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June 23, 2023

TO: Department of Health and Human Services, Office of Secretary and Centers for Medicare & Medicaid Services

FROM: State of Kansas; Office of the Attorney General of Kansas

RE: Notice of Proposed Rulemaking: “Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs”

Docket No.: CMS-9894-P
RIN: 0938-AV23
Document No.: 2023-08635

The Attorneys General for the states of Kansas, Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Missouri, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Virginia and West Virginia submit the following public comment to the U.S. Department of Health and Human Services (HHS) Centers for Medicare & Medicaid Services (CMS) (collectively, the Department) in response to the Department’s request for comments on its proposed rule titled *Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs*, 88 Fed. Reg. 25313-35 (Apr. 26, 2023).

I. Federal law prohibits deferred action recipients from receiving federal public benefits.

The undersigned attorneys general oppose the proposed rule because it violates federal law. In the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted in 1996, Congress announced a “compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.” 8 U.S.C. § 1601(6). Congress thus provided that an alien who is not a “qualified alien” is ineligible for any federal public benefit. 8 U.S.C. § 1611(a). PRWORA defined a “qualified alien” to include only lawful permanent residents, asylees, refugees, parolees granted parole for a period of at least one year, aliens granted withholding of removal, and certain battered aliens. *Id.* §§ 1641(b), (c).

In addition to the provisions of federal immigration law cited above, the proposed rule violates the Patient Protection and Affordable Care Act (ACA), which requires an individual to be either a citizen or national of the United States or to be “lawfully present” in the United States in order to enroll in a Qualified Health Plan (QHP) through a subsidized health exchange. *See* 42 U.S.C. § 18032(f)(3) (“If an individual is not, or is not reasonably expected to be for the entire period for which enrollment is sought, a citizen or national of the United States or an alien lawfully present in the United States, the individual shall not be treated as a qualified individual and may not be covered under a qualified health plan in the individual market that is offered through an Exchange.”). The ACA also requires CMS to verify that health exchange applicants are lawfully present in the United States. 42 U.S.C. § 18081(c)(2)(B).

The vast majority of exchange enrollees are receiving a federal subsidy to lower their monthly premium. *See, e.g.*, Tami Luhby, CNN, *Affordable Care Act Exchanges Seeing Record Interest in Heavily Subsidized 2022 Coverage*, https://www.abc12.com/news/health/affordable-care-act-exchanges-seeing-record-interest-in-heavily-subsidized-2022-coverage/article_99094e0f-d41c-588e-a3e6-30d3734176ea.html (“Some 95% of consumers signing up on the federal exchange for 2022 policies are getting subsidies to lower their monthly premiums.”) (last visited June 6, 2023). Such subsidies constitute a federal public benefit under PRWORA. *See* 8 U.S.C. § 1611(c)(1)(B) (defining “federal public benefit” to include any health benefit “for which payments or assistance are proved to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.”).

Aliens granted deferred action, including those in the Deferred Action for Childhood Arrivals (DACA) program created by the Department of Homeland Security (DHS), 8 C.F.R. § 236.22, are not included within Congress’s definition of “qualified alien,” nor do they fall within an exception to the prohibition on public benefits. *See generally* 8 U.S.C. § 1611(b)(1) (providing exceptions to the prohibition against federal public benefits for certain public benefits, including emergency medical care, assistance for immunizations, certain non-cash, in-kind services, and other specific federal programs under certain circumstances).

Indeed, Congress broadly prohibited non-qualified aliens from receiving any federal public benefit “[n]otwithstanding any other provision of law,” 8 U.S.C. § 1611(a). Phrases such as “notwithstanding any other provision of law” “broadly sweep aside potentially conflicting laws.” *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007). Because DACA recipients do not fall within the definition of “qualified alien” as set forth by Congress, they are statutorily ineligible for ACA benefits.¹

Similarly, the proposed rule is contrary to Congress’s statutory scheme because it would include any alien “granted employment authorization under 8 C.F.R. § 274a.12(c).” Congress’s definition of a qualified alien does not turn on whether an alien has been granted work authorization by DHS. In addition, a mere grant of work authorization does not confer lawful

¹ Notably, Congress has amended the definition of “qualified alien” as recently as 2020 but has not yet seen fit to include DACA recipients. *See* Pub. L. 116–260, div. CC, title II, § 208(c), Dec. 27, 2020, 134 Stat. 2985 (adding 8 U.S.C. § 1641(b)(8) to the definition).

presence under either the Immigration and Nationality Act (INA) or PRWORA. Indeed, even though DACA recipients are not eligible for public benefits under PRWORA, as explained above, they are eligible for work authorization under DHS regulations. 8 C.F.R. §§ 274a.12(c)(14), (33). Including such aliens in the definition of “lawfully present” is contrary to law, and the Department should withdraw the proposed rule for that reason.

