



HUMAN SERVICES

DEPARTMENT
Susana Martinez, Governor
Brent Earnest, Secretary
Nancy Smith-Leslie, Director

DEPARTMENTAL MEMORANDUM

MAD-IPP: 17-04

DATE: November 08, 2017

TO: MAD AND ISD STAFF

FROM: *KAT NSL*
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BY: *R.* ROY BURT, ELIGIBILITY BUREAU CHIEF, MEDICAL ASSISTANCE DIVISION

SUBJECT: EMERGENCY RULE CHANGES – MEDICAID CITIZENSHIP & IMMIGRATION REQUIREMENTS

The Medical Assistance Division (MAD) has issued the attached emergency rules at 8.200.410.11 NMAC (CITIZENSHIP). These emergency rules supersede prior rule changes to this section that went into effect October 1, 2017, and **are to be put in place immediately on all cases subsequent to October 1, 2017.** No changes to ASPEN were initiated as a result of the October 1, 2017 rules, so such cases shall be processed as normal. These rules will be officially in place effective November 16, 2017; however, they are applicable immediately, as noted above.

These rules reinstate language related to Medicaid citizenship and immigration requirements. All reinstated or new language is underlined in red in the attachment, and includes the following:

- 8.200.410.11(A)(4) NMAC: Language was reinstated to include non-citizens lawfully admitted for permanent residence or who are permanently residing in the United States under Color of Law (PRUCOL).
- 8.200.410.11(B)(1)(l) NMAC: Language was reinstated to exempt battered non-citizens from the five-year bar.
- 8.200.410.11(B)(2)(a) NMAC: Language was reinstated to clarify that a qualified non-citizen includes a non-citizen who is lawfully admitted for permanent residence under the Immigration and Nationality Act.
- 8.200.410.11(B)(2)(i) NMAC: Language was reinstated to include battered women and non-citizen children of battered parents in the definition of a qualified non-citizen.
- 8.200.410.11(B)(3)(a) NMAC: Language was reinstated to clarify that children under age 21 and pregnant women are considered lawfully present if they are qualified non-citizens.
- 8.200.410.11(B)(3)(d)(i) NMAC: The word “aliens” was changed to “non-citizens” for consistency throughout the rule.
- 8.200.410.11(B)(3)(h) NMAC: Language was reinstated to clarify that children under age 21 and pregnant women are considered lawfully present if they are non-citizens who are lawfully present in the Commonwealth of the Northern Mariana Islands under 48 USC Section 1806(e).

Please address questions regarding this IPP to Lori Pena with the MAD Eligibility Bureau at lori.pena@state.nm.us or (505) 827-1336.

Thank you.

8.200.410.11 CITIZENSHIP: To be eligible for medicaid, an individual must be a citizen of the United States; United States national or a non-citizen who meets the requirements set forth in either Subsection A or B of 8.200.410.11 NMAC.

A. Non-citizens who entered the United States prior to August 22, 1996: Non-citizens who entered the United States prior to August 22, 1996, will not be subject to the five-year bar for purposes of medicaid eligibility. These classes of non-citizens are as follows.

(1) Qualified non-citizens who entered the United States prior to August 22, 1996, and obtained their qualified non-citizen status prior to that date, are eligible for medicaid without the 5 year waiting period.

(2) Non-citizens who entered the United States prior to August 22, 1996, and remained continuously present in the United States until the date they obtained qualified non-citizen status on or after August 22, 1996; any single absence from the United States of more than 30 days, or a total aggregate of absences of more than 90 days, is considered to interrupt "continuous presence".

(3) Lawful Permanent Residents (LPRs) are qualified non-citizens per 8 USC 1641.

