

## **WELFARE REFORM IMPLEMENTATION**

### **Continuing Medicaid Coverage for Qualified Aliens**

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#### **Introduction**

This memorandum analyzes key elements of the provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub.L. 104-192)(the welfare law) granting to states authority to determine eligibility of qualified aliens for Medicaid.

The analysis is premised on the principle that while the welfare law creates major new restrictions on receipt of public benefits by legal immigrants, it leaves the structure of the Medicaid program intact. To exercise their option to continue to serve their existing Medicaid population, including those who lose SSI cash assistance, states need not expand their current Medicaid program or incur additional administrative expenses and may not alter or amend their Medicaid programs beyond the particular changes explicitly authorized by this law. This interpretation gives states authority to exercise their lawful options without undue administrative burden and expense; at the same time, it gives effect to President Clinton's commitment to minimize the harshest impacts of the law and preserve Medicaid for the largest number of aged and disabled qualified aliens.

Nothing in this title may be construed as an entitlement or a determination of an individual's eligibility or fulfillment of the requirements for any Federal, State, or local governmental program, assistance, or benefits. For purpose of this title, eligibility relates only to the general issue of eligibility or ineligibility on the basis of alienage.

#### **I. The Medicaid Status of Qualified Aliens Who Lose SSI Cash Assistance**

Policy: Qualified aliens who lose SSI cash assistance remain categorically needy for Medicaid unless a state affirmatively chooses to not cover qualified aliens at all. States do not need to expand their existing Medicaid programs to continue coverage for these otherwise qualified aliens.

Under Section 402(a), qualified aliens who are not otherwise exempted lose SSI cash assistance. Since SSI cash assistance recipients are mandatory categorically needy under the Medicaid program (in all except the twelve section 209(b) states), the loss of SSI by most qualified aliens will sever their automatic link to Medicaid. However, unless and until a state affirmatively exercises its choice to exclude qualified aliens from coverage in its Medicaid program, it must continue Medicaid coverage for these individuals. This is because the loss of SSI benefits is due solely to the status of the recipient as an alien; such status is an eligibility requirement inconsistent with the alien eligibility requirements of Medicaid provisions.

Congress set forth two separate alien eligibility schemes: one for SSI and one for Medicaid. Whereas non-exempt qualified aliens are excluded from SSI, Congress gave states the authority to determine their eligibility for Medicaid. It would be inconsistent with this scheme for HCFA to interpret the SSI provision to apply to Medicaid as well. Such an interpretation would require states to deny Medicaid to aliens who would have been eligible for assistance but for their immigration status.

By giving states the choice to determine eligibility for Medicaid based on alienage, Congress has delegated to the states authority to deem as receiving SSI those who would receive SSI but for their alienage. Thus, non-exempt, qualified aliens who lose SSI cash assistance are in much the same situation as "Pickle" people who lost Medicaid because a Social Security cost of living increase made them ineligible for SSI, or families with stepchildren who lost Medicaid because AFDC deeming rules made them ineligible for AFDC cash assistance. In both situations, Medicaid was restored for these beneficiaries by "deeming" them eligible for the respective cash assistance programs. Through this mechanism, these beneficiaries retained eligibility as "mandatory categorically needy."

The decision of a state to continue coverage of non-exempt, qualified aliens, therefore, is effectively a decision to deem these individuals SSI eligible and thus categorically needy and to continue to provide Medicaid as before. Stated alternatively, a state can continue to provide Medicaid benefits to qualified aliens who, "but for" their status as aliens, would be eligible for SSI cash assistance.

Absent the deeming approach, states would have to redetermine eligibility of those qualified aliens losing SSI under another existing category of their Medicaid program. If they had no applicable category, they would have to deny coverage or expand their entire program. This approach defeats the legislative intent of permitting states to choose to continue their Medicaid coverage of existing program beneficiaries. Moreover, the necessary redeterminations are administratively costly and burdensome. Those who would lose Medicaid due to loss of SSI (in

states without another category for them to fit into) might lose their right to emergency Medicaid services, a right not even denied to those who are "not qualified aliens."

a. Absent deeming, some states would have to expand their Medicaid programs in order to continue to cover current SSI recipients.

