



# Federal Register

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**Friday,  
July 13, 2007**

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**Part II**

## **Department of Health and Human Services**

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**Centers for Medicare & Medicaid Service**

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**42 CFR Parts 435, 436, 440, et al.  
Medicaid Program; Citizenship  
Documentation Requirements; Final Rule**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

42 CFR Parts 435, 436, 440, 441, 457, and 483

[CMS–2257–F]

RIN 0938–AO51

### Medicaid Program; Citizenship Documentation Requirements

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Medicaid regulations to implement the provision of the Deficit Reduction Act that requires States to obtain satisfactory documentary evidence of an applicant's or recipient's citizenship and identity in order to receive Federal financial participation. It also incorporates changes made to these requirements through section 405(c)(1)(A) of Division B of the Tax Relief and Health Care Act (TRHCA), Pub. L. 109–432, enacted December 20, 2006. This regulation provides States with guidance on the types of documentary evidence that may be accepted, including alternative forms of documentary evidence in addition to those described in the statute and the conditions under which this documentary evidence can be accepted to establish the applicant's citizenship.

**DATES:** *Effective Date:* July 13, 2007.

**FOR FURTHER INFORMATION CONTACT:** Molly Smith (410) 786–8354.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Since enactment of the Immigration Reform and Control Act of 1986 (Pub. L. 99–163, enacted on November 6, 1986), Medicaid applicants and recipients have been required by section 1137(d) of the Social Security Act (the Act) to declare under penalty of perjury whether the applicant or recipient is a citizen or national of the United States, and if not a citizen or national, that the individual is an alien in a satisfactory immigration status. (For purposes of this regulation, the term “citizenship” (or reference to citizen) includes status as a “national of the United States,” as defined in 8 U.S.C. 1101(a)(22)). Aliens who declare they are in a satisfactory immigration status have been required by section 1137(d) of the Act to present documentation of satisfactory immigration status since the declarations of citizenship or immigration status were first required.

Individuals who declared they were citizens did not have to do anything else under Federal law to support that claim, although some States did require documentary evidence of this claim. Section 6036 of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171, enacted on February 8, 2006) effectively requires that the State obtain satisfactory documentation of citizenship and identity. Self-attestation of citizenship and identity is no longer an acceptable practice. The provisions of section 6036 of the DRA do not affect individuals who have declared they are aliens in a satisfactory immigration status. As with other Medicaid program requirements, States must implement an effective process for assuring compliance with documentation of citizenship and identity in order to obtain Federal matching funds, and effective compliance will be part of Medicaid program integrity monitoring.

Section 6036 of the DRA created a new section 1903(x) of the Act that prohibits Federal financial participation (FFP) in State expenditures for medical assistance with respect to an individual who has declared under section 1137(d)(1)(A) of the Act to be a citizen or national of the United States unless the State obtains satisfactory documentary evidence of citizenship and identity or a statutory exemption applies. For new Medicaid applicants or for currently enrolled individuals, the State must obtain evidence of citizenship and identity at the time of application or at the time of the first redetermination occurring on or after July 1, 2006. Presentation of documentary evidence of citizenship and identity is a one-time activity; once a person's citizenship and identity have been documented and recorded in the case file or database, subsequent changes in eligibility should not require repeating the documentation unless later evidence raises a question of a person's citizenship or identity. The State need only check its databases to verify that the individual already established his or her citizenship and identity.

CMS continues to support States through ongoing outreach and technical assistance. CMS is monitoring States for compliance and has not initiated any action to disallow FFP.

##### *Basic Features of the Provision*

On July 12, 2006, we published in the **Federal Register** the interim final rule titled “Medicaid Program; Citizenship Documentation Requirements” (CMS–2257–IFC) (71 FR 39214). In this interim final rule with comment period, we outlined the policy and guidelines

States are required to follow to receive Federal financial participation (FFP) for medical care expenditures for Medicaid-eligible individuals with respect to the new section 1903(x) of the Act. We explained the types of documents that may be used including additional documents that may be accepted. We established a hierarchy of reliability of citizenship documents and specified when a document of lesser reliability may be accepted by the State.

##### *Implementation Conditions/ Considerations*

As we stated in the interim final rule with comment period, the State must obtain satisfactory documentary evidence of citizenship and identity for all Medicaid applicants who have declared that they are citizens or nationals of the United States. This requirement applies to all recipients who declared at the time of application to be citizens or nationals of the United States unless an exemption applies. Section 1903(x)(2) of the Act provides several exemptions.

In the interim final rule, we discussed a clear drafting error in section 6036 of the DRA, under which Congress provided an exemption such that aliens would not be required to present satisfactory documentary evidence of citizenship and identity in certain circumstances. (See 71 FR 39215 for a full discussion of the issue.) However, since publication of the DRA, section 405(c)(1)(A) of Division B of the TRHCA corrected the error by replacing the word “alien” with “individual declaring to be a citizen or national of the United States.” Congress made this correction effective as if included in the DRA.

This correction does not alter the policy as described in the interim final rule. Therefore, the policy continues to be that individuals declaring to be citizens or nationals of the United States who are receiving SSI or who are enrolled in any part of Medicare are exempt from these requirements.

The TRHCA also amended section 1903(x)(2) to exempt additional groups of individuals from the provisions requiring presentation of satisfactory documentary evidence of citizenship and identity. These groups are:

- All individuals receiving SSI (the DRA only exempted individuals receiving Medicaid by virtue of receiving SSI);
- Individuals receiving disability insurance benefits under section 223 of the Act or monthly benefits under section 202 of the Act based on such individual's disability (as defined in section 223(d) of the Act); and

• Individuals who are in foster care and who are assisted under Title IV–B of the Act and individuals who are recipients of foster care maintenance or adoption assistance payments under Title IV–E of the Act.

The above changes were made effective as if included in the DRA. CMS sent guidance to the States regarding these changes in a State Medicaid Director letter dated February 22, 2007.

The TRHCA corrected another error included in section 6036 of the DRA by replacing the cross-reference to the non-existent “subsection (i)(23)” with the relevant subsection (i)(22). This correction does not change the policy as described in the interim final rule.

In addition to the above exemptions, the statute gives the Secretary authority to exempt individuals who declare themselves to be citizens or nationals from the documentation requirements if satisfactory documentary evidence of citizenship or nationality has been previously presented. If we become aware of an appropriate instance to exercise this authority, we will do so by regulation.

Individuals who are receiving Medicaid benefits under a section 1115 demonstration project approved under title XI authority are subject to this provision. This includes individuals who are treated as eligible for matching purposes by virtue of the authority granted under section 1115(a)(2) of the Act (expansion populations), including individuals covered under section 1115 demonstrations and family planning demonstrations.

Under section 1902(e)(4) of the Act and 42 CFR 435.117, a Medicaid agency must provide Medicaid eligibility to a United States citizen child born to a woman who has applied for, has been determined eligible and is receiving Medicaid on the date of the child’s birth. We discuss CMS policy with respect to this population in more detail in the Analysis of and Responses to Public Comment section below.

Individuals who receive Medicaid because of a determination by a qualified provider, or entity, under sections 1920, 1920A, or 1920B of the Act (presumptive eligibility) are not subject to the documentation requirements until they file an application and declare on the application that they are citizens or nationals. States may receive FFP for the services provided to these individuals notwithstanding any other provision of title XIX, including the requirements of section 1903(x) of the Act. However, when these individuals file an application for Medicaid and declare on the application that they are citizens or

nationals, these regulations would apply for periods in which they receive services as eligible for Medicaid.

At the time of application or redetermination, the State must give an applicant or recipient who has signed a declaration required by section 1137(d) of the Act and claims to be a citizen a reasonable opportunity to present documents establishing U.S. citizenship or nationality and identity. Individuals who are Medicaid recipients will remain eligible until determined ineligible as required by Federal regulations at § 435.930. A determination terminating eligibility may be made after the recipient has been given a reasonable opportunity to present evidence of citizenship or the State determines the individual has not made a good faith effort to present satisfactory documentary evidence of citizenship. By contrast, applicants for Medicaid (who are not currently receiving Medicaid) should not be made eligible until they have presented the required evidence. This is no different than current policy regarding information which an applicant must submit in order for the State to make an eligibility determination.

