Empire Justice Center
Making the law work for all New Yorkers

NEW YORK'S EXCHANGE PORTAL:

A GATEWAY TO COVERAGE FOR IMMIGRANTS

By Trilby de Jung and Barbara Weiner

NEW YORK'S EXCHANGE PORTAL:
A Gateway to Coverage for Immigrants

By Trilby de Jung and Barbara Weiner

ACKNOWLEDGEMENTS
This report was made possible through the generous contributions of the United Hospital Fund, a nonprofit health services research and philanthropic organization dedicated to shaping positive change in health care for the people of New York. The views presented here are those of the authors and not necessarily those of the United Hospital Fund or its directors, officers, or staff.

We want to acknowledge the contributions to this report of our national partners in the effort to ensure maximum participation of immigrants in the nation's healthcare system, in particular Jenny Rejeske and Tanya Broder of the National Immigration Law Center, and Dinah Wiley, attorney and consultant, formerly with the National Immigration Law Center. This report would not have been possible without the New York specific healthcare systems expertise of Lisa Sbrana, Counsel to the New York Health Benefit Exchange, and Ruchika Bajaj and Kathleen Johnson in the Division of Coverage and Enrollment, Office of Health Insurance Programs, New York State Department of Health, all of whom gave generously of both their time and their knowledge. We are also grateful to our federal partners at the Center on Medicare and Medicaid Services, Office of Medicaid and CHIP Services, Anne Marie Costello and Sarah Spector. Finally, special thanks to Debbie Halper and Peter Newell of the United Hospital Fund for their thoughtful and critical comments and suggestions.

All errors and omissions are the authors' own.

ABOUT EMPIRE JUSTICE CENTER
Empire Justice Center is a statewide, public interest law firm with offices in Albany, Rochester, White Plains and on Long Island. Empire Justice focuses on changing the "systems" within which poor and low-income families live. With a focus on poverty law, Empire Justice undertakes research and training, acts as an informational clearinghouse, and provides litigation backup to local legal services programs and community based organizations. As an advocacy organization, Empire Justice engages in legislative and administrative advocacy on behalf of those impacted by poverty and discrimination. As a non-profit law firm, Empire Justice provides legal assistance to those in need and undertakes impact litigation in order to protect and defend the rights of disenfranchised New Yorkers.

TABLE OF CONTENTS

1 INTRODUCTION 2-3

2 IMMIGRANT ACCESS TO HEALTH CARE COVERAGE:
THE LEGAL LANDSCAPE 3-16
PRWORA 5-6
Expansions for Lawfully Residing
Children & Pregnant Women 7
The Affordable Care Act 8-11
New York's Unique History 11-13
Comparing Immigrant Eligibility Across
Coverage Options in 2014 & Beyond 13-16

3 NEW YORK'S EXCHANGE PORTAL 16-25
Current Challenges for Immigrant Applicants . . . 17-18
Centralizing Eligibility Determinations 18-19
The Online Application 19-22
Recommendations for fine-tuning
New York's Application 22-25

4 CONCLUSION 26

5 APPENDICES
The Eligibilty Crosswalk 27-30
Explanation of Status Terms 31-40

INTRODUCTION

Health Insurance Exchanges have the potential to eliminate many existing barriers to health insurance coverage for low-income workers facing reductions in salaries and benefits. Immigrant families, whose incomes tend to be lower to begin with, have been particularly hard hit by escalating health care costs. National figures from 2010 indicate that 75% of workers in noncitizen[1] families were in traditional blue collar jobs, as compared to 60% of workers from citizen families. The average median annual income for noncitizens was $25,000, roughly half the amount for citizen households.[2] In New York, home to 4.3 million immigrants, noncitizens are over three times as likely as citizens to lack health insurance.[3]

The federal laws that shape immigrant access to public health care programs reflect both shifting international alliances and a deep seated reluctance to provide public benefits to immigrants. While Congress has created legal pathways to citizenship and employment for specified groups of immigrants, access to benefits like food stamps, cash assistance and Medicaid is restricted for most. Immigrant eligibility for government benefits is a complex patchwork of rules that varies by the type of benefit program. In complex and layered benefit programs like Medicaid, immigrant eligibility can also vary across different levels of benefits within the same program.

New York has its own complicated history with regard to providing health care coverage to immigrant communities. Due in part to its unique constitutional obligations to the needy, New York currently uses state funds to provide Medicaid coverage to some immigrant groups that are excluded from federal Medicaid. The result has been broader potential access but even more complexity, which has often required immigrant families in need of services to engage in significant bureaucratic struggles.

New York has learned from these challenges. As the State builds technological supports for the single online application that will serve as its primary portal to its Health Benefit Exchange, a vision has emerged that should serve as a model for other states. New York envisions an Exchange Portal that will welcome families of mixed immigration status, automate verification of immigrant eligibility for both federal and state Medicaid, and prescreen undocumented immigrants for more limited forms of coverage, like Emergency Medicaid. New York is poised to present a model for an Exchange Portal that is truly capable of serving as a gateway to coverage for immigrant households.

This paper presents an Immigrant Eligibility Crosswalk[4] to help advocates and policy makers navigate the complex intersections of immigration status and eligibility for existing and emerging health care coverage options. We examine the law and policy that

[1] The term noncitizen refers to both immigrants – who by definition intend to stay in the U.S. permanently – and nonimmigrants who are in the U.S. temporarily.

[2] Kaiser Commission on Medicaid and the Uninsured, *citing* the Urban Institute's analysis of March 2011 Current Population Survey, Annual Social and Economic Supplement.

[3] Holahan, D., Cook, A., Powell, L. "New York's Eligible but Uninsured," United Hospital Fund, 2008.

[4] The Crosswalk is essentially a table which lists New York's health insurance programs along the top and most, if not all, noncitizen statuses along the left hand side with colored bands that identify which of the three main immigrant-related benefit eligibility classifications the status falls into. The Crosswalk allows the user to easily locate the particular health insurance programs for which a noncitizen in a specific status will be eligible.

governs immigrant access to health care, and present the Crosswalk as a summary of where immigrants stand today with respect to accessing health care coverage. We then describe New York's vision for incorporating this legal complexity into the technology supporting online Exchange applications, and highlight design decisions that reflect a proactive and pragmatic approach to meeting the needs of immigrant applicants. Finally, we provide a set of recommendations geared to fine-tuning New York's vision for its online application and maximizing its success with immigrant communities.

In the end, design of the online application that will serve as the primary portal for the Exchange, and the experience of immigrant applicants who use it, are both critically important, not only to the health of immigrant communities, but to the success of core public health policies and ongoing efforts to curb health care costs by reducing the ranks of the uninsured.

IMMIGRANT ACCESS TO HEALTH CARE COVERAGE: THE LEGAL LANDSCAPE

Congress has a long history of picking and choosing among groups of immigrants when it comes to providing public health coverage as well as other public benefits. This practice has been consistently upheld by the federal courts. An early challenge to the power of Congress to limit access to federal benefits based on immigration status came in the case of *Mathews v. Diaz*.[5] The case reached the Supreme Court in 1976 and involved Part B of the Medicare program. The law provided that enrollment under Part B was limited to citizens and to lawful permanent residents who had continuously resided in the U.S. for at least five years.[6] In a holding that has been affirmed and reaffirmed through the decades, the Court stated that "…Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens…" The Court went on to hold that discrimination between different classes of noncitizens, as here between permanent residents residing in the U.S. for less than five years and permanent residents residing the U.S. for five years or more, is also permissible.

In 1986, ten years after the Mathews decision, Congress again enacted limits on the access of immigrants to benefits like Medicaid, welfare and food stamps, this time to those noncitizens who were legalized under the Immigration Reform and Control Act of 1986 (IRCA), most likely to make the legalization program more palatable to those who had strongly opposed it.[7] Under IRCA, about three million undocumented workers and their families, the majority from Mexico, were provided with a path to lawful status. These newly legalized immigrants were made ineligible for federal needs based benefits like Medicaid, cash benefits and food stamps for the first five years after being granted legal status.

[5] 426 U.S. 67 (1976).
[6] Part B of the Medicare Program allows elderly people who are not eligible for Part A to buy in to Part B and thus obtain coverage for doctor's visits and other outpatient treatment.
[7] P.L. 99-603. Then as now, the country's attitude towards the presence of immigrants was sharply divided.

In a pattern that was to be repeated often in subsequent legislation governing immigrant eligibility for public benefits, Congress created various exceptions to the newly enacted limitations which it proceeded to apply, though not uniformly, across its public benefit programs. For example, in the Medicaid program, the five year bar did not apply to newly legalized immigrants who were elderly, blind or disabled, pregnant or children. In the food stamp program similar exceptions were applied except that pregnant women were not included among those exempted. The bar did not apply at all to Cuban/Haitian Entrants, in any program. Differences in how groups were treated depending on the benefit program and the status involved contributed immeasurably to the complexity of the administration of the federal benefit programs. That complexity continues through today.

The next set of limitations placed on noncitizen access to health care and other federal benefits again accompanied immigration provisions otherwise of benefit to noncitizens living in the country without legal status. The Immigration Act of 1990[8] established a new category, Temporary Protected Status (TPS), for nationals living in the U.S. without legal status whose country of origin was going through extraordinary difficulties, such as armed conflict or a major natural disaster or other extraordinary conditions, and who therefore could not be returned to their country without endangering their health or safety. TPS allowed them to live and work here until their country was in a position to take them back. However the Act specified that noncitizens granted TPS were not to be considered "permanently residing under color of law" ("PRUCOL") for purpose of federal benefit eligibility. See 8 U.S.C. § 1254a(f).

The PRUCOL category had evolved as a benefit related classification over the years as the immigration law had become more complicated and newly created immigration statuses fell short of lawful permanent residence. PRUCOL described immigrants who, though not

[8] IMMACT 90, P.L. 101-649, 104 Stat. 4978 (November 29, 1990).

lawful permanent residents, were to be considered lawfully residing and therefore eligible for various federal benefit programs. Causing no end of difficulties, the definition of who was included in the PRUCOL classification differed between the federal benefit programs. For example, the PRUCOL classification in the Medicaid and SSI programs was more expansive than the PRUCOL definition used in the AFDC (Aid to Families with Dependent Children) program. By declaring that noncitizens granted TPS were not to be considered PRUCOL for any federal benefit program, Congress completely closed the door on the access to federal benefits for those granted TPS.

The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), discussed more fully below, eliminated the PRUCOL classification entirely as a federally related classification. Some states, including New York, continue to utilize the PRUCOL classification for noncitizens in statuses which qualify for state funded benefits even though, after PRWORA, the statuses do not qualify for federal benefits.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[9] (PRWORA)

Although restrictions on benefit eligibility for certain classes of noncitizens did not begin with PRWORA, for the purpose of fully understanding current immigrant eligibility rules and the impact of the Affordable Care Act on those rules, PRWORA is indeed the starting place.

PRWORA, also known as welfare reform, renamed Aid to Families with Dependent Children (AFC), and radically restructured it. The new Temporary Assistance to Needy Families (TANF) program ceased being an entitlement program. Beneficiaries were subject to a five-year lifetime limit on benefits. In addition to transforming welfare and making substantial changes to the food stamp program, PROWA divided the world of noncitizens living in the U.S. into two groups for federal benefit eligibility purposes: "qualified aliens" eligible for federal public benefits, and "not-qualified aliens," ineligible for federal public benefit.[10] The list of qualified alien classifications has since become a standard tool for training eligibility workers about which immigrants are eligible for public benefit programs. As defined by PRWORA the "qualified alien" category includes[11]:

- Lawful permanent residents;
- Refugees and asylees;

[9] P.L. 104-193, 110 Stat. 2105 (August 22, 1996).

