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DEPARTMENT OF HEALTH

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INFORMATIONAL LETTER

TRANSMITTAL: 08 OHIP/INF-4

DIVISION: Office of Health Insurance Programs

TO: Commissioners of Social Services

DATE: August 4, 2008

SUBJECT: Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility

SUGGESTED DISTRIBUTION:
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Temporary Assistance Directors
Staff Development Coordinators
Fair Hearing Staff

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ATTACHMENTS: None

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc.Ref.
04 OMM/ADM-7 07 OHIP/INF-2 08 GIS MA/009		18 NYCRR §360-3.2(j)			

This Informational Letter (INF) clarifies Department policy regarding Medicaid eligibility for aliens who are permanently residing in the United States under color of law (PRUCOL). It affirms Department policy previously discussed in 04 OMM/ADM-7 and 07 OHIP/INF-2 regarding the PRUCOL status of aliens who have submitted an official application to a federal immigration agency for an immigration status or for other relief. It clarifies the PRUCOL status of aliens who petition a federal immigration agency by letter or other correspondence for relief for which no official application exists. Finally, it provides policy guidelines for local departments of social services to apply when the federal immigration agency fails to respond to such letters or other correspondence within a reasonable period of time after receipt.

The term "*federal immigration agency*" generally refers to the U.S. Department of Homeland Security (DHS), which was created in 2003 and inherited the functions previously performed by the former Immigration and Naturalization Service (INS). The DHS includes two separate entities: United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). The USCIS makes determinations on applications for various immigration statuses or other forms of relief. ICE apprehends and removes (deports) aliens who violate immigration laws but may also grant various forms of relief from removal. The term "federal immigration agency" can also refer to the Executive Office for Immigration Review (EOIR), which is within the U.S. Department of Justice. EOIR immigration judges decide removal cases that ICE decides to prosecute. In certain cases, EOIR also makes determinations on applications seeking relief from removal.

The term "*PRUCOL alien*" refers to an alien who is permanently residing in the United States with the *"knowledge and permission or acquiescence"* of the federal immigration agency and whose departure from the U.S. the agency does not contemplate enforcing. An alien is considered as one whose departure the federal immigration agency does not contemplate enforcing if it is the agency's policy or practice not to enforce the departure of aliens in a particular category, and the alien falls within that category; or, based on all the facts and circumstances of the case, it appears that the federal immigration agency is permitting the alien to reside in the U.S. indefinitely [18 NYCRR §360-3.2(j)(1)(ii)].

The federal immigration agency does not determine whether an alien is PRUCOL and does not grant PRUCOL status. This is because PRUCOL is not a federal immigration status. Rather, PRUCOL is a public benefits eligibility status. An alien whom the federal immigration agency would regard as illegal, and thus subject to removal, may still, under certain circumstances, be PRUCOL for purposes of eligibility for State Medicaid benefits and Family Health Plus (FHPlus).

The Medicaid eligibility worker must determine whether the alien is PRUCOL based upon the documentation that the alien, or the alien's representative, presents. An alien who establishes that he or she is PRUCOL is eligible for State Medicaid and FHPlus benefits if the alien meets the program's financial and other eligibility requirements.

Some aliens are PRUCOL because the federal immigration agency has granted them a particular immigration status or relief. These aliens are permanently residing in the U.S. with the "*knowledge and permission*" of the

federal agency. Examples include, but are not limited to, aliens paroled (admitted)into the U.S. for less than one year, aliens residing in the U.S. under an order of supervision, aliens granted an indefinite stay of deportation and aliens granted voluntary departure, deferred action or temporary protected status. A more complete list is included in the "Documentation Guide to Citizenship and Immigrant Eligibility for Health Coverage in New York State," pages 9-10, issued on March 26, 2008, as part of GIS 08 MA/009. Each of these aliens will have a form of documentation, as listed in this desk guide, issued by the federal immigration agency that shows that the agency has granted the alien a particular status or relief.

Other aliens may be PRUCOL because they have applied for or otherwise requested a particular immigration status or relief from removal and are awaiting the federal immigration agency's decision. The federal agency has received their application or request for relief and has not yet approved or denied the request. Under certain circumstances, and as further explained in this INF, these aliens are PRUCOL pending the federal agency's determination. Until the agency has adjudicated the application or request, these aliens are residing in the U.S. with the "*knowledge and acquiescence*" of the federal immigration agency.