As discussed in the interim final rule with comment period, the “reasonable opportunity period” should be consistent with the State’s administrative requirements such that the State does not exceed the time limits established in Federal regulations for timely determination of eligibility in § 435.911. The regulations permit exceptions from the time limits when an applicant or recipient in good faith tries to present documentation, but is unable to do so because the documents are not available or a third party fails to reply to a timely request. In these cases, the State must assist the individual in securing evidence of citizenship.

States are permitted to accept documentary evidence without requiring the applicant or recipient to appear in person. States may accept original documents in person, by mail, or by a guardian or authorized representative. States, at their option, may also use matches with vital statistics agencies in place of a birth certificate to assist applicants or recipients to meet the requirements of the law.

Although States may continue to use application procedures that do not include an interview with an applicant, the States must assure that the information received about the identity and citizenship of the applicant or recipient is accurate.

All documents must be either originals or copies certified by the

issuing agency. Uncertified copies or notarized copies will not be accepted.

The enactment of section 6036 of the DRA does not change any of our policies regarding the taking and processing of applications for Medicaid except the new requirement for presentation of documentary evidence of citizenship. Before the enactment of section 6036 of the DRA, States, although not required by law or regulation to document citizenship, were required to assure that eligibility determinations were accurate. Therefore, most States would request documentation of citizenship only if the applicant’s citizenship was believed to be questionable. Likewise, the regulations at § 435.902, § 435.910(e), § 435.912, § 435.919 and § 435.920 continue to apply when securing documentary evidence of citizenship and identity from applicants and recipients. Thus, States are not obligated to make or keep eligible any individual who fails to cooperate with the requirement to present documentary evidence of citizenship and identity. Failure to provide this information is no different than the failure to provide any other information which is material to the eligibility determination.

An applicant or recipient who fails to cooperate with the State in presenting documentary evidence of citizenship may be denied or terminated. Failure to cooperate consists of failure by an applicant or recipient, or that individual’s representative, after being notified, to present the required evidence or explain why it is not possible to present such evidence of citizenship or identity. Notice and appeal rights must be given to the applicant or recipient if the State denies or terminates an individual for failure to cooperate with the requirement to provide documentary evidence of citizenship or identity in accordance with the regulations at § 431.210 or § 431.211 as appropriate.

#### *Federal Financial Participation (FFP) for Administrative Expenditures*

FFP is available for State expenditures to carry out the provisions of section 1903(x) of the Act at the match rate for program administration.

#### *Compliance*

FFP is not available for State expenditures for medical assistance if a State does not require applicants and recipients to provide satisfactory documentary evidence of citizenship, or does not secure this documentary evidence which includes the responsibility to accept only authentic documents on or after July 1, 2006. As part of the standard review and audit

procedures under subpart C of 42 CFR Part 430, we will review implementation of section 6036 of the DRA to determine whether claims for FFP for services provided to citizens should be deferred or disallowed. As part of these reviews, we will monitor the extent to which the State is obtaining the most reliable evidence.

In the conduct of determining or re-determining eligibility for Medicaid, State Medicaid agencies may uncover instances of suspected fraud. In these instances, State agencies would refer cases of suspected fraud to an appropriate enforcement agency according to the requirements of § 455.13(c) and § 455.15(b).

HHS recognizes that in cases where the appropriate enforcement agency is a Federal entity, the Privacy Act of 1974 applies to United States citizens and permanent resident aliens, and privacy protections afforded by law and in accordance with Federal policy will be addressed.

## II. Provisions of the Interim Final Rule With Comment Period

We amended 42 CFR chapter IV as follows:

We amended § 435.406 and § 436.406 to require that States obtain a Declaration signed under penalty of perjury from every applicant for Medicaid that the applicant is a citizen or national of the United States or an alien in a satisfactory immigration status, and require the individual to provide documentary evidence to verify the declaration. The types and forms of acceptable documentation of citizenship are specified in § 435.407 and § 436.407. The requirement to sign a Declaration of citizenship or satisfactory immigration status was added by the Immigration Reform and Control Act of 1986 and was effective upon enactment.

At the time section 1137(d) of the Act was enacted, aliens declaring themselves to be in a satisfactory immigration status were the only applicants required to present to the State documentary evidence of satisfactory status. Beginning in 1987, States were also required to verify the documents submitted by aliens claiming satisfactory immigration status with the Immigration and Naturalization Service (INS) (now the U.S. Citizenship and Immigration Services in the Department of Homeland Security) using the Systematic Alien Verification for Entitlements (SAVE) Program.

The regulation requires the State to also obtain satisfactory documentary evidence establishing identity and citizenship from all Medicaid applicants who, under the DRA amendments, are

required to file the Declaration. In addition, for current Medicaid recipients, States are required to obtain satisfactory documentary evidence establishing citizenship and identity at the time of the first redetermination of eligibility that occurs on or after July 1, 2006.

We also amended § 435.406 and § 436.406 to define "Satisfactory immigration status as a Qualified Alien" as described in 8 U.S.C. 1641(b). We amended § 435.406 and § 436.406 to remove paragraphs (b) and (d), as well as paragraphs (a)(3) and (a)(4). These provisions have ceased to have any force or effect because the eligibility status provided to individuals who received Lawful Temporary Residence under the Immigration and Reform and Control Act (IRCA) of 1986 has expired or been superseded by the terms of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (Pub. L. 104–193, enacted on August 22, 1996). Lawful Temporary Resident Status was granted for a limited time to individuals who applied for the legalization authorized by IRCA. Most individuals receiving this status would have achieved lawful permanent resident status by 1996 when PRWORA was enacted. PRWORA declared that "notwithstanding any other law" individuals who did not have status as a qualified alien as defined in 8 U.S.C. 1641 are not eligible for any Federal public benefit. That term includes Medicaid.

We added a new § 435.407 and a new § 436.407 describing the documents and processes States may use to document an applicant's or recipient's declaration that the individual is a citizen of the United States. The documents include all the documents listed in section 6036 of the DRA plus additional documents. We noted that the State Medicaid agency determinations of citizenship are not binding on other Federal or State agencies for any other purposes. We employed a hierarchy of reliability when securing documentary evidence of citizenship and identity to assure that evidence submitted is the most reliable evidence available to establish a claim of citizenship and identity. To establish U.S. citizenship, the document must show: a U.S. place of birth, or that the person is a U.S. citizen. Children born in the U.S. to foreign sovereigns or diplomatic officers are not U.S. citizens because they are not subject to the jurisdiction of the United States. To establish identity, a document must show the most current identifying information that relates the presenting individual to the person named on the document.

We divided evidence of citizenship into groups based on the respective reliability of the evidence. The first group of documents is described in section 6036 of the DRA and is specified in § 435.407(a) and § 436.407(a) as primary evidence of citizenship and identity because it is established by statute. If an individual presents documents from this section, no other information is required. Primary evidence of citizenship and identity is documentary evidence of the highest reliability that conclusively establishes that the person is a U.S. citizen. The statute provides that these documents can be used to establish both the citizenship and identity of an individual. In general, a State should attempt to obtain primary evidence of citizenship and identity before using secondary evidence. We permitted States to use the State Data Exchange (SDX) database provided by SSA to all States that reflects actions taken by SSA to determine eligibility of applicants for the Supplemental Security Income (SSI) program. Since all individuals in receipt of SSI are now exempt from these requirements, this provision is irrelevant and has been removed from the regulations text. However, States may still use the SDX to confirm whether an individual is exempt from the provision based on receipt of SSI. Similarly, State may use SSA's Beneficiary Data Exchange (BENDEX) data base to confirm whether an individual is exempt from the provision based on receipt of SSDI.