[10] This restriction applied not only to the federal welfare, medical assistance and nutrition programs but to all federal public benefits, including student aid and federal grants, etc.

[11] *See* 8 U.S.C. § 1641(b). In addition to "qualified aliens", PRWORA also extended eligibility for benefits to American Indians born in Canada, members of certain federally recognized tribes and **lawfully residing** active duty service members and honorably discharged veterans and their immediate families. Two additional classifications were subsequently created and classified as equivalent to refugees in terms of their eligibility for benefits: certified victims of trafficking and Iraq/Afghan Special Immigrant visa holders. A more detailed explanation of these immigrant classifications can be found in the Explanation of Terms.

- Noncitizens granted withholding of deportation/removal;
- Cuban/Haitian Entrants as defined in the 1980 Refugee Education Assistance Act (REAA)
- Amerasians;
- Conditional Entrants (a now obsolete refugee related category in use before 1980);
- Noncitizens granted parole for a period of one year or more (permission given to an individual to remain in the U.S. for a specified period for humanitarian reasons or exigent circumstances); and
- Battered spouses and children of U.S. citizens or lawful permanent residents who are eligible to apply for status through the Violence Against Women Act (VAWA) and are in the process of doing so. [12]

The following groups were excluded from the qualified aliens list and thus fall into the not-qualified alien grouping:

- noncitizens without legal status;
- noncitizens with nonimmigrant status, such as students and foreign workers[13]; and
- noncitizens who had previously fallen under the public benefit-related category PRUCOL for purpose of federal benefit eligibility but who were not included in the group newly defined by Congress as "qualified aliens."

As noted above, the PRUCOL classification applies to noncitizens who do not have permanent resident status but who may be in the process of applying for lawful immigration status or who have been granted some type of permission by immigration services to remain in the U.S.[14]

The reaction against the Draconian restrictions Congress placed on needy noncitizens under PRWORA, especially with respect to the Supplemental Security Income ("SSI") program, was swift and immediate. In the next year, immigrant eligibility rules in the SSI program were amended to avert the loss of benefits to thousands of elderly and disabled immigrants, many of whom had come to the country as refugees. In the years following, immigrant eligibility rules in the food stamp program were also liberalized and today, low-income households with immigrant members face significantly fewer barriers to their participation in the country's food assistance program, now known as SNAP, Supplemental Nutrition Assistance Program. Noncitizen access to healthcare has followed a similar trajectory.

---

[12] See 8 U.S.C. § 1641(b) and (c).

[13] Nonimmigrants are generally individuals living in the U.S. with temporary visas or in circumstances that do not lead to permanent status.

[14] For example, an individual granted Deferred Action would be considered PRUCOL. Eligibility for state and local benefits under the PRUCOL classification was maintained by some states after PRWORA in their state funded benefit programs, including New York, which initially excluded PRUCOL eligibility for Medicaid.

Expansions to Include "Lawfully Residing" Children & Pregnant Women

Early liberalization of the Medicaid rules after PRWORA occurred through administrative rather than Congressional action. In 2002, the Centers for Medicare and Medicaid Services (CMS) published a rule that gave states the option of providing prenatal care through the State Children's Health Insurance Program (SCHIP, also known as CHIP) to pregnant women whose immigration status made them ineligible for Medicaid.[15] CMS did so by revising the definition of "child" to include the period from conception to birth in order to allow health coverage to be offered to the pregnant but ineligible woman.[16] Several states took up the option. New York did not but instead continued, as it had done for many years, to provide Medicaid with state funds to pregnant women regardless of their status.[17]

Further liberalization of immigrant eligibility rules came through the CHIP Reauthorization Amendments (CHIPRA) of 2009.[18] The CHIPRA Amendments provided states with the option to extend CHIP and Medicaid eligibility to children and pregnant women who are not included in the PRWORA "qualified alien" category but who are nevertheless "lawfully residing" in the United States. New York took up the options in both its Medicaid and CHIP programs. The term "lawfully residing" introduced yet another benefit related classification to an already complicated field.

In contrast to PRWORA, where Congress was very specific about which groups of noncitizens were eligible for which benefits, with CHIPRA, Congress left it to CMS, the federal agency in charge of Medicaid and CHIP, to develop the list of noncitizen statuses to be included in the "lawfully residing" classification. In developing the list, CMS looked for guidance to immigration regulations, specifically the provision that defines "lawful presence" for the purpose of determining eligibility for Title II Social Security benefits.[19] With respect to the residency aspect of the "lawfully residing" classification, CMS simply adopted the Medicaid rules for establishing residence.[20]

As will become clear later, because of the similarity between New York's PRUCOL classification and the federal category of "lawfully residing," the federal expansion of immigrant eligibility in the Medicaid and CHIP programs served primarily to provide federal reimbursement for medical care the State was already providing to PRUCOL immigrants, including pregnant women and children, in its state funded Medicaid and CHIP programs.

---

[15] The Children's' Health Insurance Program was created by the Balanced Budget Act of 1997. The regulatory amendment extending SCHIP eligibility to fetuses was published in the March 5, 2000 Federal Register: *State Children's Health Insurance Program: Eligibility for Prenatal Care for Unborn Children*, 67 Fed. Reg. 9936.

[16] See 42 C.F.R. § 457.10.

[17] This reluctance was most likely due to uneasiness with adopting a definition of child that included the unborn.

[18] *Children's Health Insurance Program Reauthorization Act of 2009*, P.L. 111-3.

[19] 8 C.F.R. § 103.12

[20] *See* State Health Official (SHO) Letter #10-06/CHIPRA #17 at http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf.

The Affordable Care Act: New Health Care Options for All Lawfully Present Immigrants

The most recent, federal legislation to address the eligibility of noncitizens for healthcare benefits is the Patient Protection and Affordable Care Act ("ACA"),[21] enacted in 2010. While the ACA continues the trend toward extending health care coverage options to immigrants, it also holds true to the less generous tradition in federal law of barring undocumented immigrants from participation. First, here is some background on the new options for health care coverage that will be available under the ACA.

New Benefits under the ACA

The ACA significantly expands health coverage options beginning in 2014 in two fundamental ways. First, the ACA expands Medicaid eligibility for most adults up to 138% of the federal poverty level (FPL), creating a new mandatory coverage population of single adults and childless couples. Not all states will expand their Medicaid programs, since the U.S. Supreme Court has ruled that failure to expand cannot trigger any loss in existing Medicaid funding from the federal government.[22] New York is fully implementing the ACA's Medicaid expansion, which will qualify New York for a significant increase in federal funding because the State was already providing coverage to many single adults and childless couples.[23]

Second, the ACA creates new health coverage options for those with incomes over the newly-expanded income level for Medicaid. The ACA establishes Health Benefit Exchanges, run either by states or the federal government, which will serve as a marketplace in which qualified individuals and small businesses can purchase private coverage through qualified health plans. Applicants with under 400% of the federal poverty level will receive federal subsidies to help make coverage more affordable.

The New York Health Benefit Exchange (the Exchange)[24] will operate an online enrollment system which will issue eligibility determinations for financial assistance for qualified health plan coverage as well as eligibility determinations for public health insurance programs. Premiums for individuals seeking private coverage in the Exchange are expected to cost 66% less than comparable premiums cost today, due to competition among plans for a new market of individuals, families, and small businesses facing insurance mandates and attracted by Exchange offerings.[25] The Exchange will be responsible for supporting and

---

[21] The Affordable Care Act or ACA refers to the Patient Protection and Affordable Care Act of 2010, P.L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

[22] *National Federation of Independent Business v. Sebelius* (NFIB), 132 S. Ct. 2566 (2012). *NFIB* is the short-hand reference for the three appeals from the 11th Circuit: *National Federation of Independent Business v. Sebelius, Florida v. DHHS, and DHHS v. Florida.*

[23] Statutory amendments required to implement the ACA's changes to Medicaid eligibility were passed during the 2013 legislative session. See A. 3006-D/S. 2606 -D, Article VII Bill, Part D.

[24] Created by Executive Order #42, issued by Governor Cuomo on April 12, 2011, available at: www.governor.ny.gov/press/04122012-EO-42

[25] Blavin, F., Blumberg, L., Buettgens, M., Roth J., "The Coverage and Cost Effects of implementation of the Affordable Care Act in New York State," Urban Institute, March, 2012.

maintaining a Consumer Service Center and a network of Navigators to assist applicants in evaluating their options for health care coverage, selecting a suitable plan, and applying for financial assistance.

Even with the predicted 66% reduction in private health insurance premiums for individuals, the financial assistance newly available to Exchange users will be critical in order to make private coverage from qualified health plans truly affordable to many uninsured New Yorkers, particularly immigrants. There are two types of financial assistance available under the ACA: advance premium tax credits and cost-sharing credits.

- ***Advance Premium Tax Credits.*** The advance premium tax credit is paid directly to the health insurer, reducing the amount of premium owed by the taxpayer, by capping premiums owed based on an income-based sliding scale. The value of the advance premium tax credit is adjusted to take into account the taxpayer's income and bring the premium for an insurance plan within financial reach.[26]
- ***Cost-sharing credits.*** Cost-sharing credits will help lower-income families with incomes below 250% of the federal poverty level (FPL) afford the cost-sharing associated with plans covering 70% of costs (a 70% actuarial value) by capping out-of-pocket expenses from co-pays and deductibles based on income.

Immigrant Eligibility under the ACA

The ACA continues the expansionist trend in federal law, expanding the "lawfully residing" classification from the 2009 CHIPRA Amendments to apply to all population categories, not just pregnant women and children. Under the ACA, then, all "lawfully present" noncitizens residing in the area covered by the Exchange are eligible to purchase health insurance through the Exchange and, if financially eligible, to obtain tax credits and subsidies to help pay for it.[27]

The ACA refers to "lawfully present" noncitizens rather than "lawfully residing" noncitizens, the term used in CHIPRA. This is a distinction without a difference since to be eligible to purchase health insurance through the Exchange, noncitizens, like everyone else, must be residing in the state or region covered by the Exchange.[28] Initially, the CHIPRA standard was incorporated into the ACA by reference. However, on January 23, 2013, HHS issued a Proposed Rule in the Federal Register that, among many other provisions, spelled out the classifications included in the term "lawfully present." The list is very similar, though not

[26] The amount of the premium assistance tax credit falls as taxpayer income rises. Those with income up to 133 % of the federal poverty level qualify for a subsidy high enough to reduce the premium payment to 2 % of household income. As income rises to 400 % of the federal poverty level, the subsidy declines, increasing the monthly cost to 9.5 % of household income. IRC §36B(b)((3)(A)(i)&(ii), added by ACA §1401.

[27] Unfortunately, and in keeping with the country's long tradition of excluding undocumented immigrants from every benefit except Emergency Medicaid, the ACA completely excludes noncitizens without legal status from applying for insurance through the Exchange, barring them from even purchasing unsubsidized health insurance.

