STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 29, 2005	No. I05-009 (R04-040) Re: Public Benefits under Federal Law and A.R.S. § 46-140.01

To: David Berns
Director, Department of Economic Security

Questions Presented

1. Are programs identified as federal public benefits in the August 4, 1998 United States Department of Health and Human Services (DHHS) Notice subject to the requirements of Arizona Revised Statutes ("A.R.S.") § 46-140.01?

2. Do the requirements in A.R.S. § 46-140.01 apply to programs identified in 8 U.S.C. § 1611(b) or § 1621(b) as exceptions to the alienage restrictions that generally apply to federal or state or local public benefits?

3. Are programs identified in the January 16, 2001 United States Department of Justice Notice of Final Order as services necessary for the protection of life or safety subject to the requirements of A.R.S. § 46-140.01?

Summary Answers

1. Programs identified as federal public benefits in the DHHS Notice dated August 4, 1998 are not subject to the requirements of A.R.S. § 46-140.01 because A.R.S. § 46-140.01 expressly applies only to "state and local public benefits." The programs identified in the DHHS notice are, however, subject to the eligibility restrictions, and verification and reporting requirements that apply to federal public benefits as set forth in 8 U.S.C. § 1611 and other federal laws.

2. Programs identified in 8 U.S.C. § 1611(b) or 8 U.S.C. § 1621(b) as exceptions to the alienage eligibility restrictions that otherwise apply to federal public benefits and state and local public benefits are not subject to the requirements of A.R.S. § 46-140.01.

3. Programs listed in the U.S. Department of Justice Notice of Final Order dated January 16, 2001, as necessary for the protection of life or safety, are not subject to the requirements of A.R.S. § 46-140.01 if the programs are community based, provide in-kind (non-cash) services, and do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income, as required by 8 U.S.C. § 1621(b)(4).

Background

At the 2004 general election Arizona voters approved A.R.S. § 46-140.01 as part of Proposition 200. This statute requires that State and local government employees verify the identity and eligibility of applicants for State and local public benefits not mandated by federal law. This Office previously advised that "state and local public benefits" subject to A.R.S. § 46-140.01 included those programs in Title 46 of Arizona Revised Statutes that are "state and local public benefits" under 8 U.S.C. § 1621(c). Section 1621 generally establishes that non-citizens

who are not qualified aliens are not eligible for State and local public benefits. A different federal law, 8 U.S.C. § 1611, establishes similar restrictions for "federal public benefits." Both of these statutes were part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Federal Welfare Reform Act"), which included many eligibility restrictions based on immigration status. [1] Pub. L. 104-193, 110 Stat. 2105 [codified in scattered sections of titles 8 and 42 of U.S.C.].

You seek additional guidance regarding the application of the federal law to assist in the implementing of A.R.S. § 46-140.01 and to ensure compliance with federal law.

Analysis

A. Programs Listed in the United States Department of Health and Human Services August 1998 Notice as Federal Public Benefits Are Not "State and Local Public Benefits" Under A.R.S. § 46-140.01.

Section 46-140.01, as added by Proposition 200, expressly applies only to "state and local public benefits." As explained in Arizona Attorney General Opinion I04-010, A.R.S. § 46-140.01 governs certain programs that are "state and local public benefits" subject to 8 U.S.C. § 1621. Section 1621 specifically provides that the term "state and local public benefits" does not include "any [f]ederal public benefit under 1611(c) of this title." 8 U.S.C. § 1621(c)(3). Likewise, by its terms, A.R.S. § 46-140.01 does not apply to "federal public benefits." Therefore, a "federal public benefit" subject to 8 U.S.C. § 1611 is not subject to A.R.S. § 46-140.01.

A "federal public benefit" is, with some exceptions:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

[1] This law also created the Temporary Assistance for Needy Families ("TANF") block grant program and made significant changes to the national child support program.

> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1).

In August of 1998, the U.S. Department of Health and Human Services (DHHS) published a notice in the Federal Register identifying DHHS programs that provide federal public benefits under the Federal Welfare Reform Act. DHHS Notice, PRWORA; Interpretation of 'Federal Public Benefit, 63 FR 41658-01, 1998 WL 435846 (Aug. 4, 1998) ("DHHS Notice"). The DHHS Notice also provided general guidance regarding its interpretation of the term "federal public benefits." DHHS advised that part A of the definition ("any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States") "generally include[s] agreements or arrangements between Federally funded programs and individuals, such as research grants, student loans, or patent licenses." *Id.*, 63 FR at 41659. Similarly, the term "grants" refers to grants to individuals, not block grants provided to states or localities. *Id.*

Regarding Part B of the definition, DHHS advised that a benefit must satisfy two conditions. First, it must be one of the enumerated benefits ("retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit") or be a "similar benefit." *Id.* at 41658 (quoting 8 U.S.C. § 1611(c)(1)(b)). Second, it must be provided to an "individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United

States." *Id.* DHHS interpreted "individual, household, or family eligibility unit" to refer to benefits that are:

> (1) provided to an individual, household, or family, and
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> (2) the individual, household, or family must, as a condition of receipt, meet specified criteria (e.g., a specified income level or residency) in order to be conferred the benefit.