### *Secondary Evidence of Citizenship*

In the interim final rule with comment period, we stated that secondary evidence of citizenship is documentary evidence of satisfactory reliability that is used when primary evidence of citizenship is not available. In addition, the statute requires that a second document establishing identity must also be presented. See § 435.407(e) and § 436.407(e). Available evidence is evidence that exists and can be obtained within a State's reasonable opportunity period. The State must accept any of the documents listed in paragraph (b) if the document meets the listed criteria and there is nothing indicating the person is not a U.S. citizen. We stated that applicants or recipients born outside the U.S. who were not citizens at birth must submit a document listed under primary evidence of U.S. citizenship, but that children born outside the United States and adopted by U.S. citizens may establish citizenship using the process established by the Child Citizenship Act of 2000 (Pub. L. 106–395, enacted on October 30, 2000). However, as we

explain in further detail in the response to comments below, States may now verify citizenship for naturalized citizens using the Department of Homeland Security's Systematic Alien Verification for Entitlements (SAVE) Program, subject to DHS SAVE program requirements, including but not limited to a Memorandum of Understanding (MOU) authorizing the use of SAVE for naturalization verification purposes. This data verification will be considered secondary evidence of citizenship and must be accompanied by a document to verify the individual's identity. Therefore, it is appropriate to permit individuals born outside the U.S. who were not citizens at birth to submit either primary or secondary evidence of citizenship. We have also modified the affidavit process to permit naturalized citizens to submit an affidavit verifying their citizenship status in rare circumstances. The remaining documents in the third and fourth tiers will not be applicable to naturalized citizens because they require that the document show a U.S. place of birth. Similarly, citizens born in the U.S. will not be able to use several documents such as the Certificate of Naturalization or a data verification with the SAVE Program.

The second group of documents consists of a mix of documents listed in section 6036 of the DRA and additional documents that only establish citizenship. This group includes a U.S. birth certificate. The birth record document may be recorded by the State, Commonwealth, Territory or local jurisdiction. It must have been recorded before the person was 5 years of age. A delayed birth record document that is recorded at or after 5 years of age is considered fourth level evidence of citizenship.

If the document shows the individual was born in Puerto Rico, the Virgin Islands of the U.S., or the Northern Mariana Islands before these areas became part of the U.S., the individual may be a collectively naturalized citizen. Collective naturalization occurred on certain dates for each of the territories and can be found in the July 12, 2006 interim final rule with comment period.

#### *Third Level of Evidence of Citizenship*

In the July 12, 2006 interim final rule with comment period, we stated that third level evidence of U.S. citizenship is documentary evidence of satisfactory reliability that is used when neither primary nor secondary evidence of citizenship is available, and the applicant or recipient alleges birth in the U.S. In addition, a second document

establishing identity must be presented as described in paragraph (e), "Evidence of identity."

A State must accept any of the documents listed in paragraph (c) as third level evidence of U.S. citizenship if the document meets the listed criteria, the applicant alleges birth in the U.S., and there is nothing indicating the person is not a U.S. citizen (for example, lost U.S. citizenship).

Third level evidence is generally a non-government document established for a reason other than to establish U.S. citizenship and showing a U.S. place of birth. The place of birth on the non-government document and the application must be consistent.

#### *Fourth Level of Evidence of Citizenship*

In the interim final rule with comment period, we stated that fourth level evidence of U.S. citizenship is documentary evidence of the lowest reliability. Fourth level evidence should only be used in the rarest of circumstances. This level of evidence is used only when primary, secondary and third level evidence are not available. In addition, a second document establishing identity must be presented as described in paragraph (e), "Evidence of identity." Available evidence is evidence that can be obtained within the State's reasonable opportunity period as discussed below.

A State must accept any of the documents listed in paragraph (d) as fourth level evidence of U.S. citizenship if the document meets the listed criteria, the applicant alleges U.S. citizenship, and there is nothing indicating the person is not a U.S. citizen (for example, lost U.S. citizenship). With the exception of the affidavit, fourth level evidence consists of documents established for a reason other than to establish U.S. citizenship that show a U.S. place of birth. The U.S. place of birth on the document and the application must be consistent. The written affidavit described in this section may be used only when the State is unable to secure evidence of citizenship listed in any other groups.

In the interim final rule with comment period, we also explained the affidavit process. We stated that affidavits should ONLY be used in rare circumstances and by individuals declaring to have been born in the United States. As discussed in more detail below in the response to comments, we have modified the policy with respect to naturalized citizens. We have modified the policy to permit naturalized citizens to utilize the affidavit process. While we believe that electronic verifications with the SAVE

Program will eliminate the need for many naturalized citizens to utilize the affidavit process, we believe that such individuals should have a recourse available to them when their information cannot be located in the SAVE database. States should recognize that the inability of SAVE to verify U.S. citizenship does not necessarily mean that the individual is not a U.S. citizen; SAVE may be unable to determine that certain naturalized citizens, including those who naturalized more than thirty years ago, those who changed their names, or those who no longer remember their alien registration number, are naturalized citizens. In such cases, States should explore other alternatives included in these regulations to determining citizenship.

If the documentation requirement needs to be met through affidavits, the following rules apply: There must be at least two affidavits by individuals who have personal knowledge of the event(s) establishing the applicant's or recipient's claim of citizenship (the two affidavits could be combined in a joint affidavit). At least one of the individuals making the affidavit cannot be related to the applicant or recipient and cannot be the applicant or recipient. In order for the affidavit to be acceptable, the persons making them must be able to provide proof of their own citizenship and identity. If the individual(s) making the affidavit has (have) information which explains why documentary evidence establishing the applicant's claim or citizenship is not available, the affidavit should contain this information as well. The State must obtain a separate affidavit from the applicant/recipient or other knowledgeable individual (guardian or representative) explaining why the evidence is unavailable. The affidavits must be signed under penalty of perjury.

We added a paragraph (e) that consists of documents establishing identity. These are a mix of documents included in section 6036 of the DRA as evidence of identity, such as drivers' licenses and State identity cards. It also includes Native American Tribal enrollment documents, such as the Certificate of Degree of Indian Blood.

These documents, when coupled with satisfactory documentary evidence of citizenship from lists (b) through (d), meet the statutory requirements of section 6036 of the DRA.

We included a paragraph (f) that describes special rules for individuals under the age of 16. Because children often do not have identification documents with photographs and a child's appearance changes significantly until adulthood, we permit parents or

guardians to sign an affidavit as to the identity of the child. This affidavit does not establish citizenship and should not be confused with the affidavit permitted in rare situations to establish citizenship.

In the final regulations we added a new paragraph (g) that describes the use of identity affidavits for disabled individuals in residential care facilities.

We also added a new paragraph (h) (formerly (g)) that describes rules for States to address special populations who need additional assistance. For example, if an individual is homeless, an amnesia victim, mentally impaired, or physically incapacitated and lacks someone who can act for the individual, and cannot provide evidence of U.S. citizenship or identity, the State must assist the applicant or recipient to document U.S. citizenship and identity.

We added a paragraph (i) (formerly (h)) that describes documentary evidence. We specified that the State can only review originals or copies certified by the issuing agency. Copies or notarized copies may not be accepted for submission. The State, however, must keep copies of documentation for its files. States must maintain copies in the case record or its database. The copies maintained in the case file may be electronic records of matches, or other electronic methods of storing information.

Moreover, we specified that individuals may submit documents by mail or other means without appearing in person to submit the documents. If, however, the documents submitted appear inconsistent with pre-existing information, are counterfeit or altered, States should investigate the matter for potential fraud and abuse. States are encouraged to utilize cross matches and other fraud prevention techniques to ensure identity is confirmed.

We specified in paragraph (j) (formerly (i)) that once a person's citizenship is documented and recorded in the individual's permanent case file, subsequent changes in eligibility should not ordinarily require repeating the documentation of citizenship unless later evidence raises a question of the person's citizenship, or there is a gap of more than 3 years between the individual's last period of eligibility and a subsequent application for Medicaid. We use a record retention period of 3 years throughout the Medicaid program as provided in 45 CFR 74.53. To require a longer retention period would be an unreasonable imposition on State resources.

