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Notices

DEPARTMENT OF JUSTICE (DOJ)

[A.G. Order No. 2353-2001]

Final Specification of Community Programs Necessary for Protection of  
Life or Safety Under Welfare Reform Legislation

66 FR 3613

DATE: Tuesday, January 16, 2001

ACTION: Notice of final order.

[\*3613]

SUMMARY: This publication contains the final version of the Attorney General's Order that is issued pursuant to sections 401 and 411 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The Order specifies the types of community programs, services, or assistance for which all aliens remain eligible. This publication also responds to comments submitted regarding the Order.

DATES: This Notice is effective January 16, 2001.

FOR FURTHER INFORMATION CONTACT: Jessica Rosenbaum, Office of Policy [\*3614] Development, Department of Justice, 950 Pennsylvania Avenue, NW., Washington, DC 20530, telephone (202) 514-3737 for general information. For information regarding particular programs, contact the federal agency that administers the program.

SUPPLEMENTARY INFORMATION: On August 22, 1996, the President signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act" or "the Act"). The Act, among other things, vests in the Attorney General the authority to specify certain types of community programs, services, or assistance for which all aliens remain eligible. Pursuant to the Act, the Attorney General issued an Order (AG Order No. 2049-96) ("the Order") implementing that authority, and making a "provisional specification" of such programs. The Order was published on August 30, 1996, at 61 FR 45985.

Under §§ 401 and 411 of the Act, aliens who are not "qualified aliens" (as defined in § 431 of the Act) are generally ineligible for federal, state, and local public benefits. However, there are a number of specified exceptions to those restrictions. Included in the list of statutory exceptions is a provision authorizing the Attorney General to

identify programs, services, and assistance to which the Act's limitations on alien eligibility do not apply. Pursuant to §§ 401(b)(1)(D) and 411(b)(4), the Attorney General may specify only those types of programs, services, and assistance that meet all of the following three criteria: (1) Deliver in-kind services at the community level, including through public or private non-profit agencies; (2) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (3) are necessary for the protection of life or safety. Any programs that are exempted under this provision of the Act must meet all three of the foregoing requirements. A program meeting only one or two of the criteria does not qualify for exemption under this section of the Act.

#### Discussion of Comments

On September 15, 1997, the Department published a notice requesting public comments on the Order (62 FR 48308). The comment period ended on November 14, 1997. The Department received 48 comments from a variety of sources including private, non-profit organizations, as well as city, state, and federal agencies.

The Department also received four comments on the Order in response to the Attorney General's notice of proposed rule-making: "Verification of Eligibility for Public Benefits," which was published on August 4, 1998 (63 FR 41662). In developing this final Order, the Department of Justice also relied on the input of other appropriate federal agencies and departments. All comments have been considered in preparing this final Order. Any significant changes are discussed below.

Many commenters seemed to believe that unless the Attorney General exempted their program, they would be required to verify citizenship or immigration status of all applicants. While that is certainly true in some cases, a service provider should not assume that it must verify citizenship or immigration status simply because its program or service is not exempted by this Order. Service providers and other interested parties should refer to benefit-granting agencies' interpretations of the term "federal public benefit" as used in the Act in order to determine whether their program is a federal public benefit and therefore subject to the alienage restrictions of the Act. See, for example, the Department of Health and Human Services notice of interpretation of federal public benefit, 63 FR 41658 (Aug. 4, 1998) (identifying which of their programs provide "federal public benefits" subject to PRWORA's limitations on alien eligibility. HHS advises that HHS programs not listed in the notice, such as Community Health Centers, and HHS programs under the Ryan White CARE Act and the Older Americans Act, do not meet the statutory definition of "federal public benefit" and therefore do not have to verify the citizenship or immigration status of applicants or recipients under PRWORA.).

In the past, the Department of Justice has deferred to other benefit-granting agencies' interpretations of whether their programs fall within certain definitions under the Welfare Reform Act. See, e.g., Department of Justice, Verification of Eligibility for Public Benefits, 63 FR 41662, 41664 (1998) (to be codified at 8 CFR pt. 104) (proposed Aug. 4, 1998) (in establishing proposed regulatory

definition of "federal public benefit," Immigration and Naturalization Service intends to give "all appropriate deference to benefit granting agencies' application of the definition to the programs they administer"); Department of Justice, 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 FR 61344, 61361 (1997) (directing interested parties with questions about the applicability of the Act to a benefit program to consult with the federal agency overseeing the program). Consistent with that practice, where commenters have raised questions about whether a particular program is a federal public benefit under the Act, the Department will grant all appropriate deference to the determination, if one has been made, by the benefit granting agency as to whether the program is a federal public benefit. Agencies and service providers should also note that section 432(d) of the Welfare Reform Act, which provides that nonprofit charitable organizations are not required to verify the immigration status of applicants for Federal, State, or local public benefits, may be applicable to their programs. For more information about this exemption, see Department of Justice, Verification of Eligibility for Public Benefits, 63 FR 41662, 41664 (1998) (to be codified at 8 CFR pt. 104) (proposed Aug. 4, 1998).