[28] 45 C.F.R. § 155.305(a)(3). See also "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers," 77 Fed. Reg. 18310, at 18452 (March 27, 2012).

identical, to the CHIPRA standard.[29]

Noncitizens that fall into one of the following categories are considered lawfully residing under CHIPRA and thus lawfully present under the ACA (changes made by the Proposed Rule are in parenthesis and underlined):

- An individual in a "qualified alien" status as defined in PRWORA;
- A nonimmigrant who has not violated the terms of the status under which (s)he was admitted or to which he or she has changed after admission (the Proposed Rule eliminates the phrase "who has not violated the terms of the status under which she was admitted", substituting: "<u>is in a valid nonimmigrant status as defined in 8 U.S.C. § 1101(a)(15) or otherwise under the immigration laws…</u>";
- An individual who has been paroled into the U.S. for humanitarian or public policy reasons for a period of less than a year under Section 212(d)(5) of the Immigration and Nationality Act (INA) (someone paroled for one year or more is classifiable as a "qualified alien");
- Noncitizens granted:
    - Temporary Protected Status (TPS);
    - Temporary Resident status under INA §§ 210A or245 A or Family Unity (both classifications are related to the 1986 legalization program);
    - Deferred action status;
    - Deferred Enforced Departure (currently only applies to Liberians), or
    - Withholding of Removal under the Convention Against Torture.
- An applicant for:
    - Adjustment to permanent resident status whose visa petition has been approved;
    - Special Immigrant Juvenile Status (SIJ); or
    - Asylum or Withholding of Removal under INA § 241(b)(3) or under the Convention Against Torture who has been granted Employment Authorization or who is under the age of 14 and has had his or her application pending for at least 180 days.
- A noncitizen granted employment authorization who is:
    - An applicant for adjustment to permanent resident status;
    - An applicant for cancellation of removal;
    - An applicant for permanent residency status under the registry provisions

[29] On January 23, 2013, HHS published a Proposed Rule in the Federal Register further implementing the provisions of the ACA: *Medicaid, Children's Health Insurance Programs and Exchange: Essential Health Benefits in the Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeals Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing.* 78 Fed. Reg. 4594, et seq. The rule contains a definition of "lawfully present", the first time a list appears in regulation, and though it is based on the HHS CHIPRA administrative guidance issued in 2010, it makes some changes. Because it is as yet just a proposed rule, the list here is the same as the CHIPRA guidance with notations in parenthesis of classifications that the regulation has revised, eliminated or added.

of the INA (permanent resident status for a noncitizen who is without status but who has been living in the U.S. since before January 1, 1972);

- Under an Order of Supervisions (someone who is deportable but is being allowed to remain in the U.S. for the time being);
- An individual with a completed legalization application or an application for adjustment under the LIFE Act (also related to the 1986 legalization program) [the Proposed Rule eliminates this list and replaces it with a provision that simply states: has been granted employment authorization under 8 C.F.R. § 274a.12(c)]

and newly added by the Proposed Rule:

- A noncitizen who is lawfully present in American Samoa under the immigration laws of American Samoa, and
- A noncitizen who is a victim of a severe form of trafficking in persons.

It should be noted that very few immigrants fall into a number of these classifications currently. For example, most immigrants who might have fallen into classifications related to the legalization program of 1986 have already adjusted to permanent resident status. A more detailed description of all the "lawfully present" categories is contained in the *Explanation of Terms* attached as an appendix to this report.

New York's Unique History

In New York, to be eligible for Medicaid and its related program, Family Health Plus, an applicant must be a citizen or national[30] of the U.S. or a noncitizen in a "qualified alien" status or who is PRUCOL.[31] It was not always so.

One year after the enactment of PRWORA, New York, with several very narrow exceptions, amended the Social Services Law to conform its Medicaid eligibility rules to the new federal standards, eliminating coverage for PRUCOL immigrants.[32] A unanimous decision from New York's highest court, the New York State Court of Appeals, in June of 2001 forced a different approach.

Aliessa v. Novello[33] was brought by twelve noncitizens who were lawfully residing in the United States and met the financial criteria for Medicaid but were denied access because of their immigration status. The Court of Appeals held that although the federal government is constitutionally permitted to distinguish among lawfully residing noncitizens for federal

[30] A U.S. national refers to an individual born in American Samoa or the Commonwealth of the Northern Mariana Islands.
[31] Medicaid is available to pregnant women regardless of immigration status as is CHIP for children.
[32] *See* Social Services Law § 122.1(c), which has yet to be amended to reflect the current noncitizen eligibility rules in the Medicaid program.
[33] 96 N.Y.2d 1, 754 N.E.2d 1085 (N.Y. Court of Appeals, 2001). Although originally brought as a class action, for technical reasons the class action claim was eliminated by the time it reached the Court of Appeals. Nevertheless, the Court's decision was given class wide effect through the settlement provisions of a companion lawsuit.

benefit programs, as it had in PRWORA, states do not have such authority. The Court made clear that New York could not distinguish between groups of lawfully residing immigrants, even if it did so by copying the restrictions in the federally funded Medicaid program. The Court thus required New York to extend Medicaid to noncitizens permanently residing under color of law, both on Equal Protection grounds and based on New York's own constitutional guarantee of aid and care to the needy.

In the years following the Aliessa decision, the New York State Department of Health ("DOH"), issued a series of administrative policy directives that identified the immigrant categories to be considered PRUCOL, a list that excluded basically only the undocumented and noncitizens with nonimmigrant visas. It has proven to be an evolving list since immigration law is far from static and new immigrant related classifications are enacted periodically. The most recent list of PRUCOL classifications are contained in a Desk Guide attached to a General Information System ("GIS") issued by DOH on March 26, 2008.[34]

Under the Desk Guide and DOH's most recent guidance on PRUCOL status,[35] noncitizens in the following categories are classified as PRUCOL and therefore eligible for public health programs:

- those who have been paroled into the U.S. for humanitarian or public policy reasons for a period of less than a year;
- those who are under an Order of Supervision;
- those who have been granted a stay of deportation, whether time limited or indefinite;
- those who have been granted indefinite voluntary departure (a pre-1997 humanitarian based status);
- those on whose behalf an immediate relative petition has been approved and family members covered by the petition[36];
- those who have filed an application for adjustment of status to lawful permanent resident;
- those who have been granted Deferred Action;
- those who have been granted Deferred Enforced Departure;
- those who entered the U.S. on or before January 1, 1972;
- those who have been granted cancellation of removal;
- those who have been granted TPS status;
- those who have a K3/K4, V, S or U visa (all of which can lead to permanent resident status);

---

[34] The link for the desk guide is www.health.ny.gov/health_care/medicaid/publications/docs/gis/08ma009att.pdf.

[35] *See* NYS DOH Informational Letter 07 OHIP/INF-2, "Clarification of PRUCOL Status for Purposes of Medicaid Eligibility," available at www.health.ny.gov/health_care/medicaid/publications/docs/inf/07inf-2.pdf.

[36] Defined to include the spouse, parent or minor unmarried children of a US citizen who has filed a Form I-130 relative petition that has been approved.

- those who have a pending application for asylum or any other immigration benefit; and
- citizens of the Federated States of Micronesia and the Marshall Islands.

These PRUCOL immigrants have access to all public health programs in New York, including Family Health Plus and Child Health Plus, both of which provide comprehensive coverage of medically necessary primary and acute care services to low-income families above Medicaid eligibility levels.[37] Undocumented immigrants who do not meet PRUCOL definitions are eligible for several less comprehensive programs, including a special Medicaid program for pregnant women; HIV related programs designed to assist low and moderate income individuals living with HIV or AIDS, and Emergency Medicaid.[38] Emergency Medicaid covers only care necessary to treat a sudden onset condition severe enough to put the individual's health in serious jeopardy.

Another program of special import to immigrants in New York is the Hospital Financial Assistance program, often referred to as charity care. Hospitals are required to provide care to all of those who present with an emergency, regardless of immigration or insurance status. Special Medicaid funds referred to as DSH (Disproportionate Share Hospital) payments are distributed to states by the federal government to make up for uncompensated care provided to the low-income uninsured (and for the lower reimbursement rates paid for care to individuals covered through Medicaid). Under the New York Hospital Financial Assistance Law, each hospital receiving DSH payments is required to establish a financial assistance program that limits charges for uninsured patients, and provides financial assistance on a sliding scale basis to help uninsured patients pay their hospital bills.[39] Federally qualified health centers represent another important source of health care in immigrant communities. The clinics qualify for similar but separate funding and also provide care on a sliding scale based on income regardless of immigration or insurance status.

Comparing Immigration Eligibility Across Coverage Options in 2014 and Beyond

Because of New York's unique history of commitment to immigrant health care, and the Aliessa decision, immigrant eligibility for New York State Medicaid does not align perfectly with immigrant eligibility for federal Medicaid. New York's broader coverage contains the

[37] New York's Family Health Plus (FHP) program is being phased out in recognition of new coverage options that will be available through the State Exchange. No new applications will be accepted after 12/31/13, and formal repeal is effective 1/1/15. Immigrants who would have been income eligible for FHP (up to 150% of federal poverty for parents and 19-20 year olds) will receive state assistance with premium payments for silver plans in the Exchange. Immigrants in this group who are not eligible for the Exchange will qualify for Medicaid up to 150% of federal poverty. See A. 3006 -D/S. 2606-D, Article VII Bill, Part D.

[38] N.Y. Soc. Servs. L.§ 365-a(6);NYS DOH General Information System 13 MA/09, available at: www.health.ny.gov/health_care/medicaid/publications/gis/13ma009.htm. For information on ADAP and related programs for people living with HIV/AIDS, visit www.health.ny.gov/diseases/aids/resources/adap/index.htm.

[39] Hospital Financial Assistance Law, N.Y. Public Health L. § 2807-k(9-a).

PRUCOL category. Similarly, immigrant eligibility for federal Medicaid fails to align completely with immigrant eligibility for the Exchange under the ACA. The ACA's broader category of "lawfully present" includes several immigrant status groupings that are not included in federal's Medicaid's "qualified alien" category. What is perhaps more surprising, is the misalignment between New York State Medicaid and the ACA's Exchange eligibility. Although immigrant eligibility for state Medicaid is broader for the most part, with PRUCOL containing several status groupings excluded from those who are considered "lawfully present," under the ACA, the ACA's eligibility category actually includes a few groups that are not eligible for New York Medicaid, primarily nonimmigrants holding nonimmigrant visas.

The Venn diagram in Figure 1 below provides an illustration of this imperfect alignment, with New York Medicaid as the largest eligibility category, federal Medicaid the smallest, and the ACA's lawfully residing category as the middle ground, a subcategory of New York Medicaid for the most part, but with a slight extension beyond New York Medicaid representing nonimmigrant visa holders.

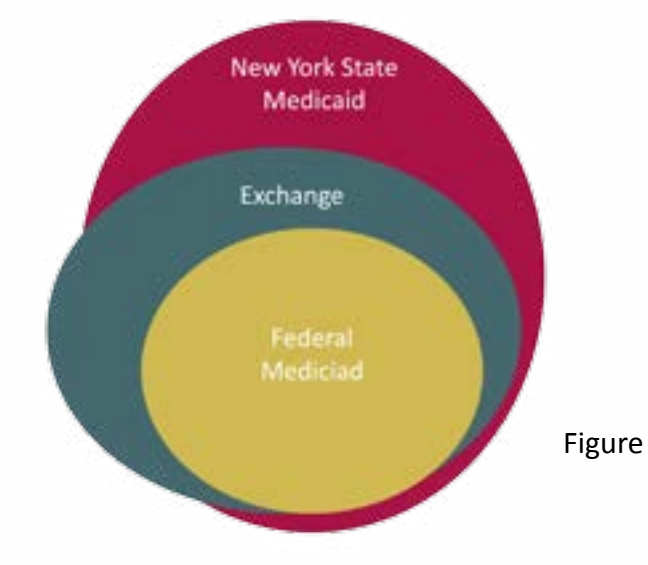


Figure 1

One of the biggest differences between the immigrant eligibility rules of the Exchange and New York's PRUCOL classification is the requirement that, in most cases, in order to be considered lawfully present and therefore eligible for Exchange-related products, the individual must have applied for and been granted employment authorization. New York has no such requirement. Thus a PRUCOL immigrant under an Order of Supervision who does not have work authorization is eligible for New York Medicaid. To be considered "lawfully residing" and eligible for the Exchange, (s)he would first have to apply for, and obtain, work authorization.