II. “Lawfully present” cannot reasonably or lawfully describe removable aliens whose deportation has been deferred.

Regardless of whether the lawful presence of DACA recipients would overcome PRWORA’s bar on public benefits to non-qualified aliens (it would not), the determination that those recipients are “lawfully present” is unreasonable, arbitrary and capricious, and contrary to law.

On August 30, 2012, the HHS issued an interim final rule amending its regulation defining “lawfully present” under the ACA. *See* 77 Fed. Reg. 52614. The amended regulation excluded DACA recipients from being eligible for the Pre-Existing Condition Plan program under the ACA. 45 C.F.R. § 152.2(8). At the time, HHS reasoned that DHS created the DACA program to preserve enforcement resources and did not intend DACA recipients to be eligible for health insurance through a federally subsidized exchange. HHS has now reconsidered its position and proposes to amend the definition of “lawfully present” to include aliens who have been “granted deferred action, including, but not limited to individuals granted deferred action under 8 C.F.R. § 236.22.” *Proposed* 42 C.F.R. § 435.4(9); *see also proposed* 45 C.F.R. § 155.20.

HHS’s determination is so illogical that even to state it is to refute it. After all, the “action” that is deferred in DACA and other deferred-action programs is action on their recipients’ *unlawful presence*. *See* 8 C.F.R. § 236.22(b)(4) (limiting DACA availability to aliens who lack lawful immigration status); *see also* 8 U.S.C. § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”); *id.* § 1229a(a)(2) (noting that inadmissible aliens are removable). The self-contradictory nature of HHS’s determination that deferred action recipients are lawfully present becomes obvious when it is spelled out in full; essentially, the Department is saying that “those aliens whose *unlawful presence* DHS is deferring action on are *lawfully present*.” Several courts have recognized the obvious fact that DACA aliens are unlawfully present. As the Eleventh Circuit explained, DACA recipients are simply “given a reprieve from potential removal; that does not mean they are in any way ‘lawfully present’ under the [INA].” *Estrada v. Becker*, 917 F.3d 1298, 1305 (11th Cir. 2019) (citing *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258 n.2 (11th Cir. 2012) (“Deferred action status, also known as ‘non-priority status,’ amounts to, in practical application, a reprieve for deportable aliens. No action (*i.e.*, no deportation) will be taken . . . against an alien having deferred action status.” (quotation omitted))).

Similarly, a district court, in a decision affirmed by the Fifth Circuit, has stated that “the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present, and Congress has not granted the Executive Branch free rein to grant lawful presence to persons outside the ambit of the statutory scheme.” *Texas v. United States*, 549 F.

Supp. 3d 572, 609-10 (S.D. Tex. 2021) (internal quote omitted), *aff'd in relevant part*, 50 F.4th 498 (5th Cir. 2022). As the Fifth Circuit put it later, in the same litigation:

DACA creates a new class of otherwise removable aliens who may obtain lawful presence, work authorization, and associated benefits. Congress determined which aliens can receive these benefits, and it did not include DACA recipients among them. We agree with the district court's reasoning and its conclusions that the DACA Memorandum contravenes comprehensive statutory schemes for removal, allocation of lawful presence, and allocation of work authorization.

Texas, 50 F.4th at 526.

In sum, because DACA and other deferred action recipients lack lawful immigration status under the INA, and thus are removable, their continued presence in the United States is unlawful, as DHS recognizes by its own acts of “deferring action” on their unlawful presence.

III. Conclusion

For the foregoing reasons, the Department should withdraw the proposed rule insofar as it includes DACA and other deferred action recipients in the proposed definition of “lawfully present.” It should also withdraw the proposed rule insofar as it deems “lawfully present” any alien “granted work authorization.”

If the Department decides to include deferred action recipients or other unlawfully-present work-authorized aliens in its definition of “lawfully present,” the undersigned urge the Department to postpone the effective date of the final rule pending judicial review. *See* 5 U.S.C. § 705 (“When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”).


Sincerely,



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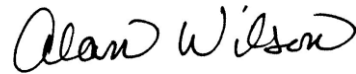
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