Sections I and II of this INF, which follow, describe the Department's policy regarding the PRUCOL status of aliens who:

(1) have filed official applications with the federal immigration agency, typically USCIS or EOIR, for a particular immigration status or to obtain other relief; or

(2) have submitted letters or other correspondence to the federal immigration agency, typically ICE, for relief, such as deferred action, for which no official application form exists.

I. Applications filed on federal immigration agency forms

There are many types of immigration statuses or relief for which an alien may apply by submitting an official application to the federal immigration agency on its application forms. Examples include applications to USCIS for adjustment of status to that of a lawful permanent resident (Form I-485), asylum and withholding of removal (Form I-589), or temporary protected status (Form I-821). An alien in removal proceedings may also apply to EOIR for suspension of deportation (EOIR-40), cancellation of removal (EOIR-42A) and for certain other forms of relief. It is the Department's understanding that the federal immigration agency generally confirms its receipt of an official application by issuing an I-797 Notice of Action.

It is the Department's policy, as stated in 04 OMM/ADM-7 and 07 OHIP/INF-2, that the alien is PRUCOL during the period of time that the federal agency is determining whether to approve the application by granting the requested immigration status or other relief. Local departments of social services should continue to follow the procedures described in these directives when the alien, or the alien's representative, presents documentation that an application has been submitted to the federal immigration agency on the agency's forms. In particular, the district should attempt to verify whether the application remains pending or whether the federal immigration agency has adjudicated the application by granting or denying the requested status or relief.

There are a few ways that the district can verify the current status of an application. The alien may have an I-797 Notice of Action, employment authorization document or other federal immigration agency document that contains a 13 character receipt number. If so, the district worker can access the USCIS website at www.uscis.gov and follow the instructions for checking the case status online. This on-line search can confirm the accuracy of the information in the document as well as whether the agency has approved the request.

However, if the alien does not have a document with a receipt number, or the district worker does not have access to the USCIS website, the worker should send a Document Verification Request, Form G-845, (also known as a Systematic Alien Verification for Entitlements (SAVE) request) to USCIS. The worker should include copies of all documentation that the alien has submitted to, or received from, the federal immigration agency, and request that it verify the alien's current status. As a general rule, the district worker should also send a G-845 Document Verification Request when the documentation does not clearly indicate a particular immigration status, the alien has presented expired documents or the worker has reason to believe that the documentation may be questionable in any respect.

The Medicaid worker should find the alien to be PRUCOL if the alien's application remains pending with the federal immigration agency, not having yet been approved or denied, unless contradictory evidence indicates that the federal immigration agency is contemplating enforcing the alien's departure from the U.S.

The alien would be PRUCOL from the date that the federal immigration agency received the application. The I-797 Notice of Action indicates the date of receipt. If the alien does not have an I-797 Notice of Action, the date of receipt can be verified from a U.S. Postal Service return receipt, a "signature confirmation" or a "delivery confirmation."

If the federal immigration agency denies the application or otherwise indicates that it is not permitting the alien to remain in the U.S., the alien is *not* PRUCOL. The alien would be eligible only for Medicaid coverage for the treatment of an emergency medical condition, if financially and otherwise eligible.

II. Other letters or requests for relief from removal

There are various forms of relief from removal or deportation for which no formal application form or process exists. Two examples are deferred action and voluntary departure.

Deferred action is a form of relief that the Department of Homeland Security, in its discretion, may afford to an otherwise removable alien whom DHS has decided not to prosecute for removal before the immigration courts, whether for humanitarian or administrative reasons. According to DHS estimates, the vast majority of cases in which deferred action is granted involve medical grounds. The former INS had operating instructions for making deferred action determinations under which the INS would consider the age or physical condition affecting an alien's ability to travel as well as the presence of sympathetic factors. Although the INS withdrew these operating instructions in 1997, deferred action continues to be available, according to DHS.

Voluntary departure permits an otherwise removable alien to depart the U.S. at his or her own expense, thus avoiding the stigma of being subjected to a removal proceeding. It is available both during and prior to removal proceedings. An alien may request voluntary departure to return to his or her home country or another country, if he or she can secure entry there.