Another difference between the ACA's "lawful presence" category and New York's PRUCOL classification is with respect to "registry aliens." Registry aliens are noncitizens eligible to apply for permanent residence if they entered the U.S. before January 1, 1972 and have continuously resided in the country since that time. To be considered lawfully present under the ACA, the noncitizen has to have actually applied for permanent residence and have been granted employment authorization pending the processing of his application. To establish eligibility for Medicaid as PRUCOL, the individual only has to provide evidence to the local social services district that (s)he entered the U.S. before January 1, 1972 and has continuously resided here since that time.

A recent development with respect to the deferred action classification illustrates the importance of maintaining access to state funded Medicaid through New York's PRUCOL classification. An individual granted deferred action is considered to be both lawfully residing and PRUCOL for Medicaid purposes. However, in an amendment to the Pre-Existing Condition Insurance Plan Program ("PCIP"), an early implementation of a part of the ACA, HHS has excluded young people who were granted deferred action under the Obama Administration's Deferred Action for Childhood Arrivals ("DACA") from access to PCIP. The exclusion was extended by the January 23, 2013 Proposed Rule to include access to Qualified Health Plans and federal subsidies in state and federal exchanges, even though deferred action is a lawfully present classification.[40] Earlier guidance issued to the states from CMS extended the DACA beneficiary bar to pregnant women and children who would otherwise be eligible for federal Medicaid and CHIP under the 2009 CHIPRA extension.[41]

Clearly the politics that are so often in play at the federal level with respect to immigrant issues has once again limited the access of lawfully residing noncitizens to federal benefits. In New York, PRUCOL noncitizens with deferred action remain PRUCOL and eligible for state funded Medicaid and CHIP, regardless of the ground on which deferred action was granted.

This exclusion by the federal government of DACA beneficiaries from public health insurance benefits and the Exchange is just one more example of federal action that discriminates between groups of otherwise similarly situated noncitizens, action that the Court of Appeals in *Aliessa* made clear New York State is not constitutionally permitted to take. This makes the preservation of New York's state funded medical assistance benefits all the more critical.

Appendix 1 presents a detailed crosswalk of immigrant eligibility for the different types of health care coverage that will be available in 2014 and beyond. This analytical framework illustrates how each of 27 different immigration statuses created in federal

[40] "Pre-Existing Condition Insurance Plan Program Amendment to Final Rule with Comment Period," Fed. Reg., August 30, 2012. The exclusion of DACA beneficiaries from access to the Exchange is also included in the January 23, 2013 Proposed Rule (see Footnote 28).

[41] *See* Letter to State Health Officials, SHO #12-002, available at www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-12-002.pdf.

law fares with respect to qualifying for federal Medicaid Exchange participation, New York Medicaid and other key health coverage programs in existence in New York. The Explanation of Status-related Terms, attached here as Appendix 2, attempts to breathe some life into the 27 different immigration statuses reflected in Appendix 1 by providing an explanation of each status, and a sense of their historical and political context. Live links in the Crosswalk connect the reader to the explanation of terms for easy reference.

NEW YORK'S EXCHANGE PORTAL

The ACA presents an unprecedented opportunity for addressing the legal complexities surrounding immigrant eligibility for health care coverage. Income eligibility for both public programs and assistance with private products is to be determined according to new, simplified budgeting rules based on Modified Adjusted Gross Income ("MAGI") that will replace the existing, complicated laundry list of income that can be deducted or disregarded.[42] Exchanges will utilize new information technology (IT) incorporating the new income rules and, to varying degrees depending on the IT system, rules related to immigration eligibility as well. States will be able to verify citizenship and immigration status, as well as income and residence, for most applicants through interaction with a new federal data hub. The federal data hub will tap into data from the Internal Revenue System, the Social Security Administration, and a source critical to immigrant applicants, the Systemic Alien Verification of Entitlements ("SAVE") program.

SAVE is an inter-governmental immigration data system administered by the Verification Division of the United State Citizenship and Immigration Services ("USCIS"). SAVE was established under the 1986 IRCA (legalization) legislation to allow state and local public benefit agencies to check information from applicants for government benefits against the millions of records contained in the Department of Homeland Security ("DHS") databases.[43] The federal data hub will pull in data from SAVE and translate responses into categories that allow states to make initial eligibility sorts and provide real-time eligibility determinations to applicants.

New York was one of seven states awarded Early Innovator status and provided with expert assistance to develop a new IT system and a template for the online health exchange application. Given New York's participation in this project, and the State's ability to capitalize on federal grants, prospects are good for New York to enter 2014 with a vastly improved web-based eligibility system. This new system, and the online application which will serve as the primary portal to coverage, take on critical importance, if New York is to maximize coverage opportunities for immigrants. Understanding challenges the current system presents to immigrant applicants is an important part of moving forward with an appropriate design for the new system.

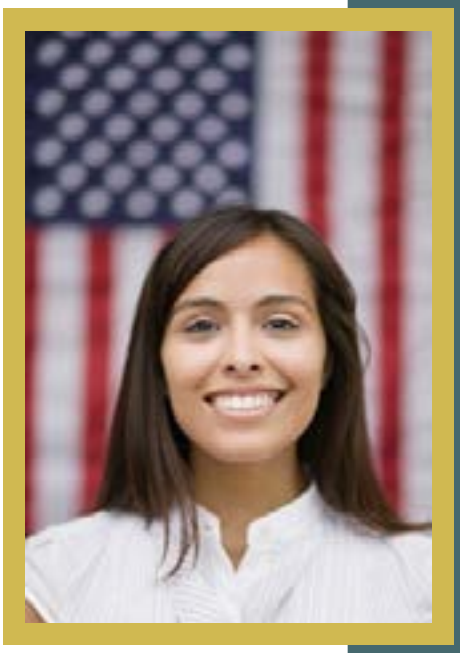
---

[42] *See* ACA § 1413(b)(1).
[43] 42 U.S.C. § 1320b-7.

Current Challenges for Immigrant Applicants

Determining Medicaid eligibility for immigrant applicants in New York has been a monumental task and one that is still extremely error prone.[44] Currently, immigrants apply for Medicaid with their local social service districts, either in New York City or one of the 58 counties outside of the city. Front line eligibility workers are often unfamiliar with the immigration law and its complex classifications, and have difficulty recognizing the variety of immigration statuses that noncitizen applicants present, particularly those included in New York's PRUCOL classification.

Front line eligibility workers face an additional challenge when processing joint applications for both Medicaid and TANF (cash assistance) because PRUCOL is defined differently for purposes of determining cash assistance eligibility than it is for purposes of determining Medicaid eligibility.[45] This is due to the fact that two different state agencies administer the programs. The definition used by DOH for Medicaid purposes is more in line with the present day realities of the immigration system, while the NYS Office of Temporary and Disability Assistance ("OTDA"), which administers TANF, relies on older and narrower welfare related PRUCOL rules for purposes of cash assistance.[46]



Adding to the complexity is that many households are of mixed immigration status, with some family members, often children, who are citizens. Other family members might be PRUCOL or unable to demonstrate any recognized status under the law. The status of each family member in need of health coverage is scrutinized and those who do not have a Social Security Number ("SSN") are sent off to apply for one even if they are ineligible because they do not have, and may not even be eligible for, employment authorization. Parents in many mixed-status immigrant households are afraid to apply for and enroll their family members because of fears about how their information will be used, or the consequences that receiving benefits might have on applications for citizenship.

The current utilization of the federal SAVE program to verify program eligibility has presented another level of challenges for both applicants and eligibility workers. To date, SAVE has functioned as a document driven

---

[44] Systematic failure to accurately evaluate the eligibility of noncitizen applicants for benefits led to a lawsuit in New York City in 2006. *See M.K.B. v. Eggleston*, 445 F. Supp. 2d 400 (S.D.N.Y. 2006). Court supervised monitoring was extended from 2009 to early 2013 because of continuing systemic problems.

[45] Compare the limited list of PRUCOL statuses contained in the 2007 policy document issued by OTDA to the local districts in 2007, available at otda.ny.gov/policy/gis/2007/07dc001.rtf with the much more expansive list of categories in the NYS DOH Document Guide for PRUCOL categories, available at: www.health.ny.gov/health_care/medicaid/reference/mrg/january2009/page455_37e_455_37g.pdf.

[46] This paper does not provide a specific recommendation to address this issue as it is beyond the scope of our discussion. We do strongly urge, however, that the State Department of Health convene a meeting with OTDA to discuss development of a uniform definition of the PRUCOL category.

system that requires the submission of certain information contained on the applicant's immigration document. If a match is not found in the SAVE database, the social service district may be asked to provide additional information, including nationality, aliases and in some circumstances, Form I-94 Arrival Departure Record Numbers, U.S. visa issued numbers or Student Exchange and Visitor Information System ("SEVIS") IDs.

Eligibility workers generally require applicants to provide immigration documents and then supply scanned copies of the documents, along with information from the documents, when submitting a verification request to SAVE. The requirement that applicants present documents to the eligibility workers, documents not readily understood by many of the workers, adds to the burden of processing applications under the current system.

While the SAVE system can be accessed on line currently, most of the social services districts outside of New York City do not have access to the web-based system.[47] These upstate districts instead rely entirely on a paper-based system that requires workers to submit Form G-485 by mail or by fax to the USCIS Verification Division, with the applicant's immigration documents attached. This is a time-consuming process and for applicants who have lost their documents, a not uncommon occurrence with applicants who are homeless or have cognitive or mental impairments, it is a system that simply does not work.

Centralizing Eligibility Determinations

In order to fully implement the fundamental changes in Medicaid eligibility and enrollment required by the ACA, New York will need to centralize eligibility determinations. Even as the State Department of Health was immersing itself in designing the new web-based eligibility system for the Exchange, staff was also meeting with county officials to develop a plan for state takeover of the Medicaid program, as mandated by legislation enacted in 2012.[48]

The resulting blueprint calls on the State to centralize administration of the Medicaid program over a six year period (by March 31, 2018), with a specific timeline for various administrative functions to be developed in consultation with counties. The State will prioritize centralization of MAGI eligible applications but may contract with some counties to perform this function for a period of time beyond January 1, 2014. MAGI budgeting applies to most Medicaid applicants with the notable exception of applicants who are elderly or disabled. The State expects most MAGI applications will be submitted online and processed through the new web-based eligibility system, referred to as NY-HIX. County workers will thus be required to have internet access.[49]

---

[47] Within HRA, only a small number of individuals are actually authorized to use the web based system.
[48] Chapter 56, Laws of 2012, Part F, §6.
[49] "*Medicaid Administration*," Annual Report to the Governor and Legislature, New York State Department of Health, December, 2012, available at: www.health.ny.gov/health_care/medicaid/redesign/docs/2013_annual_report_governor_and_legislature.pdf.

The State will operate a Customer Service Center that will receive and scan paper applications for those who choose that option, and provide individuals with assistance with the online application. The Customer Service Center will provide language access services, and assist with any follow-up that may be required when eligibility determinations cannot be completed online. The Customer Service Center will be staffed by both state workers and staff from a private contractor (MAXIMUS), and its staff will participate in consumer appeals of eligibility determinations.

The New Online Application

The ACA requires the Secretary of Health and Human Services to provide states with a template for an online and paper version of the single streamlined application, which will serve as the application for all subsidized coverage options, including Advance Premium Tax Credits, Cost Sharing Reductions, Medicaid and CHP. The ACA also allows states to develop and use their own applications, which must be approved by the Secretary.

The federal template for the single, streamlined application as proposed by CMS features a dynamic or "smart" technology that poses questions to applicants based on their responses to previous questions. In this way the application is tailored to each applicant and does not ask any non-relevant questions.[50] The group of questions immigrants will need to answer to establish their status will begin by asking if the applicant has "eligible" status. The application will provide a list of eligible statuses in a series of screens. The application will then ask what document the applicant uses to establish his or her status and provide a list of documents in a series of screens. Even if the applicant does not recognize his or her document in the list, the application will request an Alien number (A number) and/or the number on the applicant's arrival/departure record (I-94 number) and seek automated verification of eligible status.[51] The application will also collect information relevant to exceptions to federal Medicaid's 5 year waiting period.