The majority of commenters emphasized the need for the Attorney General to exempt their particular services because they believed them to be necessary for protection of life or safety. Many of those commenters, however, did not take account of the legal requirement that a program or service must satisfy all three prongs of the test set forth by Congress. Any service that is exempted by the Order not only must be necessary to protect life or safety and be delivered in-kind at the community level, but also must not condition the provision, amount, or cost of services on a client's income. With respect to the last requirement, in other words, if a state or community service provider charges fees that vary with the clients' income level, or determines the clients' eligibility for services based upon their income or ability to pay, the program at issue does not satisfy prong two of the test and therefore is not covered by the Order regardless of how necessary for life or safety the program, service, or assistance may be.

Twenty comments were received from community services providers, while the rest were from concerned citizens, members of Congress, and city, state, and federal agencies. Many comments addressed a variety of concerns, but more than twenty-eight concerned services provided to people with HIV/AIDS. The majority of those comments asked the Attorney General to exempt categorically all programs funded under the Ryan White CARE Act, Housing Opportunities for People Living with AIDS (HOPWA) and the McKinney [\*3615] Homeless Assistance Act due to the special nature of the AIDS epidemic. As already indicated, many of those programs may not be "federal public benefits" as determined by relevant benefit-granting agencies, and therefore an exemption under this Order is unnecessary. While the Act authorizes exemptions for "programs, services, or assistance" that meet the three-pronged test, the Attorney General has no authority to provide a blanket exemption for all programs authorized by a single statute. That is because one or more of those programs may fail to meet all of the requirements imposed by the statute. Agencies and service providers must assess each program

individually to determine whether it meets the three-pronged test. While many, if not all, HIV/AIDS-related services are likely to meet the first and third prongs, any state or federally funded programs that are required as a condition of their funding to employ sliding scales, or that otherwise limit the access to services or the amount of such services according to a client's income or ability to pay would not qualify for exemption under the Attorney General's Order.

Thirteen comments were received concerning services for the elderly. The majority of those comments also sought categorical exemptions for services provided under a variety of statutes. Again, the Act does not give the Attorney General the authority to exempt groups of programs. For a program to be covered by the Order, it must meet all three prongs of the statutory test.

Twenty-three comments addressed the importance of shelter and safe housing. Those community programs cover a wide range of services from emergency shelter to lead paint abatement. While many shelter and housing programs are important to the protection of life or safety, each program must meet the requirements of the three-pronged test in order to be exempt under the Order. With respect to the specific issue of lead paint abatement programs, we note that HUD has determined that benefits under the Lead Hazard Control program are not federal public benefits within the meaning of section 401(c) of the Welfare Reform Act.

In accordance with the Department's practice of deferring to the determinations of benefit granting agencies, we therefore note that there is no need to conduct any verification procedures with respect to the immigration status of individuals whose dwellings receive services under the Lead Hazard Control program. We therefore need not, at this time, consider whether such benefits should be exempted under section 401(b).

Nine comments emphasized the importance of access to health care in general. One commenter described health centers that have a sliding scale of costs for services. Such programs do not qualify for coverage under the Order as they fail to meet the prong of the Order related to means testing. However, another commenter explained that their health centers have a fundamental obligation to serve all patients regardless of their ability to pay. As stated above, where community-level health programs serve all eligible clients regardless of their ability to pay and do not administer any type of sliding scale fee schedule or other income or resource test, they are covered by the Attorney General's Order.

Some commenters argued that the administrative burden that would result from having to verify immigration status would outweigh any proposed savings that could be derived from denying benefits to unqualified aliens. It should be understood, however, that the decision to deny federal, state, and local public benefits to aliens not qualified to receive them was made by Congress. Title IV of the Act does provide several exceptions to this blanket denial, including the programs covered by this Order and an exception from verification for all non-profit charitable providers. See the Department of Justice, Proposed Rule, Verification of Eligibility for Public Benefits, 63 FR 41662, 41677 (Aug. 4, 1998). All programs and services covered by the

Order are exempt from any requirement that verification be conducted, unless service providers are mandated to conduct such verification pursuant to federal, state, or local law other than the Welfare Reform Act.

