

## **Public Benefits: What is “Deeming” and What Are its Exceptions**

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In some instances, as a condition of obtaining lawful permanent resident status, an immigrant is required to have a “sponsor” who agrees to financially support the immigrant.<sup>2</sup> In making this agreement, the sponsor signs an “affidavit of support.”<sup>3</sup> The term “deeming” refers to the procedure of combining an immigrant’s income with that of the immigrant’s “sponsor” for the purpose of determining the immigrant’s financial eligibility for a state or federal means-tested public benefit.<sup>4</sup> This fact sheet will describe who is subject to deeming, and who is not subject to it, with specific attention paid to the battered immigrant exception to deeming, which provides certain battered immigrants and the children included in their immigration applications greater access to the safety that comes with access to public benefits. The full range of deeming exceptions that are described in this fact sheet help ensure that all immigrant victims who are eligible for deeming exceptions receive them.

### **Who does deeming apply to?**

Deeming applies generally to applicants for immigration visas based upon, or that involve, family relationships, who are required to have a completed sponsor affidavit ( Form I-864) as part of their immigration application. Some immigrants are exempt from this requirement. The following categories of immigrants require sponsor affidavits as part of their immigration application and, as such, are generally subject to deeming<sup>5</sup>:

1. All family-based petitions for entry into the U.S.; and
2. Any employment-based petition in which a relative of the sponsored immigrant has an ownership interest of at least 5% in the sponsoring company

### **Who Does Deeming Not Apply to, and Who is Exempt from Deeming?**

Deeming does not apply to all immigrants, as not all immigrants are required to have sponsors, and there are several exceptions to deeming even for immigrants who are required to have sponsors.<sup>6</sup> **Deeming does not apply** to immigrants who fall into one or more of the following categories:

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<sup>2</sup> See Legal Services of Northern California, Neighborhood Legal Services of Los Angeles County, and the Western Center on Law and Poverty, *California Guide to Food Benefits*, available at: <http://foodstampguide.org/income-of-an-immigrants-sponsor/>. See also 8 U.S.C. § 1183; 7 C.F.R. § 273.4(c).

<sup>3</sup> See Center for Public Policy Priorities, *Immigrants and Public Benefits: Training for Community Service Providers* (Apr. 2004), available at: [http://www.powershow.com/view/3c5dd8-NjBjM/Immigrants\\_and\\_Public\\_Benefits\\_Training\\_for\\_Community\\_Service\\_Providers\\_San\\_Antonio\\_Texas\\_Bexar\\_County\\_Case\\_Management\\_Coalition\\_Wednesday\\_April\\_21\\_2004\\_Center\\_for\\_Public\\_Policy\\_Priorities\\_powerpoint\\_ppt\\_presentation](http://www.powershow.com/view/3c5dd8-NjBjM/Immigrants_and_Public_Benefits_Training_for_Community_Service_Providers_San_Antonio_Texas_Bexar_County_Case_Management_Coalition_Wednesday_April_21_2004_Center_for_Public_Policy_Priorities_powerpoint_ppt_presentation); See also 8 U.S.C. § 1183a(a)(1); See also 7 C.F.R. 273.4(c)(1).

<sup>4</sup> *Immigrants and Public Benefits*, supra note 2; 7 C.F.R. 273.4(c)(2).

<sup>5</sup> 8 C.F.R. § 213a.2(a)(2)(1); See also Community Health Advocates, *Immigrant Concerns: Public Charge, Sponsorship, and Verification of Status and Reporting Issues*, available at: <http://www.communityhealthadvocates.org/sites/communityhealthadvocates.org/files/images/Section%2011C.pdf>.