(4) Non-citizens lawfully admitted for permanent residence or are permanently residing in the United States under color of law as follows:

(a) the individual may be eligible for medicaid if the individual is a non-citizen residing in the United States with the knowledge and permission of the United States immigration and customs enforcement (ICE) and ICE does not contemplate enforcing the non-citizens departure; ICE does not contemplate enforcing a non-citizens departure if it is the policy or practice of ICE not to enforce the departure of non-citizens in the same category, or if from all the facts and circumstances in a particular case it appears that ICE is otherwise permitting the non-citizen to reside in the United States indefinitely, as determined by verifying the non-citizens status with ICE;

(b) non-citizens who are permanently residing in the United States under color of law are listed below; none of the categories include applicants for a non-citizen status other than those applicants listed in item (vi) or (xvi) of this Subparagraph; none of the categories allow medicaid eligibility for non-immigrants; for example, students or visitors; also listed are the most commonly used documents that ICE provides to non-citizens in these categories:

(i) non-citizens admitted to the United States pursuant to 8 U.S.C. 1153(a)(7)(Section 203(a)(7) of the Immigration and Nationality Act); ask for a copy of ICE Form I-94 endorsed "refugee-conditional entry";

(ii) non-citizens, including Cuban/Haitian entrants, paroled in the United States pursuant to 8 U.S.C. 1182(d)(5)(Section 212(d)(5) of the Immigration and Nationality Act; for Cuban/Haitian entrant (Status Pending) reviewable January 15, 1981; (although the forms bear this notation, Cuban/Haitian entrants are admitted under Section 212(d)(5) of the Immigration and Nationality Act);

(iii) non-citizens residing in the United States pursuant to an indefinite stay of deportation; ask for an immigration and naturalization services letter with this information or ICE Form I-94 clearly stated that voluntary departure has been granted for an indefinite period of time;

(iv) non-citizens residing in the United States pursuant to an indefinite voluntary departure; ask for an immigration and naturalization services letter or ICE Form I-94 showing that voluntary departure has been granted for an indefinite time period;

(v) non-citizens on whose behalf an immediate relative petition has been approved and their families covered by the petition who are entitled to voluntary departure (under 8 CFR 242.5(a)(2)(vi)) and whose departure ICE does not contemplate enforcing; ask for a copy of ICE Form I-94 or Form I-210 or a letter clearly stating that status;

(vi) non-citizens who have filed applications for adjustment of status pursuant to Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) that ICE has accepted as properly filed (within the meaning of 8 CFR 245.2(a)(1) or (2)) and whose departure ICE does not contemplate enforcing; ask for a copy of ICE Form I-94 or I-181 or a passport appropriately stamped;

(vii) non-citizens granted stays of deportation by court order, statute, or regulation, or by individual determination of ICE pursuant to Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105 (a)) or relevant ICE instructions, whose departure that agency does not contemplate enforcing; ask for a copy of ICE Form I-94 or a letter from ICE, or a copy of a court order establishing the non-citizens status;

(viii) non-citizens granted asylum pursuant to Section 208 of the Immigration and Nationality Act (8 U.S.C. 1158); ask for a copy of ICE Form I-94 and a letter establishing this status;

(ix) non-citizens admitted as refugees pursuant to Section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) or Section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)); ask for a copy of ICE Form I-94 properly endorsed;

(x) non-citizens granted voluntary departure pursuant to Section 242(b) of the Immigration and Nationality Act (8 U.S.C. 1252(b)) or 8 CFR 242.5 whose departure ICE does not contemplate enforcing; ask for a Form I-94 or Form I-210 bearing a departure date;

(xi) non-citizens granted deferred action status pursuant to Immigration and Naturalization Service Operations Instruction 103.1(a)(ii) prior to June 15, 1984 or 242.1(a)(22) issued June 15, 1984 and later; ask for a copy for ICE Form I-210 or a letter showing that departure has been deferred;

(xii) non-citizens residing in the United States under orders of supervision pursuant to Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252(d)); ask for a copy of Form I-220 B;

(xiii) non-citizens who have entered and continuously resided in the United States since before January 1, 1972, (or any date established by Section 249 of the Immigration and Nationality Act, 8 U.S.C. 1259); ask for any proof establishing this entry and continuous residence;

(xiv) non-citizens granted suspension for deportation pursuant to Section 244 of the Immigration and Nationality Act (8 U.S.C. 1254) and whose departure ICE does not contemplate enforcing; ask for an order from an immigration judge showing that deportation has been withheld;

(xv) non-citizens whose deportation has been withheld pursuant to Section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)); ask for an order from an immigration judge showing that deportation has been withheld;

(xvi) any other non-citizens living in the United States with the knowledge and permission of the immigration and naturalization service and whose departure the agency does not contemplate enforcing (including permanent non-immigrants as established by Public Law 99-239, and persons granted extended voluntary departure due to conditions in the non-citizens home country based on a determination by the secretary of state).