Only 29 states and the District of Columbia include in their state plans optional categorically needy coverage of individuals meeting SSI requirements but not receiving cash assistance (SSI/OCN). Only 35 states and the District of Columbia provide coverage to medically needy individuals. At least six states have neither a medically needy nor optional categorically needy program. Qualified aliens who lose SSI and who live in states without the full scope of optional Medicaid eligibility categories would lose Medicaid benefits unless the state amended its State Plan. Under Medicaid rules, however, if the state provides Medicaid to any individual in an optional group, the state must provide Medicaid to all individuals who apply and are found eligible in that group. 42 C.F.R. Section 435.201(b). Thus, in order to continue covering qualified aliens who lose cash assistance, states would actually have to expand Medicaid eligibility to all individuals within those other optional eligibility categories. Clearly, neither the automatic loss of Medicaid by recipients nor the mandated expansion of programs by states was intended by Congress.

Texas is one example of a State that, absent the ability to deem individuals SSI eligible, will not be able to continue Medicaid coverage of qualified aliens without expanding its Medicaid program. Over 7% of qualified aliens affected by the welfare bill live in Texas, and the Governor has indicated his interest in continuing Medicaid coverage for those individuals who will lose SSI. However, Texas has neither a medically needy program, nor a program for non-cash SSI-related individuals. The Texas Interagency Workgroup on Welfare Reform estimates that 37,283 aged and disabled qualified aliens receiving SSI in July 1996 would lose Medicaid even if the state opted to continue coverage "because their only access to Medicaid . . . is now being denied under the new federal statute."

In sum, states should not have to expand Medicaid eligibility in order to exercise the option to continue to provide Medicaid benefits to non-exempt, qualified aliens who previously received SSI. To require states to do so would effectively nullify Congress' intent and would produce extraordinarily harsh results. Instead, HCFA must issue guidance to the states informing them that if they opt to continue coverage for non-exempt qualified aliens, and such aliens qualify for SSI "but for" their alien status, they remain categorically needy under the Medicaid program.

b. Absent deeming, states will be required to undertake administratively costly and burdensome redeterminations.

When individuals lose SSI cash assistance, states are required by Medicaid law to redetermine their eligibility under different categories of coverage provided by the State plan. HCFA has already reminded the states of their obligations in this regard. While such protection is critical to Medicaid recipients, to ensure that they do not experience an unnecessary break in coverage, it will be difficult for states to effectively undertake the volume of redeterminations that will be required, absent deeming. California will have to redetermine eligibility for over 270,000 recipients; New York will have to review nearly 105,000 cases. Significantly, the effect of requiring states to find other categories into which to move those losing SSI is to shift enormous administrative costs to the states. Yet, the welfare law provided no additional money for the states to undertake this reprocessing. Thus, the most effective, least costly path for assuring continued Medicaid for those who meet all SSI requirements except the new alienage restriction is to treat them as deemed SSI recipients and avoid the redetermination process.

c. Loss of Medicaid due to loss of SSI cash assistance might also result in loss of the right to emergency Medicaid services, services provided even to those who are "not qualified aliens."

In all cases where Congress has denied Medicaid to persons due to their alienage status, it has preserved emergency services. The welfare law requires states to provide emergency Medicaid services to an "alien who is not a qualified alien," who is otherwise denied access to a whole array of federal and state benefits. Moreover, if a state chooses its option under Section 402(b)(1) to not provide Medicaid services to "qualified aliens," it must, nevertheless, provide emergency services to those individuals who otherwise meet program requirements. Nothing in the law, however, requires, or even permits, states to provide emergency Medicaid to individuals who stand to lose SSI due to their immigration status. Thus, if Texas is unable effectively to exercise its option to continue coverage of those losing SSI without expanding its Medicaid program, it will not even be able to provide those individuals emergency services and receive federal payments for them. Surely, Congress did not intend that penniless elderly and disabled "qualified aliens" would lose access to emergency services available to certain "not qualified aliens."

d. HCFA has authority to formulate policy consistent with the purpose of the law.