New York's online application will utilize the dynamic and streamlined approach embodied in the federal template, but go beyond the federal template in several important ways. First, New York will encourage families of mixed immigration status, and all immigrant applicants to complete the application through welcoming messages, reassurance about how applicant information will be used, and offers of individualized assistance and interpreters.

Second, New York plans to collect data from applicants that can help establish PRUCOL eligibility for state Medicaid in the event that an applicant does not qualify for federal Medicaid. Discussions with CMS regarding the range of status types the federal hub will be able to verify electronically are ongoing.

---

[50] Single Streamlined Application for the Health Insurance Marketplace: Items in Online Application for Comment – Paperwork Reduction Act (PRA) Appendix A, Revised January 18, 2013.

[51] Information provided during Webinar on design, elements, and user interface of Individual Health Insurance Marketplace application, Centers for Medicare and Medicaid Services, December 6, 2012.

Finally, New York envisions encouraging immigrants who are unable to demonstrate a lawful immigration status to complete the application in order to assess their eligibility for CHP, Medicaid for pregnant women, and in a groundbreaking advancement, Emergency Medicaid. NY-HIX would also provide information about other options available to undocumented immigrants, including the AIDS Drug Assistance Program, the Hospital Financial Assistance program and services from local federally qualified health centers.

New York has already begun to lay the groundwork for an online system capable of precertifying applicants for Emergency Medicaid. As of February, 2013, immigrants unable to demonstrate lawful status, as well as nonimmigrants using temporary visas, have been able to apply for Emergency Medicaid in New York even if they do not have an emergency condition at the time. If the applicant is determined to be otherwise eligible for Medicaid, he or she will have restricted coverage activated for 12 months with up to 3 months of retroactive coverage. Local districts are instructed to renew coverage prior to the end of the 12-month authorization period following standard Medicaid renewal procedures. Providers submitting claims are instructed to enter an admission type of Emergency, as has always been required under New York's Medicaid billing system, but a separate form certifying treatment of an emergency medical condition is no longer required.[52]

New York envisions that the process for precertifying applicants for Emergency Medicaid, as well as other eligibility sorts for immigrants, will be built into NY-HIX as well, as follows:

- New York's online application will utilize buttons for choices, and ask applicants to choose one button to indicate their current citizenship status.
- Response choices will include buttons labeled:
    - US Citizen
    - Naturalized citizen
    - Immigrant/noncitizen
    - Nonimmigrant visa holder
    - Other
- Applicants who choose the "Immigrant/noncitizen" button will be asked to enter several pieces of information including: their "A" number or document number, the type of document they use to prove immigration status and possibly their date of entry and/or the date they received their immigration status (if the dates are not the same). A drop down box will provide a list of document types for selection.
- Applicants who choose the "Nonimmigrant visa holder" button will be asked to enter their visa number. The State may have to ask for more information from these applicants to establish eligibility for some insurance affordability programs.
- Applicants who choose the "Other" button, and who do not submit an "A" or other document number, will be provided text encouraging them to continue with their

[52] NYS DOH General Information System 13 MA/09, available at www.health.ny.gov/health_care/medicaid/publications/gis/13ma009.htm.

application. This encouraging text will explain that:

- Applicants always have the chance to submit follow-up documentation regarding immigration status and assistance is available over the phone and through Navigator programs;
- Immigrants without documentation who complete the online application can still qualify for CHP and Medicaid for pregnant women;
- Immigrants without documentation are likely to qualify for other programs as well, such as Hospital Financial Assistance, services from a federally qualified health center, and the AIDS Drug Assistance Program. Information regarding how to apply for these programs will be offered;

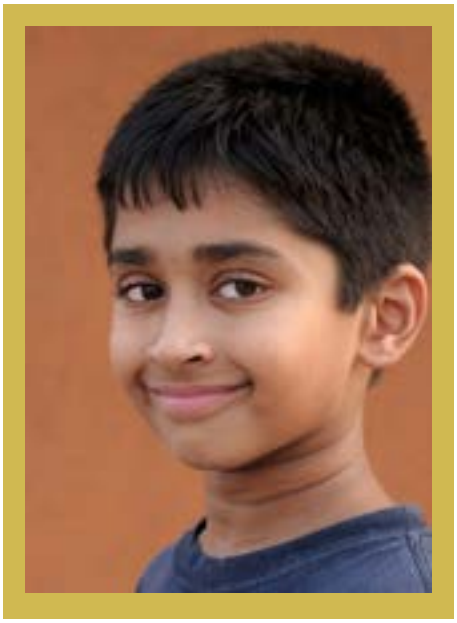
The State's instructions regarding precertification for Emergency Medicaid are still evolving. NY-HIX may not have the capacity to make determinations regarding Emergency Medicaid, by October 1. However, as soon as the technology is in place immigrants will be encouraged to complete the online application so that they can be pre-certified as eligible for Emergency Medicaid. With precertification in place, hospitals will be able to receive payment if and when an emergency occurs.

New York's vision for precertifying undocumented immigrants for Emergency Medicaid in real time through the online Exchange application represents a ground-breaking advancement that should serve as a model for other states. Although welcoming words and reassurances about confidentiality may encourage some undocumented parents to enroll their children, the fact that the system also offers those parents themselves a benefit speaks much more loudly than words. The fact that all members of a household with mixed immigration status will be eligible for some kind of assistance through the online application will undoubtedly result in greater use of the portal, and ultimately, greater access to care for immigrant families.

In addition, pre-certification for Emergency Medicaid will help maximize revenues for hospitals that serve as a safety net for the uninsured. Safety net hospitals that provide care to large numbers of Medicaid patients and low-income uninsured patients in New York and elsewhere are facing a significant loss of funding. As discussed earlier, these hospitals receive Disproportionate Share Hospital (DSH) funding through Medicaid to make up for uncompensated care provided to the low-income uninsured and for the lower reimbursement rates paid for care provided to individuals covered through Medicaid. These DSH payments are scheduled to be reduced under the ACA. The premise for the reduction is that as more of the currently uninsured gain coverage through the Medicaid expansion and the new options available through state and federal Exchanges, hospitals should see a reduction in their uncompensated or charity care. Cuts in hospital funding will begin in 2014, reaching a total cut of 50% nationwide by 2019.[53]

[53] Health Care and Education Reconciliation Act of 2010, P.L. 111-152,§1203.

New York currently relies heavily on DSH funding, receiving the largest share of any state at $1.6 billion annually. Although the state Exchange will offer coverage to millions of currently uninsured New Yorkers, as many as 1.8 million may remain uninsured.[54] It is therefore critical for New York, and other states facing similar challenges, to maximize every potential source of federal assistance for safety net hospitals to make up the loss in DSH revenue. Building an online application system that can precertify eligible persons for Emergency Medicaid will allow hospitals to begin billing for these patients immediately, in the event that they do present with an emergency. Such a system will help the State maximize precious federal revenues even as it protects immigrant patients from financially devastating hospital bills.



Over time, New York may be able to build in pre-certification for other programs available to undocumented immigrants, like the AIDS Drug Assistance Program and Hospital Financial Assistance.

Recommendations for Fine-tuning New York's Application

We applaud New York for its vision with regard to welcoming immigrant applicants, verifying PRUCOL status in real time, and pre-screening undocumented immigrants for Emergency Medicaid. We offer the following recommendations for fine-tuning New York's online application and the rules engine that will drive eligibility determinations (NY-HIX):

1. **NY-HIX should incorporate the State's ground-breaking process for precertifying undocumented immigrants for Emergency Medicaid.** New York should ensure that the online application has the ability to precertify undocumented immigrants for Emergency Medicaid even when they do not yet face an emergency as long as they otherwise qualify for Medicaid. The system should provide applicants who are pre-certified for Emergency Medicaid with a print-out confirming their status as pre-certified and indicating the period of eligibility.

2. **A special unit of workers trained on immigration classifications should be developed within the Consumer Service Center.** Centralized enrollment staff will need training on eligibility issues related to immigration status, as not all statuses will be verified by the federal data hub and immigrants whose applications require follow-up will need expert

[54] Boozang, P., Dutton, M., Lam, A., & Bachrach, D., "*Implementing Federal Health Care Reform: A Roadmap for New York State*," New York State Health Foundation, August, 2010.

assistance. All immigrant applicants who request help should be referred to these specially trained staff.

3. **Welcoming messages should be provided early in the online application process to address the barriers that mixed-status immigrant families are likely to confront.** The following issues should be covered in these early welcoming messages:
   a. Immigrant families are often confused about eligibility rules and assume they are not eligible. New York should encourage immigrant families to apply, specifically explaining that many immigrants can qualify for help from the Exchange or Medicaid and that even those unable to demonstrate lawful status can be pre-certified for Emergency Medicaid.
   b. The application also needs to provide information about the effect of applying for health insurance on an individual's chances of having a Lawful Permanent Resident (green card) application approved by DHS. Many immigrants are concerned that an application for help paying for health care costs may result in DHS deeming them inadmissible as "likely to become a public charge," although the legacy INS issued clarification over a decade ago that only long term institutionalization at public expense might raise such a concern. Applicants with questions should be referred to specially trained staff at the State's Consumer Service Center for individualized assistance and advice.
   c. Assurances regarding confidentiality should promise that no questions will be asked of non-applicants regarding their immigration status. Confidentiality is essential, particularly for adult immigrant family members who will often need to complete an application on behalf of eligible family members such as children. Knowing that information will not be collected is even more reassuring than messages explaining that the use of information will be limited. Again, applicants with questions should be referred to specially trained staff at the Consumer Service Center for individualized assistance.

4. **Help text should appear for applicants once they are in the section of the application on immigration status.** The help text should explain technical terms and provide links to samples of common documents to help applicants locate the numbers on the documents that are requested by the application. Equally important is an instruction to use only numbers assigned to applicants by immigration authorities, as the information submitted by applicants for verification by SAVE can be used for criminal law enforcement purposes if the information indicates potential fraud or misrepresentation.[55]

[55] *See "Privacy Impact Assessment for the Systematic Alien Verification for Entitlements (SAVE) Program*," DHS/USCIS.PIA-006, August 26, 2011, available at: http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_save.pdf.

5. **New York should use the federal data hub, or access SAVE outside the federal data hub, if necessary, in order to seek verification of statuses that are included in PRUCOL but not federal eligibility categories.** Beginning in 2014, the federal data hub will be able to translate data it retrieves from SAVE and tell requesting agencies whether the applicant is a qualified alien and within the 5 year bar for federal Medicaid or a lawfully residing noncitizen.[56] However, given that New York's PRUCOL eligibility category is more expansive than the federal lawfully present classification; New York will need access to additional data in order to maximize automated eligibility determinations for immigrants.

   For example, a response from the federal data hub should be capable of verifying that an applicant is under an Order of Supervision even if the applicant has no work authorization and therefore would not meet the lawful presence requirements. Such an applicant would not be Exchange eligible but could be determined PRUCOL eligible. CMS has said that the Federal Hub will send states the verification data it receives from SAVE, and that states will receive all of the data elements they are currently receiving under the existing system, but clarification is needed to ensure that the federal hub returns verifications of the PRUCOL statuses in use in New York Medicaid to the greatest extent possible.

6. **Whenever verification of immigration status cannot be provided in real time, NY-HIX should initiate a level two SAVE verification query and refer the applicant for individualized assistance.** If the federal data hub does not find data in SAVE initially, New York should initiate a more extensive search of the SAVE database through a request for what had been referred to as a "level two" SAVE query. Level two queries in SAVE can involve supplemental data sources and manual record checks. Sometimes the requesting state or agency will be directed to request further information from the applicant. Applicants should be referred to specially trained staff at the Consumer Service Center, and in-person assistors as necessary, to help them complete the application in these cases.[57]

---

[56] Centers for Medicare & Medicaid Services, Center for Medicaid and CHIP Services, "*Medicaid/CHIP Affordable Care Act Implementation: Answers to Frequently Asked Questions – Federal Data Services Hub*," September 20, 2012.