<sup>6</sup> *Id.*

1. Immigrants who are not required to have sponsors, including<sup>7</sup>
  - a. Refugees;
  - b. Asylees;
  - c. Parolees;
  - d. Cuban or Haitian entrants;
  - e. Individuals who were granted withholding of deportation under Section 243 of the Immigration and Nationality Act (INA); and
  - f. Certain battered immigrant spouses and children
2. Immigrants whose sponsors did not sign the modern Form I-864 affidavit of support, as that is the binding affidavit.<sup>8</sup> This form would not have been signed in the following situations:
  - a. If the immigrant obtained their green card prior to December 19, 1997; or
  - b. If the affidavit form signed was Form I-134, rather than the legally binding Form I-864.<sup>9</sup>
3. Immigrants who are sponsored by an organization as opposed to being sponsored by an individual.<sup>10</sup>
4. Immigrant children under the age of 18 (even if the child has a sponsor who signed Form I-864).<sup>11</sup>
5. Immigrants who live in the same food stamp household as their sponsor.<sup>12</sup>
6. Immigrants who qualify for an “indigence exception” arising from their household being below 130% of the poverty level based on support *actually* received from sponsor.<sup>13</sup>
  - a. Specifically, deeming does not apply to any immigrant who the State agency has determined is “unable to obtain food and shelter,” taking into account any and all cash, food, housing, and/or other assistance provided to the immigrant by others, including the sponsor.<sup>14</sup>
  - b. The term “unable to obtain food and shelter” in this context means that the sum of the immigrant’s income plus all the resources listed above from the sponsor and other individuals does not exceed 130% of the poverty line.
7. Under certain circumstances, battered immigrant spouses, an immigrant parent of a battered child, or the child of a battered immigrant.<sup>15</sup>

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<sup>7</sup> 7 C.F.R. § 273.4(c)(3)(iii); MPP § 63-503.492(c).

<sup>8</sup> U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Instructions for Affidavit of Support Under Section 213A of the Act* (Mar. 22, 2013), available at: <http://www.uscis.gov/sites/default/files/files/form/i-864instr.pdf>.

<sup>9</sup> *California Guide to Food Benefits*, *supra* note 1.

<sup>10</sup> 7 C.F.R. § 273.4(c)(3)(ii).

<sup>11</sup> U.S.C. § 2014(i)(2)(E); 7 C.F.R. 273.4(c)(3)(vi)-(vii).

<sup>12</sup> 7 C.F.R. § 273.4(c)(3)(i).

<sup>13</sup> 7 U.S.C. § 2014(i)(2)(E); 7 C.F.R. 273.4(c)(3)(vi)-(vii).

<sup>14</sup> 8 U.S.C. § 1631(e); 7 C.F.R. § 273.4(c)(3)(iv).

<sup>15</sup> 7 C.F.R. § 273.4(c)(3)(iv).

<sup>16</sup> 8 U.S.C. § 1631(f); 7 C.F.R. § 273.4(c)(3)(v).

## The Battered Immigrant Exception to Deeming

Taking into account the particular financial susceptibility of battered immigrants, Congress created a specific exception to deeming for that group of immigrants. The federal means-tested public benefits that deeming applies to are: Supplemental Security Income (SSI), Non-Emergency Medicaid, Food Stamps, and Temporary Aid to Needy Families (TANF).<sup>16</sup> This exception exempts qualified battered immigrants eligible to receive federal means-tested public benefits from deeming requirements for the initial 12 month period that the battered immigrant receives the mean-tested public benefit if:

- a. the battery of extreme cruelty took place in the United States;
- b. the abuser was the spouse, parent, or member of spouse's or parent's family;
- c. there is a "substantial connection between the battery or extreme cruelty and the need for the public benefit;" and
- d. the victim no longer resides with the abuser.<sup>17</sup>

In effect, this exempts the following groups of immigrants from deeming requirements for an initial 12-month period:<sup>18</sup>

- VAWA self-petitioners (adults and children with *prima facie* determinations, approved self-petitions, or those who have received lawful permanent residency under VAWA);
- VAWA cancellation of removal or VAWA suspension of deportation applicants (adults and children with *prima facie* determinations, approved self-petitions, or those who have received lawful permanent residency under VAWA);
- Battered immigrants with approved family based immigration( I-130) petitions filed for them by their spouses or parents;
- Children whose battered immigrant parent qualifies for benefits due to VAWA or an approved family-based visa petition (whether or not the child has been abused); and
- Lawful permanent residents and any dependent children who obtained their status through a family-based visa petition and were battered before or after obtaining lawful permanent residency.

<sup>16</sup> See SORAYA FATA, LESLYE E. ORLOFF AND MONIQUE DREW, *Access to Programs and Services that Can Help Victims of Sexual Assault and Domestic Violence* 23 ("Access to Programs and Services") in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (citing 8 U.S.C. 1631(f); 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, Att'y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,371 (Nov. 17, 1997)), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/other-public-benefits/16-public-benefits-access-MANUAL-ES.pdf/view>.