While it is clear that Congress delegated authority to the states to determine eligibility based on

alienage, and thus implicitly, to deem as categorically eligible those who would receive SSI "but for" their alien status, any doubt about the meaning of the statute can be resolved by HCFA's interpretation. It is the job of the Administration to make policy judgments that choose among competing reasonable interpretations of a statute. See *Pauly v. Bethenergy Mines*, 501 U.S. 680, 698-99 (1991). "The power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress... ." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Courts will accept such policy-based determinations, and will not substitute their own constructions of ambiguous provisions, so long as the Administration's interpretation of the statute is "reasonable." *Id.* at 844. Thus, HCFA's interpretation of the law will be accorded weight by the courts both because of HCFA's expertise in administering the Medicaid statute and because of its authority and responsibility to elucidate the policy underlying the Congressional enactment.

### **II. States Opting to Cover Qualified Aliens under Section 402(B)(1) Must Comply with Requirements of the Medicaid Program.**

Policy: States exercising their choice to cover qualified aliens must cover all qualified aliens with the full range of eligibility categories and services available to other Medicaid recipients in the state.

Section 402(b)(1) provides "Notwithstanding any other provision of law . . . a state is authorized to determine the eligibility of an alien who is a qualified alien . . . ." Section 402(b)(1), however, does not give states authority to selectively repeal provisions of the Medicaid statute. In fact, nothing in Title IV of the welfare law -- the segment addressing benefits for non-citizens -- amends the Medicaid statute. The clearest and most reasonable interpretation of section 402(b)(1) is that it authorizes states to elect to cover qualified aliens in their Medicaid program or not to cover qualified aliens in their Medicaid program. Once a state chooses to cover qualified aliens, it must do so within the existing framework of federal and state Medicaid law.

If Congress wants to repeal the Medicaid statute or give states authority to do so, it must act "with clear and manifest intent." *Watt v. Alaska*, 101 S. Ct. 1673, 451 U.S. 259, 68 L.Ed. 2d 80 (1981). Thus, Section 402(b)(1) must be construed narrowly. Rather than a broad grant of authority to rewrite the Medicaid statute, it merely gives states the option of restricting eligibility on the basis of alienage or not. Support for this position is found in Section 433(a)(1), which provides:

(Emphasis added).

The "notwithstanding any other law" clause must be construed only to preclude operation of any law that would prohibit a state from denying Medicaid benefits on the basis of alienage. No legislative history suggests that Congress intended to repeal Medicaid provisions not related to alienage status and such a broad reading of the "notwithstanding" clause would be anathema to the way courts interpret laws. A fundamental tenet of statutory construction is that repeals by implication are not favored. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.

*Morton v. Mancari*

, 417 U.S. 535, 550 (1974). "Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.' " (Emphasis added) *Radzanower*, 426 U.S. at 155 citing

*Silver v. New York Stock Exchange*

, 373 U.S. 341, 357 (1963). The Medicaid statute's requirements and the welfare law's option to the states can be reconciled by the narrow interpretation stated above.

This narrow interpretation of the "notwithstanding" clause is necessary for another reason: to allow states to do other than choose "up or down" as to whether they will cover legal aliens in their Medicaid programs would result in violations of the 14th Amendment's equal protection clause. Agencies have a duty to construe a statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting

*United States v. Jin Fuey Moy*

, 241 U.S. 394, 401 (1916)). Classifications "based on alienage, . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate."

*Graham v. Richardson*

, 403 U.S. 371, 372 (1971)

Thus, Congress may not have the authority to permit states to discriminate based on legal alienage. "A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." *Id.* at 382. Even if Congress has such authority, such choices by the states must be exercised within the narrowest parameters. For example, a state could not choose to cover Russian immigrants in its program, but not Chinese immigrants. Similarly, a state cannot choose to offer some qualified aliens some services under one category of its Medicaid program, but exclude qualified aliens from other portions of the program.

Statutory construction also compels a narrow interpretation of how states can exercise their choice under section 402(b). When Congress wants to give states wider latitude to pick and choose among aliens, it knows how to use language to do so. In contrast to the welfare law, the immigration law, Pub. L. 104-208 authorizes states to "prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance..." Sec. 553(a) (Emphasis added.) No such distinction is offered in the welfare law, and none should be implied. See *Russello v. United States*, 464 U.S. 16, 23 (1983). (General assumption is Congress acts intentionally and purposely in the disparate inclusion or exclusion of specific language.)

Accordingly, the only question for states is whether they intend to continue to provide Medicaid coverage for qualified aliens or not. If a state chooses to continue coverage, it must comport with all Medicaid provisions (unless waived) including those regarding eligibility, statewideness and comparability.

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