Because no formal application process exists for these types of relief, the federal immigration agency might not timely respond to, or even acknowledge receipt of, the alien's letter requesting relief. Several months may pass before the agency responds to the informal request, if it responds at all. It is also more difficult for local departments of social services to verify the current status of the federal immigration agency's review of a request for deferred action or other relief made by letter rather than the current status of a formal application filed on official USCIS or EOIR application forms.

However, an alien who has made a letter request for deferred action or other relief from removal may still be PRUCOL under certain circumstances.

Sections II, A through C of this INF, which follow, present guidelines for local departments of social services to apply when determining the PRUCOL status of an otherwise removable alien who has requested, by informal letter, the federal immigration agency to grant relief from removal including, but not limited to, deferred action, voluntary departure or any other relief that may reasonably be construed as humanitarian relief.

A. Initial contact with the federal immigration agency

The letter or other correspondence to the federal immigration agency must clearly state the type of relief sought, which must be a recognized form of relief from removal or a recognized immigration status. The letter should summarize pertinent facts and circumstances of the alien's case that would support the granting of the relief. For example, if the alien is requesting deferred action or other humanitarian relief from removal based on the alien's medical condition, this information would include such factors as the following: date of birth and nationality; address in the U.S.; family ties in the U.S., if any; immigration history; criminal history, if any; and, in particular, the alien's current medical condition with a rationale for why the federal immigration agency should grant deferred action relief based on the alien's medical condition. If the alien is requesting voluntary departure, the alien must be capable of departing the U.S. if the federal immigration agency grants voluntary departure under the applicable federal regulations at 8 C.F.R. § 240.25 or § 1240.26. If the alien is represented by an attorney, the attorney should include an executed copy of the "Notice of Appearance as Attorney or Representative."

The alien, or the alien's representative, must present documentation sufficient to show that the letter was mailed to, and received by, the federal immigration agency. There is more than one way to establish mailing and receipt. A letter sent via the U.S. Postal Service by certified mail proves that the letter was mailed on a certain date. A certified letter, return receipt requested, is proof not only of mailing but also of receipt. A U.S. Postal Service "signature confirmation" or "delivery confirmation" also verifies receipt. In addition, a letter that is properly addressed, stamped and mailed by regular first-class mail is presumed to have been received, although this presumption can be rebutted.

B. Affording the federal immigration agency a "reasonable period of time" to adjudicate the request for relief

The alien is not considered PRUCOL immediately upon mailing of the initial letter requesting relief. Before the alien may be considered PRUCOL, the federal immigration agency must be afforded a "reasonable period of time" to consider and act upon the request. This is consistent with 04 OMM/ADM-7, in which the Department stated that an alien may be PRUCOL when the federal immigration agency, despite having been notified of the alien's presence in the U.S., fails after "*a reasonable period of time*" to respond to the alien's letter requesting relief or fails to take any action to enforce the alien's departure from the U.S.

Under federal law, the federal immigration agency is required to conclude matters presented to it "within a reasonable time" (5 U.S.C. § 555). There is no hard and fast rule that defines a "reasonable time." What is "reasonable" depends on all the facts and circumstances of a case. However, local departments of social services may consider that a "reasonable period of time" is *six months*. This six-month period is measured from the date that the alien, or the alien's representative, mailed to the federal immigration agency the initial letter requesting relief.

C. Subsequent contacts with the federal immigration agency within the six-month period

A single letter or other piece of correspondence requesting relief from the federal immigration agency does not establish PRUCOL status. (An exception applies to applications to USCIS or EOIR that are filed on official application forms, as previously discussed.) It is reasonable to expect that any alien who has submitted a good faith request for relief to a federal immigration agency would take steps to follow-up on the status of the original request. The same principle applies here. The Medicaid applicant, or the applicant's representative, must make reasonable efforts to follow-up with the federal immigration agency on the status of the request for deferred action or other relief. These efforts to monitor the status of the initial request must occur during the six-month period that begins with the date that the alien, or the alien's representative, mailed to the federal immigration agency the initial letter requesting relief. If the applicant, or the applicant's representative, fails to make *any* effort to follow-up on the request within this period, this indicates that the request was not a "good faith" effort to seek relief.