<sup>17</sup> *Id.*

<sup>18</sup> *Access to Programs and Services*, *supra* note 16. As that source notes: "Battered immigrants with I-864 affidavits of support submitted after December 5, 1997 are explicitly exempted from the I- 864 deeming rules for 12 months. Interim Guidance on Verification of Citizenship, Qualified Immigrant Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att'y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,371 (Nov. 17, 1997). Some immigrant victims will have had I-134 affidavits of support filed on their behalf prior to December 5, 1997. Immigrant victims with the I-864 and the I-134 affidavits of support should both be eligible for the battered immigrant exceptions to deeming. However, in some cases Balanced Budget Act of 1997 § 5505(e), Pub. L. No. 105-33, codified at 42 U.S.C. § 608(f) amendments may be used to apply deeming in cases of battered immigrants. If this occurs advocates and attorneys working with battered immigrants should argue that the state can use the Family Violence Option to waive deeming in the case of immigrant victims with old I-134 affidavits of support. Alternatively, since VAWA self-petitioners are fully exempt from deeming rules without regard to whether an affidavit of support was filed for them, immigrant victims seeking benefits based on an approved family based visa petition can additionally file a self-petition and then proceed to seek benefits based on the self-petition case and the victim will be exempt from deeming."

Beyond that initial 12-month period, a battered immigrant can continue to be exempted from deeming requirements if the immigrant can demonstrate that:

- A. An order of a judge or a DHS determination has recognized the battery or cruelty; **and**
- B. There continues to be a substantial connection between the battering or cruelty suffered and the need for the benefits sought.<sup>19</sup>

Battered immigrants seeking to be exempt from deeming for additional time following the end of the 12-month exemption period must obtain either a judicial or DHS-issued determination of abuse. Such a determination can be made in a wide variety of proceedings, such as the following:

- A family court proceedings for:
  - a) A protection order;
  - b) A temporary protection order;
  - c) Custody;
  - d) A divorce; or
  - e) Property division
- A criminal court proceeding in the context of:
  - a) A bond hearing;
  - b) A plea;
  - c) A conviction; or
  - d) Sentencing
- A general civil court proceeding, such as a small claims case for property division for non-married parties or an employment case in which the immigrant was employed and abused at a place of work owned by a family member who is also a member of the victim's household
- An immigration case:
  - a) Concerning a VAWA self-petition;<sup>20</sup>
  - b) Concerning a battered spouse waiver<sup>21</sup>;
  - c) Concerning a VAWA NACARA case<sup>22</sup>;
  - d) Under the VAWA Cuban Adjustment Act<sup>23</sup>;
  - e) Under VAWA suspension of Deportation<sup>24</sup>;
  - f) Under VAWA Haitian Refugee Immigration Fairness Act<sup>25</sup>;
  - g) Concerning a VAWA cancellation of removal; or
  - h) Concerning a 10 year cancellation where battery or extreme cruelty is an extreme hardship factor

<sup>19</sup> *Access to Programs and Services*, supra note 15 (citing IIRAIRA § 552, amending PRWORA § 421(f)(1)(B), 8 U.S.C. § 1631(f)(1)(B)).

<sup>20</sup> *Access to Programs and Services*, supra note 15 (citing as an example 8 U.S.C. § 1154(a)(1)(A)(iii)(bb); 8 U.S.C. § 1154(a)(1)(B)(ii),(iii); 8 U.S.C. § 1186a(c)(4)(C); 8 U.S.C. § 1255 note; 8 U.S.C. § 1229b(b)(2)).

<sup>21</sup> *Access to Programs and Services*, supra note 15 (citing 8 U.S.C. § 1229b(b)(2)).

<sup>22</sup> *Access to Programs and Services*, supra note 15 (citing VAWA of 2000, Publ. L. No. 106-386, § 1510; Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, § 202(d)(1)).

<sup>23</sup> *Access to Programs and Services*, supra note 15 (citing VAWA of 2000, Pub. L. No. 106-386, § 1509).

<sup>24</sup> *Access to Programs and Services*, supra note 15 (citing IRIRA of 1996, Pub. L. No. 104-208 (division C) § 309).

<sup>25</sup> *Access to Programs and Services*, supra note 15 (citing VAWA of 2000, Pub. L. No. § 1511).