[57] One PRUCOL status merits special mention here because it is not likely to be verifiable in real time through SAVE and yet, if it can be proven, it will suffice to establish eligibility for State Medicaid. The status is New York's "registry alien" status. A registry alien refers to a noncitizen who entered the U.S. before January 1, 1972 and has continuously resided in the country since that time. Such individuals are eligible to apply for adjustment of status under the immigration law, and are required to have done so, and to have work authorization, in order to be considered lawfully present, under the ACA. However, there is no requirement under the state PRUCOL classification that the individual have actually applied for adjustment or be authorized to work. If the applicant can provide evidence showing that (s)he entered the US before January 1, 1972 and has lived here ever since, that is sufficient to establish PRUCOL status. If the noncitizen entered with a visa, the SAVE system should be able to supply a date of entry but will not be able to provide any information about "continuous residence." For noncitizens who entered without inspection, the date of entry will have to be established through the evidence used to show continuous residence. New York must ensure that these cases receive a special explanatory screen explaining that proof of date of entry and continuous residence is needed. The applicant should be referred to in-person or telephone assistance to help them assemble this proof rather than having their application resubmitted to SAVE.

7. **Consumer testing should be used before roll-out and reengaged periodically to help focus ongoing adjustments to NY-HIX.** Consumer testing in immigrant communities is a fundamental first step that New York must take prior to releasing its online application. Although the federal application has undergone consumer testing, New York's application will include additional text and questions related to Emergency Medicaid, and other subjects important to immigrant applicants. Consumer testing should be utilized prior to roll-out and again subsequent to October 1, 2013, in order to inform ongoing adjustments to the application.

8. **In order to leverage the significant improvements the ACA brings to the Medicaid program for all immigrant applicants, verification systems for Medicaid applications processed outside the Exchange should align with verification systems inside the Exchange.** Not all immigrant applications will be processed through the Exchange and its improved verification and customer services systems. Local districts are expected to retain responsibility, at least temporarily, for determining Medicaid eligibility for non-MAGI applicants, primarily those elderly and disabled. In order to process applications for elderly or disabled immigrants accurately and efficiently, counties must receive training and quality support on immigrant classifications similar to that received by the special unit within the Customer Service Center for the Exchange. Finally, it will be critical to provide district workers with access to the paperless verification system for SAVE requests when required (see section on Verification, supra).[58]

[58] Quality support for counties is critical even after non-MAGI applications are centralized, given that there will likely always be a significant local role in conducting follow-up when automated verification fails.

Conclusion

Health Insurance Exchanges have the potential to eliminate many existing barriers to health insurance coverage for immigrant families, who have been particularly hard hit by shrinking salaries and escalating health care costs. While immigrant access to health care is still governed by a complex patchwork of rules, new IT systems supporting online applications for coverage can circumvent much of this complexity and promise to significantly reduce the paperwork involved in applying for Medicaid.

New York, with its unique history of providing health care coverage to a broader group of immigrants, envisions an online application that will build upon the national template for Health Insurance Exchanges in a number of significant ways. New York's online application, which will serve as the primary portal to the Exchange, will provide welcoming messages, collect data needed to determine PRUCOL eligibility for State Medicaid, and conduct pre-screening for Emergency Medicaid.

The Eligibility Crosswalk in Appendix 1 should help both advocates and policy makers review immigrant eligibility for the different types of health care coverage that will be available in 2014 and beyond. We applaud the State of New York for its proactive and pragmatic approach to meeting the needs of immigrant applicants and offer a set of recommendations for fine tuning the vision. We look forward to continued collaboration in the iterative process of building an Exchange Portal that serves as a true gateway to coverage to all New Yorkers.

HEALTH COVERAGE CROSSWALK: ELIGIBILITY BY IMMIGRATION STATUS

Benefit Related Immigration Classifications		Immigration Status	HEALTH COVERAGE OPTIONS				
			EXCHANGE (BHP)[1]	FEDERAL MEDICAID	NYS MEDICAID/ FHPlus[2]	ADAP CHIP[3] (<19)	EMERGENCY MEDICAID[4]
Lawfully Present[5]	Qualified Aliens	Lawful Permanent Resident (LPRs)	Yes	5 year bar unless pregnant or child<21	Yes	Yes	Only while subject to 5 year bar for Fed Med
		Refugees and Asylees[7]	Yes	Yes	Yes	Yes	No
		Granted withholding of removal under the INA	Yes	Yes	Yes	Yes	No
		Battered Spouses / children of U.S. citizens or LPR w/ pending VAWA or family petition	Yes	5 year bar unless pregnant or child<21	Yes	Yes	Only while subject to 5 year bar for Fed Med
		Cuban/Haitian Entrant	Yes	Yes	Yes	Yes	No
		Paroled for period of one year or more	Yes	5 year bar unless pregnant or child< 21	Yes	Yes	Only while subject to 5 year bar for Fed Med
		Lawfully residing armed services connected noncitizens and their dependents[8]	Yes	Yes	Yes	Yes	No
		Iraq / Afghan SIV [9]	Yes	Yes	Yes	Yes	No
		Canadian born Native Americans[10]	Yes	Yes	Yes	Yes	No
		Amerasians	Yes	Yes	Yes	Yes	No
		T Visa Holders and Certified Victims of Trafficking [11]	Yes	Yes	Yes	Yes	No
		In valid nonimmigrant status [12]	Yes, if state resident	Only if pregnant or child <21 and state resident	Only if pregnant or child <21 and state resident	Yes, if state resident	Yes, unless eligible for Fed Medicaid[13]
	PRUCOL[6]	U, K3 / K4, V, and S visa holders	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Approved Visa and Pending I-485	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Granted withholding of removal under CAT	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid

Benefit Related Immigration Classifications		Immigration Status	HEALTH COVERAGE OPTIONS				
			EXCHANGE[1] (BHP)	FEDERAL MEDICAID	NYS MEDICAID/ FHPlus[2]	ADAP CHIP[3](<19)	EMERGENCY MEDICAID[4]
Lawfully Present[5]	PRUCOL[6]	Paroled for less than 1 year	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Temporary Protected Status (TPS)	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		(non DACA) Deferred Action [14]	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Order of Supervision	**Only with EAD**	Only with EAD AND pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Deferred Enforced Departure	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Granted stays of deportation or removal	Yes	Only if pregnant or child <21	Yes	Yes	Yes
		Noncitizens Lawfully Present in American Samoa Under its Immigration Laws[15]	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Temporary resident INA 210 / 245A	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Family Unity Beneficiary	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		APPLICANTS FOR:					
		Special Immigrant Juvenile Status	Yes	Yes	Yes	Yes	No
		Asylum / Withholding Under INA or CAT	**Only w EAD** or, if child ≤ 14, 180 days after app	Only with EAD AND pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Cancellation of Removal	**Only w/ EAD**	Only with EAD AND pregnant or child <21	Yes	Yes	Only with EAD AND pregnant or child <21
		Temporary Protected Status (TPS)	**Only w/ EAD**	Only with EAD AND pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid

Benefit Related Immigration Classifications		Immigration Status	HEALTH COVERAGE OPTIONS				
			EXCHANGE[1] (BHP)	FEDERAL MEDICAID	NYS MEDICAID/ FHPlus[2]	ADAP CHIP[3] (<19)	EMERGENCY MEDICAID[4]
Lawfully Present[5]	PRUCOL[6]	For Record of Admission Under 249 (registry alien)	**Only w/ EAD**	Only with EAD AND pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Adjustment Under LIFE Act	**Only w/ EAD**	Only with EAD AND pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		Legalization Apps Under SAW and IRCA	**Only w/ EAD**	Only with EAD AND pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
		PRUCOL ONLY					
		Noncitizens who can show continuous residence since on or before 1/1/1972 (registry aliens)	No	No	Yes	Yes	Yes
		Immediate Relatives with approved I-130	No	No	Yes	Yes	Yes
		Deferred Action under DACA (including applicants)[16]	No	No	Yes	Yes	Yes
		Request for Deferred Action (non DACA cases) pending for 6 months or more and not denied[17]	No	No	Yes	Yes	Yes
		Citizens of Micronesia, Paula and Marshall Islands[18]	Yes	Only if pregnant or child <21	Yes	Yes	Yes, unless eligible for Fed Medicaid
Out of Status		Entry across border without inspection (EWIS) and Visa Overstays	No	No	No, unless pregnant	Yes	Yes

ENDNOTES

[1]Exchange eligibility for the various immigration statuses refers to: Eligibility to purchase private insurance in the Exchange,Eligibility for Exchange related financial assistance (advance premium tax credits and assistance with cost-sharing), and Eligibility for the Basic Health Plan (BHP), which New York may choose to create
[2]New York State's Medicaid program (including Family Health Plus) provides assistance to noncitizens for whom it receives federal reimbursement as well as for those who are ineligible for the federal Medicaid programs. This includes most noncitizens who are "lawfully present" but not qualified aliens as well as noncitizens who meet the definition of PRUCOL.
[3]Federal reimbursement for CHIP is only available for qualified alien and lawfully residing children <19.
[4]The state can seek federal reimbursement through the federal Emergency Medicaid program for qualifying services provided to noncitizens ineligible for Federal Medicaid but in receipt of Medicaid using only state funds. This is a "back end" process that does not require the noncitizen in the state's Medicaid program to actually apply for Emergency Medicaid.
[5]The ACA's category of "lawfully present" is for all practical purposes identical to the 2009 CHIP category "lawfully residing" because the ACA requires that to be eligible for the Healthcare Exchange, a "lawfully present" noncitizen must meet the Medicaid state residency rules.
[6]Permanently Residing Under Color of Law (PRUCOL).
[7]Even if a refugee or asylee adjusts to permanent resident status, their exemption from the 5 year bar is not lost.
[8]This category includes active duty service members and honorably discharged veterans not only who are in the "qualified alien" classifications but also those in the "lawfully present" categories. They are not subject to the 5 year bar but may be subject to sponsor deeming and liability.
[9]Treated as refugees for benefits purposes as required by the legislation that created the status.
[10]Must have tribal membership documents. Do not have to apply for LPR status to be eligible.
[11]NYS DOH includes T-visa holders in the "qualified alien" category because they are treated like refugees for benefits purposes. However, under the recently published federal rules, they are defined as "lawfully present."
[12]In its recently published Proposed Rule, HHS removed the phrase "who have not violated their status" inasmuch as that determination is not within the jurisdiction of the Medicaid agency to make. *Medicaid, Children's Health Insurance Programs and Exchanges: Essential Health Benefits in the Alternative Benefit Plans, Eligibility Notices, Fair Hearings and Appeals Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid and Premiums and Cost Sharing*, Proposed Rule, 78 Fed.Reg. 4594, at 4613 (January 23, 2013).
[13]In other words, all immigrants in these and the following categories are eligible for Emergency Medicaid except pregnant women and children <21, who are eligible for Federal Medicaid and therefore ineligible for Emergency Medicaid.
[14]HHS issued clarification at the end of August 2012 that noncitizens granted deferred action under the Deferred Action for Childhood Arrivals (DACA) program are **not** eligible for Federal Medicaid or for the Exchange.
[15]Added by 1/23/2013 Proposed Rule, which also eliminated the category of those lawfully present in Micronesia, Paula and the Marshall Islands from the "lawfully present" list on the ground that they were included in other categories.
[16]See endnote 14. The code on the work authorization of DACA beneficiaries will be (c)(33), which distinguishes them from other noncitizens with Deferred Action, whose work authorization code is (c)(14) and who are eligible for the Exchange.
[17]NYS DOH Policy Guidance memo 08 OHIP/INF-4 at:
www.health.ny.gov/health_care/medicaid/publications/docs/inf/08inf-4.pdf.
[18]*See* endnote 15.