B. Qualified non-citizens who entered the United States on or after August 22, 1996:

(1) Qualified non-citizens who entered the United States on or after August 22, 1996, are barred from medicaid eligibility for a period of five years, other than emergency services (under Category 085), unless meeting an exception below. LPRs who adjust from a status exempt from the five-year bar are not subject to the five-year bar. The five-year bar begins on the date the non-citizen obtained qualified status. The following classes of qualified non-citizens are exempt from the five-year bar:

(a) a non-citizen admitted to the United States as a refugee under Section 207 of the Immigration and Nationality Act;

(b) a non-citizen granted asylum under Section 208 of the Immigration and Nationality Act;

(c) a non-citizen whose deportation is withheld under Section 243(h) of the Immigration and Nationality Act;

(d) a non-citizen who is lawfully residing in the state and who is a veteran with an honorable discharge not on account of non-citizen status; is on active duty other than on active duty for training, in the armed forces of the United States; or the spouse or unmarried dependent child under the age of 18 of such veteran or active duty non-citizen;

(e) a non-citizen who was granted status as a Cuban and Haitian entrant, as defined in Section 501(e) of the Refugee Education Assistance Act of 1980;

(f) a non-citizen granted Amerasian immigrant status as defined under Section 584 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 1988;

(g) victims of a severe form of trafficking, in accordance with Section 107(b)(1) of the Trafficking Victims Protection Act of 2000, P.L. 106-386;

(h) members of a federally recognized Indian tribe, as defined in 25 U.S.C. 450b(e);

(i) American Indians born in Canada to whom Section 289 of the Immigration and Nationality Act applies;

(j) Afghan and Iraqi special immigrants under Section 8120 of Pub. L. 111-118 of the Department of Defense Appropriations Act, 2010; ~~and~~

(k) ~~N~~non-citizens receiving SSI; and

(l) battered non-citizens who meet the conditions set forth in Section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) as added by Section 501 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208 (IIRIRA), and amended by

Section 5571 of the Balanced Budget Act of 1997, P.L. 105-33 (BBA), and Section 1508 of the Violence Against Women Act of 200, P.L. 106-386; Section 431(c) of PRWORA, as amended, is codified at 8 USC 1641(c).

(2) Qualified non-citizen: A "qualified non-citizen", for purposes of this regulation, is a non-citizen, who at the time the non-citizen applies for, receives, or attempts to receive a federal public benefit, is:

(a) a non-citizen who is lawfully admitted for permanent residence under the Immigration and Nationality Act:

- (a) (b) a non-citizen who is granted asylum under Section 208 of such act; or
- (b) (c) a refugee who is admitted to the United States under Section 207 of the act; or
- (e) (d) an Amerasian who is admitted to the United States under Section 207 of the act;

or

(d) (e) a non-citizen who is paroled into the United States under Section 212(d)(5) of such act for a period of at least one year; or

(e) (f) a non-citizen whose deportation is being withheld under Section 243(h) of such act or under Section 241(b)(3); or

(f) (g) a non-citizen who is granted conditional entry pursuant to 203(a)(7) or such act as in effect prior to April 1, 1980; or

(g) (h) a non-citizen who is a Cuban or Haitian entrant (as defined in Section 501(e) of the Refugee Education Assistance Act of 1980); or

(h) (i) ~~a non-citizen, per 8 USC 1641(e), who has been battered per 8 USC 1641(c) or subject to extreme cruelty in the United States by a spouse or a parent or by a member of the spouse's or parent's family who is residing in the same household as the non-citizen; but only after having resided in the United States for at least five calendar years from the date the non-citizen obtained qualified status. The child or children of a battered non-citizen meeting these requirements are also eligible. certain battered women and non-citizen children of battered parents (only those who have begun the process of becoming a lawful permanent resident under the Violence Against Women Act); or~~

(i) (j) victims of a severe form of trafficking and their spouses, children, siblings, or parents; or

(j) (k) members of a federally recognized Indian tribe, as defined in 25 U.S.C. 450b(e); or

(k) (l) American Indians born in Canada to whom Section 289 of the Immigration and Nationality Act applies; or

(l) (m) Afghan and Iraqi special immigrants under Section 8120 of Pub. L. 111-118 of the Department of Defense Appropriations Act, 2010.