A number of commenters sought clarification as to whether service providers were obligated to verify a benefit seeker's immigration status prior to providing services covered by the Order. The services exempted by the Order are one of several categories of services that were designated by Congress to remain available to all aliens regardless of their status as qualified or not qualified for welfare benefits. Accordingly, service providers are not obligated to verify immigration status before providing those services unless they are required to do so by a law other than the Welfare Reform Act.

The remaining comments addressed services to migrant farmers, the disabled, victims of domestic violence, child care, and mental health services. While all of those concerns are important to the protection of life or safety, each program must meet the requirements of the three-pronged test described above in order to be exempt under the Order.

Several providers of emergency shelter have expressed the concern that they may be barred from providing temporary housing to aliens not qualified for welfare benefits. The final Order, like the original Order, specifies that "short term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused or abandoned children" are deemed to be necessary for the protection of life or safety. Accordingly, programs and services of that type that deliver in-kind services at the community level and do not condition the provision of assistance, or the amount or cost thereof, on the individual recipient's income or resources are exempt from any requirement that verification be conducted, unless service providers are mandated to conduct such verification pursuant to federal, state, or local law other than the Welfare Reform Act.

#### Final Specification of Community Programs Necessary for the Protection of Life or Safety Under the Welfare Reform Act

##### Preamble

(1) The types of programs, services, and assistance enumerated in this Order are ones that Congress authorized the Attorney General to except from limitations on the ban on the availability of federal, state, or local public benefits imposed by Title IV of the Act.

(2) The Attorney General has fully exercised the power delegated to her under §§ 401(b)(1)(D) and 411(b)(4) of the Welfare Reform Act (codified at 8 U.S.C. 1611(b)(1)(D) and 1621(b)(4)).

(3) Neither states nor other service providers may use the Act as a basis for prohibiting access of aliens to any programs, services, or assistance covered by this Order. Unless an alien fails to meet eligibility requirements provided by applicable law other than the Act, benefit providers may not restrict the access of any alien to the

services covered by this Order, including, but not limited to, emergency shelters.

(4) Thus, unless required by some legal authority other than the Act, benefit providers who satisfy the requirements of this Order are not required to verify the citizenship, nationality, or immigration status of applicants seeking benefits. [\*3616]

(5) If a benefit provider offers a number of services, only some of which are exempt from verification as a result of this Order, the benefit provider may conduct verification of the non-exempt programs or services as specified in the applicable portions of the "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 FR 61,344 (1997) or may be required to conduct verification as specified by any subsequent or superseding regulations.

(6) To the extent that it can be accomplished without undue administrative hardship, benefit providers should make every effort to provide information to all prospective benefit seekers about which benefits they qualify for and which benefits involve citizenship or immigration verification requirements.

#### Specification

Therefore, by virtue of the authority vested in me as Attorney General by law, including Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, I hereby specify that:

1. I do not construe the Act to preclude aliens from receiving police, fire, ambulance, transportation (including paratransit), sanitation, and other regular, widely available services and, for that reason, I am not making specifications of such programs, services, or assistance. It is not the purpose of this Order, however, to define more specifically the scope of the public benefits that Congress intended to deny certain aliens either altogether or absent my specification, and nothing herein should be so construed.

2. The government-funded programs, services, or assistance specified in this Order are those that: deliver in-kind (non-cash) services at the community level, including through public or private non-profit agencies or organizations; do not condition the provision, amount, or cost of the assistance on the individual recipient's income or resources, as discussed in paragraph 3, below; and serve purposes of the type described in paragraph 4, below, for the protection of life or safety. Specified programs must satisfy all three prongs of this test.

3. The community-based programs, services, or assistance specified in paragraphs 2 and 4 of this Order are limited to those that provide in-kind(non-cash) benefits and are open to individuals needing or desiring to participate without regard to income or resources. Programs, services, or assistance delivered at the community level, even if they serve purposes of the type described in paragraph 4 below, are not within this specification if they condition on the individual recipient's income or resources:

- (a) the provision of assistance;
- (b) the amount of assistance provided; or
- (c) the cost of the assistance provided on the individual recipient's income or resources.

4. Included within the specified programs, services, or assistance determined to be necessary for the protection of life or safety are:

(a) 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; or treatment of mental illness or substance abuse;

(b) Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children;

(c) Programs, services, or assistance to help individuals during periods of heat, cold, or other adverse weather conditions;

(d) Soup kitchens, community food banks, senior nutrition programs such as meals on wheels, and other such community nutritional services for persons requiring special assistance;

(e) Medical and public health services (including treatment and prevention of diseases and injuries) and mental health, disability, or substance abuse assistance necessary to protect life or safety;

(f) Activities designed to protect the life or safety of workers, children and youths, or community residents; and

(g) Any other programs, services, or assistance necessary for the protection of life or safety.

Dated: January 5, 2001.

Janet Reno,

Attorney General.