Immigration Status: Explaining the Terms

"Qualified Aliens" Under PRWORA and "Lawfully Present[1]" Under the ACA:

1. Lawful Permanent Resident (LPRs):

Lawful permanent residents are foreign nationals who immigrate to the United States to live here permanently. Most noncitizens become permanent residents through a family petition filed by their U.S. citizen or lawful permanent resident spouse or parent. Once granted LPR status, they have permission to work and live in the U.S., travel abroad, petition for certain of their family members to come to the U.S. and, after a few years, apply for citizenship. In addition to family based immigration, another path to LPR status is through employment, when an employer files an immigration petition on behalf of an employee, generally one with special skills. Refugee and asylees are eligible to apply for LPR status one year after being granted status. An LPR can apply for citizenship after five years in LPR status, three if the immigrant is married to a U.S. citizen.

2. Refugees and Asylees:

A refugee is a noncitizen who, while outside the U.S. and their home country, has been granted permission to enter and live in the U.S. because of a well-founded fear of persecution based on their nationality, religion, race, political opinion or membership in a particular social group. Asylees are noncitizens who have come into the U.S. in some other way and are already here when they apply for, and are granted, refugee status. Both refugees and asylees can apply for LPR status.

3. Granted withholding of deportation or removal under the Immigration and Nationality Act (INA):

A status similar to asylum, it is granted to noncitizens who are in removal proceedings and who prove that their life or freedom would be threatened based on one of the five protected grounds listed above if they were to be returned to their home country. To be granted this relief, the individual must meet a higher evidentiary standard than for asylum. It is generally granted to someone who, because of their past actions, does not qualify for asylum. A person granted withholding could be removed to a third country if there is one that will accept him. There is no path to permanent residence from a grant of withholding.

4. Spouses and children of U.S. citizens or LPRs subjected to "battery or extreme cruelty":

Noncitizen spouses and children of U.S. citizens or lawful permanent residents who have been subjected to battery and abuse may petition on their own behalf (self-petition) for lawful permanent residence under the Violence Against Women Act (VAWA). Under PRWORA, they are eligible for Medicaid and other public benefits while they are waiting for the immigration process to be completed and before they adjust to LPR status. In order to be classified as a qualified alien for

[1] The "lawfully present" immigrant eligibility classification of the ACA is identical to the "lawfully residing" immigrant classification established under the Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). Because the ACA requires that, in order to be eligible to utilize the Health Care Exchange, a "lawfully present" noncitizen must meet the Medicaid state residency rules; there is no difference between these two classifications.

Immigration Status: Explaining the Terms

benefit purposes, the individual can no longer be living with the abuser and must also show that (s)he has begun the immigration process by providing evidence that:

a. her/his VAWA self-petition has been approved or is pending and (s)he has received a "prima facie case determination" from USCIS, or
b. (s)he has an approved or pending visa application filed by the abusive U.S. citizen or lawful permanent resident spouse or parent and the benefit agency finds that (s)he has presented credible evidence of abuse, or
c. (s)he has an application pending for cancellation of removal or suspension of deportation under VAWA based on the battery and abuse of her/his US citizen or LPR spouse or parent.

5. Cuban/Haitian Entrants as defined by the Refugee Education Assistance Act (REEA)[2]:

The classification Cuban/Haitian Entrant has its historical roots in the time of the Mariel boatlift and the influx of Cuban and Haitian nationals in 1980, when, between April and October, about 125,000 Cubans and 40,000 Haitians entered the U.S. This massive influx occurred just after Congress passed the 1980 Refugee Act. However, the Refugee Act was directed toward the admittance and resettlement of refugees arriving from abroad, not for individuals arriving directly into the U.S. Furthermore, the Cubans and Haitians entering the U.S. fit somewhere between refugees fleeing persecution and immigrants seeking better lives[3]. In June of 1980, the federal government used the Attorney General's parole authority to create a new immigrant category, "Cuban/Haitian Entrant (Status Pending). "In October of 1980, the Refugee Education Assistance Act was passed, which authorized the provision of refugee benefits to Cuban and Haitian entrants.

A Cuban/Haitian Entrant is defined under Section 501(e) of the REAA as:

1. any individual granted parole status as a Cuban/Haitian Entrant (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, **regardless of the status of the individual at the time assistance or services are provided** (emphasis added); and
2. any other national of Cuba or Haiti –
   A. who-
      i. was paroled into the United States and has not acquired any other status under the Immigration and Nationality Act;
      ii. is the subject of removal proceedings under the Immigration and Nationality Act; or
      iii. has an application for asylum pending with the Immigration and Naturalization Service and
   B. with respect to whom a final, nonappealable, and legally enforceable order of removal has not been entered.

[2] P.L. 96-42, 94 Stat. 1799 (1980)
[3] Hemenway, Rohani and King, *Cuban, Haitian, and Bosnian Refugees in Florida: Problems and Obstacles in Resettlement*, Florida Department of Children and Families, Refugee Programs Administration, June 1999, available at: www.cala.fsu.edu/files/refugee_lit_review.pdf.

Immigration Status: Explaining the Terms

The years since the Mariel boatlift have seen periodic waves of both Cuban and Haitian migrations. Many of the later arrivals were simply given parole status, without any special designation. A rule published in the Federal Register in the late 1990's by INS clarified that a national of Cuba or Haiti who is paroled into the U.S. at any point after October of 1980 is considered to have been paroled in the "special status" referred to in the REAA.[4] Thus, for example, Haitians who came to the U.S. in parole status after the massive earthquake of three years ago are Cuban/Haitian Entrants and therefore qualified aliens with respect to Medicaid and other benefits.

Even an order of removal does not terminate the Cuban/Haitian Entrant status for the purpose of determining the individual's eligibility for Medicaid or other benefits. This applies primarily to Cubans who were initially granted parole status and then, at some later point, were placed in removal proceedings and ordered deported. Because they cannot legally be returned to Cuba while the Communist government is in power, the Office of Refugee Resettlement, in a 2001 clarification to State Refugee Coordinators, instructed that they be treated as Cuban/Haitian Entrants for benefit purposes if they had been granted parole status at any point after October of 1980.[5]

3. Paroled into the U.S. for a period of one year or more:

Noncitizens "paroled" into the U.S. are foreign nationals who have been given permission to enter the U.S. on humanitarian grounds or because it is in the public interest of the U.S. to allow them into the country even though they do not have a visa or lawful status. It is not an immigration status and, with some exceptions, notably Cuban and Haitian parolees, it does not provide a path to permanent residence. If the period of parole granted is one year or more, the person is both a "qualified alien" and "lawfully present." If the period of parole granted is less than one year, the individual is not considered a "qualified alien" but is "lawfully present."

4. Noncitizens from Iraq and Afghanistan with Special Immigrant Visas:

Under various programs enacted by Congress over the last six or so years, a specified number of nationals of Iraq and Afghanistan who have worked with the U.S. in their home country, as translators and in certain other capacities, are permitted to come to the U.S. with special immigrant visas (SIV) each year. Though they enter as lawful permanent residents, they are treated for Medicaid and other public benefit purposes as if they were refugees. Consequently they are not barred for the first five years from qualifying for these benefits.

These special visas are currently limited to 1500 a year through the year 2013 for Afghan nationals who worked with the U.S. and 50 a year for Afghan and Iraqi nationals who acted as translators. From fiscal years 2008 through 2012, there was an annual allocation of 5,000 visas a year for Iraqi nationals who worked for the U.S. but that ended this federal fiscal year. Spouses and children accompanying the principal visa holders do not count towards these limits.

---

[4] Final Rule, *Effect of Parole of Cuban and Haitian Nationals on Resettlement Assistance Eligibility*, 63 Fed. Reg. 31895 (June 11, 1998).

[5] However, in New York, Cubans who have a deportation order and are under an Order of Supervision at the time they apply for benefits, even if they were initially granted parole status, are classified as PRUCOL rather than as Cuban/Haitian Entrants. Consequently, the state receives no federal reimbursement for medical assistance provided to them and they are denied food stamps.

Immigration Status: Explaining the Terms

5. Amerasians:

Amerasians are noncitizens from Vietnam who are admitted to the U.S. as immigrants (LPRs) pursuant to legislation enacted by Congress in 1988. The term Amerasians refers to Vietnamese children born to U.S. citizen fathers between 1962 and 1976 and their children, spouses and mothers, guardians or next of kin. Because of the passage of time this is likely to be a relatively rarely encountered immigration classification.

6. T Visa Holders and Certified Victims of Trafficking:

Trafficking victims with a T visa or a prima facie case determination on a T visa application are "lawfully present" under federal immigration law.

T visa holders are treated like refugees in qualifying for Medicaid and other public benefits. Noncitizens who are victims of human trafficking but not yet in possession of a T visa are also eligible for benefits as if they were refugees if the Office of Refugee Resettlement (ORR) has certified them. To be certified, the individual must be a victim of human trafficking as defined by the Trafficking Victims protection Act of 2000, be willing to assist with the investigation and prosecution of trafficking cases and have completed a bona fide application for a T visa or have received "continuous presence" status from the Department of Homeland Security Immigration and Custom Enforcement (ICE). Children (under 18) who are victims of human trafficking do not have to be certified to be eligible for benefits. Rather, ORR will issue an eligibility letter stating that the child is such a victim.

NYS DOH classifies this group as "qualified aliens" because they are treated as refugees for benefit purposes. T visa holders are eligible to apply for permanent resident status after three years.

Noncitizens who are "Lawfully Present" and Residing in the State but who are not "Qualified Aliens" or PRUCOL

In Valid Nonimmigrant Status:

Most noncitizens in a valid nonimmigrant status, for example students or foreign workers, are classified as "lawfully residing." They are not classified as PRUCOL because historically, nonimmigrants were never, and are still not, eligible for welfare or food stamps or federal housing programs and the like, programs in which the concept of PRUCOL developed. The January 23, 2013 Proposed Rule eliminated the earlier phrase "who have not violated their status" since benefit agencies are not capable of making that determination. Whether an individual violated the conditions of their nonimmigrant status is a determination to be made only by immigration agencies. (An example of a violation of status would be a student who takes a job even though he is not authorized to work.)

Immigration Status: Explaining the Terms

Noncitizens who are "Lawfully Present" and PRUCOL

7. K3/K4, "U", "S", and "V" visa holders--nonimmigrants that are eligible to adjust to LPR status[6]:

a. A victim of crime who can obtain certification from a state or federal law enforcement agency or a state or federal court that s/he has been, or is willing to be, helpful to the agency or court in the investigation or prosecution of the crime is eligible to apply for a "U" visa. It is a visa designed to encourage noncitizens without legal status to come forward to report crimes without fear that they will be placed in removal proceedings if they do so. The spouse, parent, child(ren), and in some cases, the unmarried siblings, of the crime victim may be eligible for U visas as derivatives. U visa holders are eligible to apply for work authorization and, after 3 years, can apply to adjust to permanent resident status. There is a 10,000 annual cap in the number of U visas that can be granted.

b. K3 and K4 visas are granted to the spouse of a U.S. citizen, and to his/her children, who are the beneficiaries of a family based petition. This allows them to enter the U.S. and live and work here until they are eligible to adjust to permanent resident status.

c. A "V" visa is one that is granted to the spouse and children of a lawful permanent resident who are the beneficiaries of a family based petition filed on or before December 21, 2000. The petition must either have been pending for 3 years or more or, if it was granted, the spouse and his or her children are not yet eligible to adjust status. Long delays are endemic to the immigration of the spouses and children of lawful permanent residents because of the annual cap on the number of such relatives who may enter the U.S. in any given year. However, because this was a time limited remedy, no one who is a beneficiary of a petition filed by an LPR after December of 2001 is eligible for the visa. Since most of the spouses and children of LPRs with petitions filed before then have already adjusted status, it is unlikely that there are many, if any, noncitizens left who currently have a "V" visa.

d. The "S" visa is very rare. It is not a benefit that the noncitizen can apply for on his or her own behalf. Rather, it must be applied for by Attorney General on behalf of a noncitizen who is determined to possess critical information about a criminal organization or enterprise that s/he is willing to supply to law enforcement authorities. Like "U" visa holders, "S" visa holders are eligible to work and to apply for adjustment to permanent resident status after 3 years and may obtain visas for his or her immediate family members.