(3) Children under age 21 and pregnant women exempt from the five year bar: As authorized by CHIPRA 2009 legislation, New Mexico medicaid allows lawfully residing children under age 21 and pregnant women, if otherwise eligible including meeting state residency and income requirements, to obtain medicaid coverage. Lawfully residing children under age 21 and pregnant women must meet the residency requirement as set forth in 8.200.410.12 NMAC. A child or pregnant woman is considered lawfully present if he or she is:

(a) a qualified non-citizen as defined in Section 431 of PRWORA (8 USC Section 1641);

(a) (b) a non-citizen in nonimmigrant status who has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission as defined under 8 USC 1101(a)(15);

(b) (c) a non-citizen who has been paroled into the United States pursuant to Section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. Section 1182(d)(5)) for less than one year, except for a non-citizen paroled for prosecution, for deferred inspection or pending removal proceedings;

(e) (d) a non-citizen who belongs to one of the following classes:

(i) ~~non-citizens~~ aliens currently in temporary resident status pursuant to Section 210 or 245A of the Immigration and Nationality Act (8 U.S.C. Section 1160 or 1255a, respectively);

(ii) non-citizens currently under temporary protected status (TPS) pursuant to Section 244 of the Immigration and Nationality Act (8 U.S.C. Section 1254a), and pending applicants for TPS who have been granted employment authorization;

(iii) non-citizens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24);

as amended;

- (iv) family unity beneficiaries pursuant to Section 301 of Pub. L. 101-649,

- (v) non-citizens currently under deferred enforced departure (DED) pursuant to a decision made by the president;

- (vi) non-citizens currently in deferred action status except those with deferred action under "Defined Action for Childhood Arrivals" who are not considered lawfully present.

- (vii) non-citizens whose visa petitions have been approved and who have a pending application for adjustment of status;

- ~~(d)~~ (e) A non-citizen with pending applicants for asylum under Section 208(a) of the INA (8 U.S.C. Section 1158) or for withholding of removal under Section 241(b)(3) of the INA (8 U.S.C. Section 1231) or under the convention against torture who has been granted employment authorization, or is an applicant under the age of 14 and has had an application pending for at least 180 days;

- ~~(e)~~ (f) non-citizens whose applications for withholding of removal under the convention against torture have been granted;

- ~~(f)~~ (g) children who have pending applications for special immigrant juvenile status as described in Section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. Section 1101(a)(27)(J));

- ~~(g)~~ (h) non-citizens who are lawfully present in the Commonwealth of the Northern Mariana Islands under 48 USC Section 1806(e);

- ~~(h)~~ (i) non-citizens who are lawfully present in American Samoa under the immigration laws of American Samoa; or

- ~~(i)~~ (j) victims of trafficking.

(4) Non-citizen sponsors (where an affidavit of sponsorship was executed pursuant to Section 213 of the Immigration and Nationality Act subsequent to August 22, 1996): The income and resources of a non-citizen sponsor, of any individual applying for medicaid, are deemed available to the applicant, when an affidavit of support is executed pursuant to Section 213 of the Immigration and Nationality Act, on or after August 22, 1996. This counting of non-citizen sponsor income and resources is effective until the sponsored non-citizen achieves citizenship.

(5) The state assures that it provides limited medicaid services for treatment of an emergency medical condition, not related to an organ transplant procedure, as defined in 1903(v)(3) of the social security act and 8.285.400 NMAC and implemented at 42 CFR 440.255, to the following individuals who meet all medicaid eligibility requirements, except documentation of citizenship or satisfactory immigration status or present an SSN.

- (a) qualified non-citizens subject to the 5 year waiting period described in 8 USC 1613; or

- (b) non-qualified non-citizens, unless covered as a lawfully residing child or pregnant woman by the state under the option in accordance with 1903(v)(4) and implemented at 42 CFR 435.406(b).

[8.200.410.11 NMAC - Rp, 8.200.410.11 NMAC, 10/1/2017]