Lastly, in paragraph (k) (formerly (j)), we described the reasonable opportunity to submit satisfactory

documentary evidence of citizenship and identity. We specified that a reasonable opportunity must meet the competing goals of providing sufficient time for applicants or recipients to secure documentary evidence and the requirements placed on States to determine, or redetermine eligibility promptly. These goals derive from sections 1902(a)(19) and 1902(a)(8) of the Act respectively. For example, States may use the reasonable period they provide to all applicants and recipients claiming satisfactory immigration on the Declaration required by section 1137(d) of the Act.

We solicited comments and suggestions on several areas of the new regulations. We asked the public to identify additional documents that are a reliable form of evidence of citizenship or a reliable form of identity that have not been included in this regulation. We also solicited comments as to whether the number of documents accepted for proof of citizenship and identity should be limited. Finally, we solicited comments as to whether individuals would have difficulty proving citizenship and identity if only primary or secondary level documents were permitted. Many commenters responded to this request. Our responses and final policies are included in this preamble.

### III. Analysis of and Responses to Public Comment

We received over 1,400 timely items of correspondence that raised many different issues. Many commenters represented State agencies, medical societies, advocacy groups, hospital associations, and law firms. The remaining comments were from private citizens. A summary of the major issues and our responses follow:

*Comment:* Many commenters acknowledged their agreement with the requirement that only citizens and specific immigrant populations be eligible for Federal public benefits, including Medicaid. However, one commenter requested that CMS clarify that the policies set forth in the July 12, 2006 interim final rule did not change Medicaid-eligibility requirements but rather added a requirement that States verify citizenship. The commenter noted that he has witnessed significant confusion within the immigrant community. He stated that many non-citizen Medicaid recipients who fall into one of the eligible immigration statuses believe that they are no longer eligible for Medicaid.

*Response:* We agree with the commenter. The rule did not change Medicaid eligibility requirements. As we stated in the interim final rule with

comment period, this new provision effectively requires that the State obtain satisfactory documentation of a declaration of citizenship (see 71 FR 39215).

We noted from several of the commenters' letters that many individuals are unclear about whether these new requirements apply only to citizens or to citizens and individuals in a satisfactory immigration status. We would like to clarify that these requirements only impact individuals who declare themselves to be U.S. citizens. Individuals who declare themselves to be aliens in satisfactory immigration status follow the procedures under § 435.406(a)(2).

*Comment:* Many commenters suggested that CMS revise the regulations to permit applicants and recipients to submit copies of the required documents. The commenters noted that it is often difficult, expensive, and time-consuming to get originals or certified copies of many of the required documents. One commenter noted that individuals would not be able to mail in certain documents. The commenter gave the example that an individual could not mail in a driver's license and continue to legally drive. In addition, many commenters expressed concern that the process of procuring original documents would be exceptionally difficult for semi-literate and non-English speaking applicants, potentially resulting in many eligible individuals choosing not to apply or reapply for Medicaid.

One commenter stated that requiring originals or certified copies violates the 2006 edition of the Federal Civil Judicial Procedure and Rules, which states that duplicates are admissible to the same extent as an original unless there is a genuine question raised as to the authenticity of the original.

The commenters also stated that requiring original documents contradicts CMS' stated position that States should ease application processes by allowing and encouraging mail- and phone-in applications. Most commenters noted that if required to submit original documents, applicants or recipients would make unnecessary visits to the State Medicaid Agency office to reduce the risk of losing original documents in the mail or during the handling process. The commenters noted that these trips could be difficult for applicants and recipients to make due to employment, transportation, and financial constraints. Several commenters remarked that this was of particular concern in States with large rural areas where many applicants and recipients

live exceptionally far distances from any State Medicaid office. The commenters stated this would be an unnecessary burden and one that could be avoided by permitting individuals to submit copies of the necessary documents. The commenters suggested giving eligibility workers the option of requiring original versions of the documents if they believe the copies submitted are questionable.

In contrast, one commenter stated that it is important that documents be originals or copies certified by the issuing agency. The commenter stated that originals and certified copies better ensure an applicant's citizenship because these documents are more difficult to falsify.

*Response:* We understand from the commenters that requiring applicants and recipients to submit original or certified copies of documents is more cumbersome than accepting copies. However, we do not agree that this additional burden outweighs the importance of States being able to verify that these documents are valid. We note that it is easier for an individual to falsely manufacture a document if it is not required to come from the issuing agency, and therefore, requiring originals or certified copies helps protect the integrity of the Medicaid program. In addition, we note that Medicaid coverage represents a value of thousands of dollars for a covered family. We do not believe the burden described by the commenters is unreasonable for determining eligibility for such a benefit.

In addition, Federal agencies generally require original or certified copies of documents to establish eligibility for benefits. For instance, the Social Security Administration requires original documents or certified copies prior to establishing eligibility for benefits (see GN 00301.015 Acceptance of Evidence of the SSA's Program Operations Manual System (POMS)); the Department of State requires original documents or certified copies prior to issuing a passport.

While we recognize that many individuals are hesitant to submit these documents through the mail, we note that they are still permitted to submit them in person to be photocopied by the State Medicaid Agency. State Medicaid Agencies often outstation workers to various points in the community, such as in hospitals and clinics. These eligibility workers are permitted to accept citizenship and identity documentation which they can then send to the State for approval. In addition, States are encouraged to utilize electronic data matching, which

may obviate the need for an applicant/recipient to submit paper documentation.

In response to the commenter who stated that this requirement violates the Federal Civil Judicial Procedure and Rules, we are not certain whether the commenter was referring to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. In any case, both sets of rules apply to courts of law and are not applicable in this instance.

*Comment:* Many commenters agreed with CMS' policy to allow States to cross-match data on public benefit recipients. Some commenters requested that CMS delineate the process by which an individual who has already provided proof of citizenship in one State should be precluded from providing this information again in another State.

*Response:* Ultimately, each State is responsible for having verified the citizenship of individuals receiving coverage under its State plan. In keeping with current policy for applications, when a person moves to another State, he or she must submit an application for Medicaid in that State and meet all eligibility requirements. States may establish partnerships with each other that allow them to share citizenship data. However, States must be able to produce a copy, electronic copy or other conclusive evidence of the original documentation used to determine an individual's citizenship. Therefore, if a State accepts evidence of citizenship or identity from another State, it should request a copy or electronic copy of the documentation reviewed by another State to keep in its own files. We note that a determination made by one State is not binding on another. Each State is responsible for the accuracy of its eligibility determinations. If a State is not confident that the information provided by another State is accurate, it must request that the individual resubmit the necessary documentation.

*Comment:* Several commenters recommended that CMS work with States to establish an electronic system to record and cross-check citizenship information. One commenter requested that this system be available via the internet. The commenters also requested that CMS not require States to print paper copies of electronic matches in order to minimize the burden of creating and maintaining additional paperwork. One commenter also stressed that CMS must ensure privacy and confidentiality protections to applicants/recipients.

*Response:* While we are very interested in this suggestion, we currently do not have such a system developed for use. However, several

Federal agencies, including CMS, are working with the National Association for Public Health Statistics and Information Systems (NAPHSIS) on the Electronic Verification of Vital Events (EVVE) databank. EVVE contains birth record information for all participating States. States would be able to electronically verify birth information for births in their own State and within other States. If and when this databank becomes available, we will consider its application to these requirements. In the meantime, we strongly encourage States to develop methods of working together to achieve efficient, effective ways of verifying citizenship and identity.

In response to the request that CMS not mandate States to print paper copies of electronic matches, we emphasize that while States must be able to produce a copy of the documentation used to determine an individual's citizenship, the copy may be in electronic format.

We also note that applicants and recipients will receive all privacy and confidentiality protections required under the law (see 42 CFR 431 subpart F).