The benefits do not include "benefits that are generally targeted to communities or specified sectors of the population (e.g., people with particular physical conditions, such as a disability or disease; gender; general age groups, such as youth or elderly)." *Id.* at 41658. For example, DHHS advised that a benefit provided under the Maternal and Child Health program, which provides health services to women and children, is not a "federal public benefit." *Id.* at 41659.

Based on these principles and a review of DHHS programs, the DHHS Notice identified 29 specific programs or sources of funding as "federal public benefits that are subject to the eligibility restrictions in 8 U.S.C. § 1611.[2] These federal benefits are generally not available to immigrants who are not lawfully present in the United States. *See* 8 U.S.C. § 1611(a). Even though some of the programs identified in the 1998 DHHS notice are administered by State and

[2] The programs included: Adoption Assistance; Administration on Development Disabilities (ADD) — State Developmental Disabilities Councils, ADD special projects, and ADD university affiliated programs; Adult Programs/Payments to Territories; Agency for Health Care Policy and Research Dissertation Grants; Child Care and Development Fund; Clinical Training Grant for Faculty Development in Alcohol & Drug Abuse; Foster Care; Health Profession Education and Training Assistance; Independent Living Program; Job Opportunities for Low Income Individuals; Low Income Home Energy Assistance Program; Medicare; Medicaid (except assistance for an emergency medical condition) Mental Health Clinical Training Grants; Native Hawaiian Loan Program; Refugee Cash Assistance; Refugee Medical Assistance; Refugee Preventive Health Services Program; Refugee Social Services Formula Program; Refugee Social Services Discretionary Program; Refugee Targeted Assistance Formula Program; Refugee Targeted Assistance Discretionary Program; Refugee Unaccompanied Minors Program; Refugee Voluntary Agency Matching Grant Program; Repatriation Program; Residential Energy Assistance Challenge Option; Social Services Block Grant; State Child Health Insurance Program; Temporary Assistance To Needy Families. *Id.* at 41660. Although these programs are "federal public benefits," some of the specific benefits or services that these programs provide may not be provided to an "individual, household, or family eligibility unit." If a service is not provided to an "individual, household, or family eligible unit," it would not be a "federal public benefit" subject to 8 U.S.C. § 1611. *Id.* at 41658.

local governments, they are federal public benefits, not State and local public benefits. The DHHS Notice acknowledges this distinction between state and local public benefits and federal public benefits:

> Services or benefits that are wholly funded by state or local governments may be "state or local public benefit(s)" as defined in section 411(c) of [the Federal Welfare Reform Act]. However, services or benefits that are wholly or partially funded with DHHS resources must comply with the interpretation provided in this Notice.
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> DHHS Notice, 63 FR at 41660.

Any program identified in the DHHS notice as a federal public benefit is not a State and local public benefit subject to A.R.S. § 46-140.01. Under the Federal Welfare Reform Act, States and other entities that provide federal public benefits are required to verify that applicants for federal public benefits are U.S. citizens or qualified aliens. 8 U.S.C. § 1611. States that opt to participate in federal programs are required to follow federal standards and meet federal requirements.

B. Programs Identified in 8 U.S.C. § 1611(b) and 8 U.S.C. § 1621(b) Are Provided to All Eligible Persons Regardless of Immigration Status.

Although 8 U.S.C. § 1611 broadly restricts the eligibility of persons not lawfully in the United States for "federal public benefits," it also includes several exemptions from those eligibility restrictions. 8 U.S.C. § 1611(b)(1) identifies several federal public benefits that are exempt from the eligibility restrictions in 1611(a). Under federal law these federal public benefits are available to people regardless of whether they are lawfully present in the United States:

1. Emergency medical care (other than organ transplants) for Medicaid eligible persons (8 U.S.C. § 1611 (b)(1)(A));

2. Short-term, non-cash, in-kind emergency disaster relief (8 U.S.C. § 1611 (b)(1)(B));

3. Non-Medicaid public health assistance for immunizations with respect to immunizable diseases, as well as for testing and treatment of symptoms caused by communicable diseases (8 U.S.C. § 1611 (b)(1)(C));

4. Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the U.S. Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety (8 U.S.C. § 1611 (b)(1)(D));

5. Programs for housing or community development assistance or financial assistance administered by the U.S. Secretary of Housing and Urban Development, any program under Title V of the Housing Act of 1949, and any assistance under 7 U.S.C. §1926C to the extent the alien was receiving such a benefit on August 22, 1996 (8 U.S.C. § 1611(b)(1)(E));

6. Title II Social Security Act payments to an alien lawfully present in the U.S. as determined by the U.S. Attorney General if nonpayment would contravene an international agreement, be contrary to 42 U.S.C. § 402(t), or the alien was

entitled to the benefit based on an application filed on or before August 1996 (8 U.S.C. § 1611(b)(2));

7. Medicare payments to an alien lawfully present in the U.S. as determined by the U.S. Attorney General, and with respect to benefits payable under Part A of Medicare, if the alien was authorized to be employed and with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits (8 U.S.C. § 1611(b)(3));

8. Railroad Retirement Act of 1974 or Railroad Unemployment Insurance Act benefits to an alien who is lawfully present in the United States as determined by the U.S. Attorney General or to an alien residing outside the U.S. (8 U.S.C. § 1611(b)(4)); and

9. SSI benefits (or those programs related to eligibility under SSI) for an alien who was receiving them on August 22, 1996 (8 U.S.C. § 1611 (b)(5)).