5. Noncitizens with an Approved Visa Petition and a Pending Application for Permanent Resident Status:

This category refers to noncitizens who are the beneficiaries of an approved immigrant visa petition under which they are now eligible to adjust to permanent resident status. If they have filed the application for adjustment and are now simply waiting for their application to be processed by USCIS, they are considered to be lawfully present.

[6] Nonimmigrants generally are noncitizens with temporary visas that, by definition, do not have an intention to remain in the U.S. permanently. These specific visa holders are the exception to that rule.

Immigration Status: Explaining the Terms

6. Granted withholding of deportation/removal under the Convention Against Torture (CAT):

The Convention Against Torture is an international treaty to which the U.S. is signatory and it prohibits the return of individuals to their home country who have substantial grounds for believing that they would be at risk of being subjected to torture. As with withholding of removal under the INA, there is no path to permanent residence from a grant of withholding of removal under CAT.

7. Persons paroled for a period of less than one year:

Noncitizens paroled for humanitarian or public interest reasons for a period of less than one year are not included in the definition of "qualified aliens" but are included in the "lawfully present" and PRUCOL classifications. Whether they meet the definition of "lawfully residing" and are thereby eligible to participate in the Exchange will depend on the length of the period for which parole was granted, i.e. whether they can meet the residence requirement of Medicaid and the ACA.

8. Noncitizens Granted Temporary Protected Status (TPS):

Temporary protected status is granted to nationals of certain countries who are residing in the U.S. when their country suffers a severe natural disaster or is experiencing serious civil strife. The Secretary of Homeland Security designates the countries whose nationals are eligible for TPS. For example, in 2010, Haitians who had been living in the U.S. when the earthquake struck were made eligible to apply for TPS. TPS beneficiaries are eligible to remain in the U.S. for specified periods that can be, and routinely are, renewed, often for many years. Individuals applying for TPS must apply for employment authorization at the same time, regardless of age. Once employment authorization is granted, even if it is prior to the grant of TPS, the noncitizen is considered to be lawfully present.

9. Noncitizens Granted Deferred Action:

Immigration officers can exercise "prosecutorial discretion" by granting "deferred action" to a noncitizen who is otherwise removable. There are no statutory or regulatory provisions for this exercise of discretion and generally it is granted on a case-by-case basis on humanitarian grounds. However, there are certain instances where it is granted to certain classifications as a whole, for example VAWA self-petitioners whose petition has been granted but who have not yet adjusted to permanent resident status may be granted deferred action. It has also been granted to U visa applicants whose application has been granted but where the cap on U visas for the year has already been reached.

Most recently, young people who came to the U.S. before reaching the age of 16 and who meet certain requirements have been made eligible for deferred action as "childhood arrivals." However, they have been excluded from ACA eligibility.

Noncitizens granted deferred action are eligible to apply for employment authorization.

10. Noncitizens Granted Orders of Supervision:

A noncitizen who has been ordered removed or deported by the Immigration Court but where it is unlikely that the removal can be effectuated is usually placed under an order of supervision.

Immigration Status: Explaining the Terms

This would happen for example with a Cuban national who cannot be removed because the U.S. has no diplomatic relationship with Cuba or when someone is ordered removed to a country without a functioning government that can issue travel documents. Orders of supervision require the noncitizen to report to the local immigration officer on a regular basis and permit the individual to apply for employment authorization.

11. Noncitizens Granted Deferred Enforced Departure:

Deferred Enforced Departure (DED) is much like TPS. It is in the President's discretion to authorize and in the past has been granted to nationals of Haiti, El Salvador and the People's Republic of China. Currently only nationals from Liberia are covered under DED. Like TPS, DED is granted for a specified period of time, which can be renewed, and people under DED can apply for employment authorization.

12. Noncitizen Granted Stay of Removal:

Under certain circumstances, ICE may grant a stay of removal to a noncitizen who has a final Order of Removal. This not often granted and almost always involves overwhelming humanitarian considerations.

13. Temporary Residents and Applicants for Adjustment under INA Sections 210 and 245A:

The Immigration Reform and Immigrant Control Act of 1986 included a legalization program for two groups of noncitizens who were without legal status. One was a general legalization program for those who had lived in the U.S. without status since prior to January 1, 1982. The other program was for "special agricultural workers" (SAW), noncitizens who had done agricultural work for a specific period of time. Under the legalization program, individuals were first granted temporary resident status. They were then required to apply for permanent status within a certain time frame.

SAW noncitizens became lawful permanent residents automatically after residing in temporary resident status after 3 to 4 years. Because of the automatic conversion to permanent resident status for SAW noncitizens and the requirement for legalization applicants to apply for permanent status within a certain period of time after being granted temporary resident status, there are unlikely to be few if any noncitizens left who fall into this category.

14. Family Unity Beneficiaries:

Family Unity status provides protection from removal for the children and spouses of noncitizens who legalized under the 1986 legalization program. To be eligible, the person must have been the spouse or child of the legalized immigrant as of May 5, 1988 and must have been continuously living in the U.S. since that time. In 2000, Congress extended Family Unity protection to the spouses and unmarried minor children of noncitizens eligible to apply for permanent resident status under the Legal Immigration Family Equity (LIFE) Act "late amnesty" legalization program.

Immigration Status: Explaining the Terms

Applicants for Immigration Benefits who are Lawfully Present and PRUCOL:

15. Applicants for Special Immigrant Juvenile Status (SIJ):

This category refers to young noncitizens under the age of 21 who have come under the jurisdiction of the Family Court and who have been abandoned or abused by at least one parent and have an application for SIJ status pending. To be eligible for SIJ the individual must have a court order with special findings, including a finding that it is not in the best interest of the child to be returned to his or her home country.

16. Noncitizens with Employment Authorization[7] who are:

a. applicants for asylum or withholding of removal under the INA or CAT – if the applicant is a child under 18 years old, there is no requirement that s/he have employment authorization to be considered "lawfully present" but the application for asylum or withholding has to have been pending for at least 180 days;
b. applicants for cancellation of removal – noncitizens without legal status who have been living in the U.S. for at least 10 years and who are placed in removal proceedings who are of good moral character and who have a U.S. citizen or LPR child, spouse or parent who would suffer severe and extreme hardship if the noncitizen were ordered removed are eligible to apply for cancellation of removal;
c. applicants for TPS - note that the application for TPS must be accompanied by an application for employment authorization;
d. applicants for a "record of admission" under INA 249 ("registry alien") – a noncitizen of "good moral character" who has been continuously residing in the United States since before January 1, 1972 is eligible to apply for permanent resident status solely based on their length of residence and is also eligible to apply for employment authorization while his or her application for adjustment is pending;
e. applicants for adjustment under the LIFE Act – the LIFE Act of 2000 authorizes class members of one of three class actions that challenged the INS' implementation of the legalization program under the 1986 Immigration Reform and Immigrant Control Act (IRCA) to file for adjustment of status. In order to be eligible, the individual must show that they were continuously physically present in the U.S. during the period between November 6, 1986 and May 4, 1988 and that they applied for membership in the class before October 1, 2000. The filing period for adjustment applications under LIFE ended May 31, 2002, so it is unlikely that any applications remain pending currently.
f. and applicants for legalization under 1986 IRCA - the filing period has long been closed, even for those applying under LIFE's late amnesty program. Because it has been closed for a long time, there is unlikely to be anyone left with an application still pending.

[7] For benefit eligibility under the **PRUCOL** category, there is **no requirement** that the applicants have employment authorization. In the January 23, 2013 Proposed Rule, HHS proposes to eliminate this long list and simply include all noncitizens with employment authorization under 8 C.F.R.§ 273.12(c) in the category of "lawfully present."

Immigration Status: Explaining the Terms

Noncitizens who are PRUCOL but not Classified as Lawfully Present Under the ACA[8]

17. Registry Aliens with evidence of continuous residence:

These are noncitizens who are authorized to apply for permanent resident status if they can show that they entered the U.S. before January 1, 1972 and have evidence of continuous residence since then. In contrast to the ACA classification of "lawful presence", to be considered PRUCOL, the individual doesn't need to have an application for adjustment pending. Rather, to establish PRUCOL eligibility the individual need only provide the benefit agency with proof that s/he has been living in the U.S. since before January 1, 1972.

18. Immediate relatives with an approved I-130 petition:

Noncitizen spouses and children of U.S. citizens who are beneficiaries of an approved family petition are considered PRUCOL without meeting the ACA's "lawfully present" requirement of having an application for adjustment pending with USCIS.

19. Requests for Deferred Action pending for a period of 6 months that have not been denied:

Unlike the deferred action program for childhood arrivals, which has a formal application procedure, most requests for deferred action are made by letter on behalf of noncitizens who, usually because of their health or other exigent circumstances, are requesting that they be granted deferred action on humanitarian grounds. Because these requests sometimes go unanswered by ICE, NYS DOH has developed a policy that if the request has been pending for at least 6 months without a denial by ICE, the person will be considered PRUCOL as someone who is known by the government to be in the country but where the government appears to have no intention of enforcing their departure.[9]

This policy does not apply to applicants for Deferred Action by Childhood Arrivals, who are treated like all other applicants for an immigration benefit or status under NYS DOH's PRUCOL rules.[10] This means that they are immediately eligible for Medicaid upon proof that the application has been filed.

20. Applicants for various immigration benefits who do not have employment authorization.

With the exception of applicants for Special Immigrant Juvenile Status, to be considered lawfully present and eligible for the Exchange, applicants for most other immigration benefits must also have an employment authorization document (EAD) in addition to the pending application. In

[8] These are individuals who are only eligible for public health insurance under New York's state funded Medicaid/Family Health Plus programs.

[9] NYS DOH Informational Letter 08 OHIP/INF-4, *Clarification of PRUCOL Status* (August 4, 2008) available at: www.health.ny.gov/health_care/medicaid/publications/docs/inf/08inf-4.pdf

[10] For the purpose of eligibility for public assistance, the NYS Office of Temporary and Disability Assistance does not treat a noncitizen applicant for lawful status as PRUCOL. In order to be considered eligible for cash assistance the individual must actually have the status.

Immigration Status: Explaining the Terms

New York, these applicants are considered PRUCOL regardless of whether they have an EAD or not. Included in the list of PRUCOL eligible noncitizens are applicants for:

a. Special immigrant Juvenile Status (also considered lawfully present even without an EAD);
b. Asylum or withholding of Removal under the INA or CAT;
c. Cancellation of Removal;
d. Temporary Protected Status;
e. Record of Admission under Section 249 of the Immigration and Nationality Act (INA);
f. Adjustment under the LIFE Act, and
g. Legalization under SAW and IRCA.

Each of these immigration benefits is described in paragraph 13 above, under the section "Applicants for Immigration Benefits who are Lawfully Present and PRUCOL."

EMPIRE JUSTICE CENTER

Albany ♦ Long Island ♦ Rochester ♦ White Plains

www.empirejustice.org