*Comment:* Several commenters requested that CMS make the following databases available for data matches or verifications: Public Assistance Recipient Information System (PARIS), U.S. Department of Veterans Affairs data files, Social Security Administration's SS5 database (Numident), SAVE database, Indian Health Services databases, and the State Attorney General's databases. One commenter requested that CMS permit States to use any governmental database that verifies citizenship to match against a birth certificate in order to verify citizenship.

Several commenters suggested that CMS require State Medicaid agencies to cross-match data with the State mental health authority since individuals with serious mental illnesses may have difficulty obtaining the necessary documents. One commenter requested that CMS allow States to verify citizenship by cross-referencing with State agencies that handle food stamps, child support, corrections, juvenile detention, motor vehicle, or child protective services.

*Response:* After reviewing the databases above, we have determined that States may, with DHS approval, utilize SAVE to verify citizenship for naturalized citizens. A verification with the SAVE Program will be considered secondary evidence of citizenship. Since SAVE does not maintain photographs, States will be required to supplement a data verification with

SAVE with a form of identity listed under the regulations at § 435.407(e).

In general, the databases recommended by commenters did not contain information that could reliably establish citizenship. For instance, the Child Support program does not maintain citizen information and section 454(26) of the Act requires State Child Support programs to have in effect safeguards on access to and use of information that is collected. Other statutory language restricts what authorized information can be provided to what authorized program for what authorized purpose (*i.e.*, sections 453 and 463 of the Act). In addition, neither the Department of Veterans Affairs databases nor the IHS Data Warehouse necessarily store citizenship information. PARIS reports on what public benefits an individual receives for purposes of identifying cases of duplicate coverage of benefits. The only information in PARIS that could be of use is data on SSI enrollment. However, since States have access to SSA's State Data Exchange system to check for SSI enrollment, PARIS would be unnecessary for data matches.

SSA currently makes available to States through the Numident database information on whether a particular social security number is valid and issued to the person named on it. This is not sufficient evidence of citizenship since non-citizens may have a social security number and the information provided does not personally identify the individual. Although the Numident database may contain additional information for individuals with a social security number that establishes citizenship, this information is not generally available to States. While States may be able to negotiate with the SSA for what information they are granted access to, CMS does not have the authority to grant access to additional fields in SSA's Numident database.

Although several commenters requested that we approve State Attorney General's databases, we were not able to determine exactly what these databases are or what information they contain. Therefore, we are not approving their use at this time. However, these databases may meet the requirements for verifying identity through a cross match with a Federal or State governmental, public assistance, law enforcement, or correction agency's data system under § 435.407(e) and § 436.407(e).

As for matches with the Food Stamps database, the Food Stamps program does not collect citizenship information as a condition of eligibility. The Food

Stamp program issued a letter to its regional directors on May 12, 2006 reiterating Food Stamp policy that the Food Stamp program does not require verification of citizenship except when a client's statement of United States citizenship is questionable or when a State has mandated verification of citizenship. Therefore, the food stamps database does not contain sufficient evidence of citizenship. However, as stated in the interim final rule with comment period and per the regulations at § 435.407(e)(2) (formerly § 435.407(e)(10)), States may use cross matches with the food stamps database to verify the identity of an individual.

With respect to data matches with the department of motor vehicles, as stated in the regulations at § 435.407(a)(4) and § 436.407(a)(4), a State may utilize data matches with the department of motor vehicles if the State requires proof of U.S. citizenship prior to the issuance of a driver's license or obtains a social security number from the applicant and verifies before issuance of the license that the number is valid and assigned to the applicant who is a citizen. At this time, we are not aware of any State that makes providing evidence of citizenship a condition of issuing a driver's license and includes evidence that the license holder is a citizen on the license or in a system of records available to the Medicaid agency. As stated in the regulations, CMS will monitor compliance of States implementing this provision. We note that the process the State uses to verify citizenship must comply with the statutory provision in section 6036 of the DRA.

Child support, corrections, juvenile detention, or child protective services databases may be used to verify identity but cannot be used to verify citizenship. We cannot ensure that the owners of these systems either (1) verify citizenship, or (2) verify citizenship using comparable criteria to this rule. Therefore, we are unable to approve their use at this time.

*Comment:* One commenter stated that requiring States to match files for individuals who only have third or fourth levels of evidence as a check against fraud is contrary to the requirement that this be a one-time activity. One commenter specifically stated that States should not be required to double-check SSNs. They stated that since they already require SSNs on the application to verify income eligibility, any non-matches would already have been caught in this process.

*Response:* After considering the commenters' concerns, we believe that several commenters may have misunderstood the requirement. We did

not change the regulations to require States to match SSNs for applicants and recipients who submitted third and fourth tier documents. We agree that this would duplicate another part of the application process. We intended for States to utilize new electronic means of verifying citizenship and identity as they become available. We stated that we encourage States to use automated capabilities to verify citizenship and identity of Medicaid applicants and that when these capabilities become available, States will be required to match files for individuals who used third or fourth tier documents to verify citizenship and documents to verify identity. We also stated that CMS will make available to States necessary information in this regard when such capabilities become available. We emphasize that this only applies to new applicants. It is not necessary for States to electronically verify the citizenship of recipients who used third and fourth tier documents in the past. We note that this provision is unlikely to apply to recipients submitting documentation at redetermination since this provision is a one-time action and all redeterminations affected by this provision should be complete by July 1, 2007. Since CMS has not issued instructions to States requiring States to utilize specific electronic databases and does not expect to do so prior to July 1, 2007, we do not believe this requirement will have any effect on recipients required to submit documentation at redetermination.

*Comment:* One commenter requested that CMS require States to utilize electronic data matches to increase efficiency and lessen the burden on Medicaid recipients and applicants. One commenter asked that States be required to utilize all available electronic matching data before asking an individual to submit original versions of paper documents.

*Response:* Most States have already implemented data matching or verification as a method of verifying citizenship and identity and many others have expressed an interest in doing so. We encourage States to utilize electronic matching; however, each State is best suited to understand its own capabilities for data matching and we do not believe it is appropriate for us to require States to use electronic data matching prior to asking for paper documents. There exists variation in the resources and technical capabilities available to each State, and some electronic matching may require additional State resources and expenditures that are not currently available to the State.



*Comment:* One commenter requested that CMS defer to the States on how long each State should retain the citizenship documentation records. One commenter requested that State Medicaid agencies retain this information indefinitely.

*Response:* We agree with the commenter who stated that CMS should defer to the States on how long citizenship documentation records should be maintained, as long as that time period is at least 3 years, consistent with the regulations at § 431.17 and 45 CFR 74.53. However, we do not agree that we should require States to maintain this information indefinitely. States are in a better position to decide what record retention schedule works best with their systems and resources.

*Comment:* One commenter requested that CMS permit States to use any information already in possession of the State Medicaid office that verifies citizenship. The commenter stated that there would have been no incentive in the past for an individual to submit fraudulent information on citizenship and, therefore, the determination should be considered valid even if the office cannot document how the information was obtained.

*Response:* As we stated in the interim final rule with comment period, States are responsible for verifying the authenticity of the documents used to establish citizenship and identity. States may use information already contained in the Medicaid file if the State can verify that an original or certified copy of the documentation was originally reviewed and a reproduction of the document is in the file. There should be evidence in the file that the eligibility worker reviewed an original or certified copy. A State is at risk for losing FFP if it cannot provide sufficient evidence to assure that originals or certified copies were reviewed.

*Comment:* Many commenters agreed with CMS' policy to allow presumptively eligible individuals to maintain Medicaid coverage while they locate and submit the required documentation. However, several commenters requested that CMS clarify in the final rule which groups are considered presumptively eligible and which are not. One commenter requested that CMS consider presumptively eligible individuals recipients of Medicaid and, thus, delay citizenship verification until the next period of redetermination. The commenter noted that these groups are in need of expedited critical services and therefore should not risk facing any delay in coverage.