A state agency administering these federal programs should not verify the immigration status of applicants for the exempt programs because, under federal law, these programs are available without regard to the applicant's immigration status. *See* DOJ Notice of Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of PRWORA, AG Order No. 2129-97, 62 FR 61344, 61347 (November 17, 1997) ("no verification of an applicant's status as a U.S. citizen, U.S. non-citizen national or qualified alien should be undertaken where benefits are not contingent on such status").

Similarly, 8 U.S.C. § 1621, which governs "state and local public benefits," exempts certain programs from its eligibility restrictions. Although A.R.S. § 46-140.01 applies to State and local public benefits in Title 46 of Arizona Revised Statutes that are subject to 8 U.S.C. §

1621, those programs exempt from 8 U.S.C. § 1621 are not subject to the eligibility verification requirements in A.R.S. § 46-140.01. Section 46-140.01 applies to State and local public benefits not mandated by federal law. Although federal law does not mandate "state and local public benefits," it does mandate that some state and local public benefits be provided without regard to a person's immigration status. Those programs that are available without regard to immigration status are specified in 8 U.S.C. § 1621(b). They include primarily emergency services:

(1) assistance for health care items and services that are necessary for the treatment of an emergency medical condition and are not related to an organ transplant;

(2) short-term, non-cash, in-kind emergency disaster relief;

(3) public health assistance for immunizations which respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the United States Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

Those programs that are exempt from the eligibility restrictions in 8 U.S.C. § 1611 or § 1621 are not subject to the provisions of A.R.S. § 46-140.01.

C. Programs Necessary for Life and Safety are Exempt from the Requirements of A.R.S. § 46-140.01.

The Federal Welfare Reform Act required the Attorney General of the United States, in the Attorney General's "sole and unreviewable discretion," to identify certain federal, state and local public benefits that are exempt from the general prohibition against undocumented immigrants receiving those public benefits. 8 U.S.C. §§ 1611(b)(1)(D); 1621(b)(4). The Attorney General was required to identify programs, services, and assistance that meet three criteria: (1) deliver in-kind services at the community level, including through public or private non-profit agencies; (2) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (3) are necessary for the protection of life or safety. 8 U.S.C. § 1611 (b)(1)(D). Congress specified that soup kitchens, crisis counseling and intervention, and short-term shelter were examples of such assistance. *Id.*

To satisfy this statutory requirement, in 2001, Attorney General Reno identified programs necessary for the protection of life or safety. DOJ Notice of Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, A.G. Order No. 2353-2001, 66 FR 3613, 3616 (Jan. 16, 2001) ("2001 Order") The services listed in the order included:

(1) Crisis counseling and intervention programs; services and assistance relating to child protection, adult protective services, violence and abuse prevention, victims of domestic violence or other criminal activity; or treatment of mental illness or substance abuse;

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

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

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

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

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

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

These programs are not subject to the alienage restrictions in the Welfare Reform Act, if they are in-kind, community-based services and the provision of the assistance, amount of assistance or the cost of the assistance are not conditioned on the recipient's income or resources. 8 U.S.C. 1621(b)(4). According to the Order, "[n]either states nor other service providers may use the [Welfare Reform Act] as a basis for prohibiting access of aliens to any programs, services, or assistance covered by this Order." Unless the person is otherwise ineligible for the services, "benefit providers may not restrict the access of any alien to the services covered by this Order." 2001 Order.[3] These emergency programs that meet the statutory requirements in 8

[3] The Order also specifically found that the alienage restrictions in the Welfare Reform Act did not apply to police, fire, ambulance, transportation, sanitation or other "widely available services." 2001 Order, 64 FR at 3616. The U.S. Attorney General directed that "[s]ervice providers and other interested parties should refer to benefit-granting agencies' interpretations of the term 'federal public benefit' as used in the Act in order to determine whether their program is a federal public benefit and therefore subject to the alienage restrictions of the Act. *Id.* at 3614.

U.S.C. § 1621(b)(4) are not subject to A.R.S. § 46-140.01 because federal law mandates that they be provided without regard to immigration status.

Conclusion

Federally funded public benefits and programs within 8 U.S.C. § 1611 are not subject to A.R.S. § 46-140.01, which expressly applies only to state and local public benefits. This includes those programs identified in the 1998 DHHS notice as "federal public benefits." In addition, certain emergency programs exempt from the eligibility restrictions in 8 U.S.C. § 1611 and § 1621, including those identified in the U.S. Attorney General Order, are not subject to the eligibility verification requirements in A.R.S. § 46-140.01.

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