, 1996 if the individual who worked such quarter received any Federal means-tested benefits during the quarter.

[6] See note 4.