*Response:* Individuals who receive Medicaid because of a determination by a qualified provider under sections 1920, 1920A, or 1920B of the Act are considered presumptively eligible if the State has elected to include that option in its State plan. Section 1920 refers to pregnant women; section 1920A refers to children; and section 1920B refers to certain breast or cervical cancer patients. However, within a certain time period, presumptively eligible individuals are required to apply for regular Medicaid under sections 1920(c)(3), 1920A(c)(3), and 1920B(c)(3) of the Act, respectively. Once this application occurs the standard eligibility rules apply, including the requirement that the individual verify a declaration of U.S. citizenship.

*Comment:* Many commenters requested that CMS modify its policy to allow otherwise-eligible applicants to receive benefits once they declare they are a citizen. The commenters did not agree with allowing current recipients an opportunity to produce the documents while still being covered by Medicaid when otherwise-eligible applicants are required to produce documentation before the start of coverage. Instead, the commenters suggested that CMS allow applicants who meet all other criteria for Medicaid eligibility to receive coverage during the reasonable opportunity period. If the applicant is unable to produce the documents within the defined period, the State could then rescind Medicaid coverage.

Commenters noted that by not providing new applicants with a "grace period" for submitting the required documentation, CMS will create significant delays for those seeking health care coverage. Several commenters noted that the gaps in coverage caused by these delays may have consequences that are more costly, such as affected individuals seeking care in hospital emergency departments. The commenters emphasized that the cost of emergency care always exceeds the cost of preventive care.

In addition, several commenters stated that treating Medicaid recipients and Medicaid applicants differently was prohibited by Federal Medicaid law. One commenter stated that because this provision could inhibit an eligible U.S. citizen from receiving coverage under Medicaid, CMS was violating a provision of the Medicaid statute that prohibits CMS from approving State Medicaid plans that impose "any citizenship requirement which excludes any citizen of the United States" as a condition of eligibility for the program (see 42 U.S.C. 1396a(b)(3)). One

commenter stated that this regulation violated Federal law by contradicting section 1137(d)(4) of the Act.

The commenters urged CMS to reconsider the new regulations as they pertain to new applicants, especially in the case of pregnant women, children, parents, and persons with disabilities. As an alternative, one commenter recommended that CMS permit States that administer separate State Children's Health Insurance Programs (SCHIP) to be expressly permitted to enroll children in the separate programs pending submission of necessary documentation.

*Response:* In response to the commenters who urged CMS to reconsider applying this provision to pregnant women, children, parents, and persons with disabilities, we note that Congress exempted many groups from these requirements. CMS does not have the authority to exempt additional groups. As stated earlier, however, in some cases, presumptive eligibility might apply to pregnant women and children. Persons with disabilities may be eligible for either Medicare or disability benefits under sections 223 or 202 of the Act, and by virtue of receiving such benefits, would be exempt from the citizenship documentation requirements.

In response to the commenters who stated that CMS may not treat applicants and recipients differently, we note that Congress specifically stated in section 1903(i)(22) of the Act that the Federal share of Medicaid will not be available to States unless they can obtain documentation of citizenship consistent with section 1903(x) of the Act. Thus, because a State would not be entitled to receive Federal Financial Participation (FFP) for their expenditures unless documentation on the applicant is received, a State is not required to provide Medicaid to an individual who has failed to provide documentation of citizenship or nationality. (See *Harris v. McRae*, 448 U.S. 297 (1980)). We also note that section 6036(b) of the DRA addressed how the statute would apply to initial applicants versus those seeking redeterminations of eligibility on or after the effective date of the requirements (July 1, 2006).

We do not believe the regulations violate section 1903(b)(3) of the Act. First, Congress has required documentation of citizenship in sections 1903(i)(22) and 1903(x) of the Act, and these provisions must be read in concert with the remainder of Title XIX. Second, the citizenship documentation requirements are better viewed as procedural requirements, rather than as substantive limitations.

The documentation requirement does not place any substantive limit on the classes or types of citizens that may receive Medicaid.

Section 1137(d)(4) is not applicable, because it applies only to individuals who are not citizens or nationals of the United States who declare satisfactory immigration status. The citizenship documentation requirements under section 6036 of the DRA apply to citizens and nationals of the United States, and not to individuals declaring to be in a satisfactory immigration status.

In order to ensure that unnecessary delays do not occur, the State should ensure that applicants are aware of these requirements at the time of application along with any other documentation requirements and ensure them a reasonable opportunity to produce the documents just as applicants must do to establish other factors of eligibility such as proof of income or resources. States must make applicants aware that once they have been determined to be eligible and have provided documentation verifying citizenship, Medicaid eligibility is granted back to the date of application or to the beginning of the month in which the application was received. In addition, under section 1902(a)(34) of the Act and 42 CFR 435.914, if an individual would have been eligible for State Medicaid assistance at the time care and services were furnished (or—at State option—during the month in which care and services were furnished), retroactive coverage may be made available beginning with the third month prior to the month of application. In other words, once the individual has proven his or her citizenship, eligibility will be conferred on that individual retroactive to up to 3 months before the month of application, if the individual is found to be eligible during that prior period or part thereof.

Under Title XXI, the State cannot make eligible for SCHIP an individual who is potentially eligible for Medicaid. Under the regulations at 42 CFR 457.350(f)(1), a child who is potentially eligible for Medicaid cannot be found eligible for SCHIP unless and until a completed Medicaid application for that child is denied, or the child's circumstances change. A Medicaid application is not complete without submission of all documentation, including documentary evidence of citizenship and identity. An incomplete application may be denied; however, because the application was incomplete, this denial does not meet the criteria that a completed Medicaid application for the child is denied. Therefore, it is

not permissible under the regulations to enroll a potentially Medicaid-eligible child into a separate SCHIP program pending submission of citizenship and identity documents necessary to complete the Medicaid application process.

*Comment:* Several commenters requested that the reasonable opportunity period be at least 90 days in length. One commenter stated that many of the required documents take at least 6 weeks to receive, including a U.S. Passport, and that it is unreasonable to require applicants and recipients to produce these documents in less time than it regularly takes to receive the documents.

*Response:* We specified in the interim final rule with comment period that the reasonable opportunity period should be consistent with the State's standing administrative requirements such that the State does not exceed the time limits established in Federal regulations for timely determination of eligibility in § 435.911. The regulations permit extensions to the time limits when an applicant or recipient in good faith tries to present documentation, but is unable to do so because the documents are not available. We note that there are many ways a State can ensure documentation of citizenship and identity, including cross matches with other government agency databases.

*Comment:* Several commenters suggested that CMS clarify that existing retroactive eligibility is not impacted by the new regulations. They noted that retroactive eligibility determinations ensure that both children and providers are protected while eligible individuals await documentation of citizenship.

*Response:* We agree with the commenters who stated that the retroactive eligibility rules are not impacted by the new regulations. Once a State has determined that an individual is eligible for Medicaid, including having verified citizenship, Medicaid eligibility is granted back to the date the application was filed or to the beginning of the month in which the application was filed. The date of application is the date the individual submits the application. If further documentation is required beyond what is initially submitted, the date of application remains the initial date of filing. Under authority at section 1902(a)(34) of the Act, States must provide retroactive eligibility for up to a 3-month period prior to the month of application, for those who are determined eligible during that period or a part thereof.

*Comment:* One commenter requested that CMS permit individuals to make

declarations of name changes. The commenter stated that many married or formerly married women will have different names on their birth certificates and identity documents. The commenter stated that requiring additional documentation, such as a marriage license, would adversely affect female recipients or applicants.

*Response:* The State is responsible for ensuring it has authentic documentation. The State may accept the citizenship and identity documents from a woman whose last name has changed due to marriage if the documentation matches in every way with the exception of the last name. If the State is not confident that the two documents belong to the individual, it may request that the woman produce the marriage license, divorce decree or other official document verifying the change. The State may also accept other available documentation that does not differ in the name of the individual. We do not want to cause undue burden if it is clear that the two documents belong to and describe the individual.

However, individuals who have changed both their first and last names under other circumstances must produce documentation from a court or governing agency documenting the official change.

*Comment:* One commenter requested that CMS clarify what documentation is required of individual members of a household when eligibility is determined on a family or household basis. The commenter recommended that CMS only require documentation for one adult member of the family or household.