This policy is consistent with court cases that have found otherwise removable aliens to be PRUCOL when the federal immigration agency was made aware on numerous occasions of the alien's presence in the U.S. but neither responded to the alien's letters nor took any action to enforce the alien's departure.

Applying these guidelines, local departments of social services should determine that the alien is PRUCOL when, based on all the facts and circumstances of the particular case, it appears that the federal immigration agency is acquiescing, at least for now, to the alien's presence in the U.S.

Three examples of circumstances in which the local department of social services should conclude that federal acquiescence to the alien's presence exists, and the alien is thus PRUCOL, are illustrated below:

1. The federal immigration agency does not respond to the alien's initial or subsequent letters within six months after mailing and made no effort within that six-month period to enforce the alien's departure from the U.S.

In this example, the alien would be PRUCOL effective on the date that is six months *after* the alien, or the alien's representative, mailed the initial letter requesting relief provided that the alien, or the alien's representative, made reasonable and good faith efforts to follow-up on the status of the initial request during this six-month period. An exception applies if other evidence indicates that the federal immigration agency contemplates enforcing the alien's departure from the U.S.

2. The federal immigration agency responded to the alien's initial letter within six months after mailing by referring the matter to another entity and the entity to which the letter was referred did not respond within that same initial six-month period.

For example, ICE responded to the alien's initial letter within six months of the date it was mailed by referring the matter to another wing of the Department of Homeland Security, namely USCIS, and USCIS did not respond within that same initial six-month period.

In this example, the alien would be PRUCOL effective on the date that is six months *after* the alien, or the alien's representative, mailed the initial request that was then referred to another entity. This presumes, however, that the alien, or the alien's representative, made reasonable and good faith efforts to follow-up on the status of the request for relief during this six month period. Again, an exception applies if other evidence indicates that the federal immigration agency is contemplating enforcing the alien's departure from the U.S.

3. The federal immigration agency responds to the alien's initial letter within six months of mailing and the agency's response can be reasonably interpreted as indicating that the agency does not contemplate enforcing the alien's departure from the U.S. at this time.

In this example, the federal immigration agency *has* responded within six months after the alien, or the alien's representative, mailed the initial letter. If the agency had granted the alien's request for relief, the alien would be PRUCOL effective on the date of the agency's response.

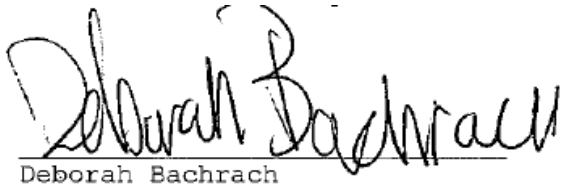
However, the alien may still be PRUCOL if the agency's response, although not granting the requested relief, also does not show that the agency intends to enforce the alien's departure from the U.S. For example, the federal immigration agency may have responded that the alien is not in any form of formal expulsion proceedings or is not under a final order of removal and that the agency is returning the request for deferred action or other relief without adjudicating the request; that is, without determining whether to grant or deny the requested relief. In that example, the alien would be PRUCOL effective on the date of the federal immigration agency's response.

NOTE: As a general rule, the Medicaid worker should determine that an alien is ***not*** PRUCOL when the federal immigration agency denies the alien's request for relief from removal or indicates that it is not permitting or acquiescing to the alien's continued presence in the U.S. or, from all the facts and circumstances of the particular case, it appears that the agency is contemplating enforcing the alien's departure from the U.S.

For example, the federal agency might respond to an alien's letter seeking deferred action or other relief by stating that the alien has been placed in formal removal proceedings or is under a final order of removal. In that case, the alien is ***not*** PRUCOL and is eligible ***only*** for Medicaid coverage for the treatment of an emergency medical condition, if financially and otherwise eligible.

Also as a general rule, Medicaid applicants are responsible for providing information and documentation necessary to establish their eligibility for Medicaid. This obligation includes providing information and documentation necessary to establish eligibility for Medicaid as a PRUCOL alien. Among other factors, an applicant who asserts that the federal immigration agency has a policy or practice of not enforcing the departure of aliens in a particular category, and that he or she falls within that category, is responsible for establishing that the federal immigration agency has such a policy or practice.

Questions regarding this INF and the Medicaid eligibility of aliens in general may be directed to the Office of Health Insurance Programs at (518) 474-8887.



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