*Response:* When eligibility is determined on a family or household basis, per section 1137(d)(1)(A) of the Act, the individual applicant often makes a declaration of citizenship for all members of the household. Therefore, although each individual has not made a declaration of citizenship, someone has made a declaration on his or her behalf and that declaration must be verified. As a result, each individual of the household has effectively declared to be a citizen of the United States, and documentation verifying such citizenship must be submitted for every individual member of the household.

*Comment:* One commenter requested that CMS require that individuals who were born outside the U.S. be treated in the same manner as individuals born inside the U.S. The commenter recommended that CMS revise the regulations to state that individuals born outside of the U.S. may use the same forms of documentation as individuals born in the U.S.

*Response:* We agree with the commenter and have modified the regulations to permit naturalized citizens to use additional documents as well as the affidavit process. We note that it is not possible to permit individuals born in the U.S. and naturalized citizens born outside of the U.S. to present all the same evidence of citizenship. For instance, a birth certificate issued in a U.S. hospital may be used to verify U.S. citizenship; however, it is not possible for a person born outside of the U.S. to have such a document. Likewise, most individuals born inside the U.S. will not be able to obtain a Certificate of Naturalization.

#### *Citizenship Documents*

*Comment:* Several commenters requested that CMS address in the final rule what the procedure will be when an individual can neither produce any documentation verifying citizenship nor locate two qualified individuals to support his or her affidavit declaring citizenship. The commenters stated that there is likely to be a significant number of individuals who cannot meet any of the documentation options. The commenters requested that States be allowed to grant "good cause" or hardship exemptions to the new regulations and permit applicants to show other evidence of citizenship. Several commenters suggested that CMS follow the approach taken by the Social Security Administration (SSA). The commenters stated that SSA permits individuals applying for Supplemental Security Income (SSI) the opportunity to explain why they have no proof of citizenship and provide any information they do have. The commenters suggested that CMS amend the proposed change to the regulations to permit a State Medicaid office to determine that it has obtained satisfactory documentation of citizenship outside of the guidelines published in the July 12, 2006 interim final rule.

One commenter requested that CMS provide an exception process whereby the State Medicaid agency could request the CMS regional office to review and approve the citizenship of an individual based on evidence submitted by the State that does not meet the documentation currently required under the regulations.

*Response:* It is important to note that Congress required the documentation of citizenship as a requirement in Medicaid. In order to ensure the validity of such documentation, we believe it is important to have consistent standards for States to follow. Therefore, we have not provided authority for States to accept additional documentation

beyond what is specified in our regulations, or to create an exception process at the Regional Office level. We note that if commenters wish to propose additional types of documentation, they may present such documents to the Secretary, who will then engage in notice and comment rulemaking to determine whether the documents are acceptable evidence of citizenship or identity or both.

In addition, based on experience so far with the interim final rule, we believe it will be a very rare occurrence that the individual or State agency will be unable to produce any of the acceptable documents. If such a case arises, States must work with the individual to help them obtain whatever documentation could be made available. States may contact CMS for technical assistance if they experience instances in which they have questions or concerns.

Finally, we believe that the affidavit process is appropriate because it offers flexibility to individuals who have no other method of verifying their citizenship while protecting the integrity of the Medicaid program. The process was not intended to be simply a process of self-attestation, which the Congress intentionally eliminated by establishing this provision. We believe it will be less likely that an individual who is falsely declaring to be a U.S. citizen will be able to arrange for two individuals to submit affidavits on his or her behalf. The requirement that at least one of the individuals be a non-relative better ensures that there is less conflict of interest.

*Comment:* Several commenters noted that section 6036 of the DRA did not mandate a hierarchy of acceptable documents, and, therefore, CMS should not impose one. The commenters suggested that CMS revise the regulations to give States flexibility to comply with the documentation requirements. The commenters recommended allowing States to accept documentation from the second- and third-tier evidence groups without first ensuring that primary-level evidence is unavailable, unavailable without cost, or if there is some uncertainty about when the primary evidence can be obtained. The commenter requested that States be able to accept lower level evidence that is available at the time of application if waiting for higher level evidence will result in a delay in the eligibility determination. One commenter requested that CMS permit States to determine that a document is "not available" when it cannot be obtained within the reasonable opportunity period.

Several commenters also requested that if CMS is to maintain the hierarchy, it should continue to accept third and fourth level documents. One commenter requested that CMS collapse the second through fourth tiers. The commenter stated that once a document was deemed reliable for verifying citizenship or identity, it should be treated as equally reliable as all other approved documents.

In contrast, one commenter stated that the hierarchical approach to document acceptance is important and should remain in the regulations. The commenter stated that ensuring that applicants provide the most reliable documentation available to them will decrease the chance of fraud or abuse of the Medicaid system.

In addition, the commenter requested that CMS consider a document to be available if it is known to exist. The commenter stated that allowing individuals to submit lower-tier evidence when a higher level of evidence exists would encourage individuals to simply submit the available document without putting in the effort to locate and submit more reliable evidence.

*Response:* We understand that several commenters were concerned about our system for categorizing documents by reliability. While States should first seek documents from the first level (U.S. Passport, Certificate of Citizenship, Certificate of Naturalization, or certain State driver's licenses), States are not prohibited from accepting documentation from the second tier or below if a document from the first tier is not available. In other words, an applicant or recipient is not expected to purchase a passport if the individual does not already have one but does have available other evidence of citizenship and identity. As we stated in the preamble to the July 12, 2006 interim final rule, States have the authority (and flexibility) to determine when a document is considered unavailable (see 71 FR 39215). However, we would not expect a State to require an individual to secure a document that cannot be made available within the reasonable opportunity period if a lower level document is already available. We have made clarifying, technical changes to the regulations at § 435.407(c) and (d) to make clear that if higher level documents are unavailable, lower-level documentation may be used.

We do not agree with the commenter who suggested collapsing the second through fourth tiers. It is important for States to strive to collect the most reliable evidence first, and we believe that we have the authority under Title

XIX, as well as our rulemaking authority in section 1102 of the Act, to create the hierarchical system. Documents in the fourth tier are not as reliable as documents in the second tier and should not be considered as such.

*Comment:* Several commenters asked that CMS not further limit in the final rule the types of evidence that may be used to document citizenship or identity. In addition, the commenters suggested that CMS allow States greater flexibility in determining what documentation will be permitted. The commenters stated that this flexibility would enable States to confidently verify an individual's status using means that CMS has not considered or by methods that have yet to be developed.

In contrast, one commenter disagreed with CMS' expansion of the list of documents offered in the DRA. The commenter stated that the Secretary should have first published a set of proposed regulations followed by a public comment period, prior to the issuance of final regulations.

*Response:* After considering the comments received, we have decided not to further limit the list of documents considered satisfactory proof of citizenship and identity as published in the July 12, 2006 interim final rule. As we have previously stated, we think it will be a rare occurrence that an individual cannot meet these requirements using the broad spectrum of documents included in the regulations. If we become aware of additional documents that might serve as evidence of citizenship or identity or both, we will engage in notice and comment rulemaking to determine whether the documents should be accepted as evidence.

The July 12, 2006 interim final regulation is considered a regulation under the Administrative Procedure Act. For a discussion on why we had good cause to publish the regulation without first engaging in notice and comment, we refer readers to the interim final rule at 71 FR 39220.

*Comment:* Several commenters disagreed with CMS' policy of only allowing three pieces of documentation to qualify as first tier documents for purposes of verifying citizenship. The commenters noted that the cost, delay in receipt, and other factors make it unlikely that many low-income citizens will have access to these documents. For instance, several commenters noted that a Certificate of Citizenship currently costs \$255, not including supporting documentation, passport photos, and the trip to a U.S. Citizenship and Immigration Service

(USCIS) office. Commenters stated that a Certificate of Naturalization currently costs \$200 and can take a considerable amount of time to receive. They indicated that a U.S. passport costs \$97 and takes 6 weeks to process. The commenters noted that the U.S. Passport Agency verifies citizenship independent of the Department of Homeland Security (DHS) and therefore its records are not linked to the automated records used by DHS. The commenter therefore concluded that it will be especially burdensome for individuals to obtain a passport if they have lost their Certificates of Naturalization or Citizenship. The commenter concluded that limiting acceptable first tier documents to these three pieces of documentation will result in an increase in the number of Medicaid-eligible individuals not receiving coverage and turning to alternate sources of care in the community.

*Response:* We note that the Congress specifically cited these documents as proof of both citizenship and identity. We are not aware of any other government-issued documents that could satisfy both the U.S. citizenship and identity requirement and thus be considered a first tier document. As previously stated, while States should first seek documents from the first level, States are not prohibited from accepting documentation from the second tier or below if a document from the first tier is not available. For instance, if an applicant is in possession of an original or certified copy of his or her birth certificate but does not have a passport, the individual may present the birth certificate along with another form of identification that proves identity. In the case of a naturalized citizen, the State may conduct an electronic data verification with DHS' SAVE Program at no cost to the applicant or recipient. As we stated in the preamble to the July 12, 2006 interim final rule, States have the authority (and flexibility) to determine when a document is considered unavailable (see 71 FR 39215).

*Comment:* Several commenters recommended that CMS amend the list of evidence of citizenship by including: souvenir birth certificates; birth certificates from a foreign country stamped "U.S. Citizen;" marriage certificates showing place of birth of the individual; entries in a family bible documenting birth in the United States; and for a parent, a U.S. birth certificate of a child showing the parent's place of birth.

*Response:* We have reviewed each of the documents above. As part of our review, we considered SSA policy with respect to documents acceptable for

issuance of a social security number. The documents listed above are not accepted by SSA as proof of citizenship for a social security number.

We are not accepting these documents as evidence of citizenship because they do not definitively establish an individual's citizenship. For many of the documents listed above, there is an existing alternative document or a database States may access that constitutes a more reliable record.

Recipients or beneficiaries with the types of birth records mentioned above should be able to obtain a birth certificate or have the State conduct a data match with the State vital statistics agency. An individual who was a U.S. citizen at birth despite being born abroad, can obtain a Department of State report of birth as described in the regulations at § 435.407(b)(2), (3), or (4).

*Comment:* Several commenters requested that CMS permit States to accept SSI check stubs for newly qualified SSI recipients whose names have not yet been entered into the State Data Exchange (SDX) database.

*Response:* Individuals receiving checks from SSA should have been entered into the SDX database. All States can check for SSI eligibility through this system. However, if the State cannot confirm with SSA that the individual has been deemed eligible for SSI via the SDX database, the State should pursue obtaining evidence of citizenship and identity.

*Comment:* One commenter recommended that CMS amend the list of secondary evidence of citizenship by including records that are considered secondary level evidence for citizenship verification from the SSA Program Operation Manual System (POMS). Several commenters requested that CMS revise the regulations to permit States to verify citizenship following the POMS guidelines for social security numbers.

*Response:* In the interim final rule we did not include two types of documents the SSA accepts as secondary evidence for social security numbers as listed in the POMS RM 00203.310: religious records recorded in the U.S. within three months of birth and early school records showing a U.S. place of birth.

We have accepted these documents as third level evidence of citizenship in the final rule. Religious records recorded in the U.S. within 3 months after the birth must show that the birth occurred in the U.S. and must show the date of the birth of the individual or the individual's age at the time the record was made. These must be official records recorded with the religious organization. Examples of such records include baptismal certificates. We caution States that in

questionable cases (e.g. where the child's religious record was recorded near a U.S. international border and the child may have been born outside the U.S.), the State should verify the religious record and/or document that the mother was in the U.S. at the time of birth. We have added regulations text at § 435.407(c)(3) and § 436.407(c)(3) to include these records as third level evidence of citizenship.

Early school records must show the name of the child, the date of admission to the school, the date of birth (or age at the time the record was made), a U.S. place of birth, and the name(s) and place(s) of birth of the applicant's parents. We have added regulations text at § 435.407(c)(4) and § 436.407(c)(4) to include these records as third level evidence of citizenship.

These records have been approved as third level evidence of citizenship because they are issued by non-governmental entities.

*Comment:* One commenter requested that CMS permit States to accept a duplicate of the information sent from hospitals to the State's Vital Statistics Agency for registering births to prove the citizenship of infants.

*Response:* This document could be permitted under 42 CFR 435.407(c)(1) or 42 CFR 436.407(c)(1) if it is part of the official hospital record and is on hospital letterhead.

*Comment:* One commenter recommended that CMS accept a letter of verification or any other official document from DHS or a U.S. District Court indicating that the person is a naturalized citizen. The commenter suggested that these documents be considered secondary evidence of citizenship.

*Response:* The Department of Homeland Security (DHS) has confirmed that documentation that an individual is a naturalized citizen may be contained in the SAVE database. All States have access to SAVE and data verifications can be conducted with the database. However, because SAVE verification is based on alien registration numbers, the State will need to provide DHS with the individual's alien registration number to enable the search to take place. While this number is found on the certificate of naturalization, it is necessary to keep in mind that since a SAVE verification has been designated as an acceptable form of second-tier evidence to be used only when first-tier evidence such as the certificate of naturalization is unavailable, that source for the alien registration number cannot, by definition, be used when SAVE is used as second-tier evidence, i.e., as a

substitute for documentary evidence of citizenship rather than as a verification of the certificate of naturalization. If an applicant has a certificate of naturalization, the applicant must provide it as first-tier evidence. Thus, the applicant will need to provide the alien registration number using another means, such as memory or documentation of previous dealings with DHS.

In addition, all use of the SAVE system is subject to DHS requirements, including execution of an appropriate Memorandum of Understanding (MOU) providing access to the system. The fact that entering a name, date of birth and alien registration number may generate a response that the subject of the query is a naturalized citizen does not necessarily mean that that is an authorized use of the system. SAVE was designed as a method of verifying alien immigration status, including responding that the subject of an alien status inquiry is in fact a naturalized citizen if such is the case. SAVE MOUs with State agencies administering Medicaid do not currently authorize use of the system to verify claims to naturalized citizen status. In addition and as previously stated, naturalized citizens may also now make use of the affidavit process as well. Therefore, we are not amending the policy to accept additional documents for use by naturalized citizens.

*Comment:* One commenter requested that CMS permit States to follow guidelines used by the Department of State for establishing citizenship, including accepting census records and a doctor's record of post-natal care.

*Response:* In our interim final and final regulations at § 435.407(d)(1) and § 436.407(d)(1), we permit as fourth-level documents census records showing U.S. citizenship or U.S. place of birth, as well as the applicant's age. Generally, census records from 1900 through 1950 provided this kind of information. Medical records of post-natal care could qualify as an extract of a hospital record, which is considered third level evidence at § 435.407(c)(1) and at § 436.407(c)(1), or a medical record, which is considered fourth level evidence at § 435.407(d)(4) and at § 436.407(d)(4).

*Comment:* Many commenters disagreed with CMS' policy to require that third and fourth tier evidence only be considered valid if issued at least 5 years before the date the individual applied for Medicaid. They stated that 5 years is an arbitrary period of time. The commenters noted that an applicant could not have been aware of the policy to use these documents to verify

citizenship before the issuance of the July 12, 2006 interim final rule and, therefore, would not have had the foresight to create false documents in advance for purposes of meeting these requirements. Several commenters noted that many individuals have been receiving Medicaid for 20 or more years. They question CMS' decision to require those individuals to produce documents that were created decades ago. Several commenters suggested CMS permit States to accept documents that existed at the time of the enactment of the DRA. Other commenters recommended that CMS permit current recipients to use documents that existed on the date of the enactment of the DRA and permit new applicants to use documents that existed 2 or 3 years before this date.

*Response:* Five years prior to application is not an arbitrary date. This is long standing SSA policy which we have adopted. This requirement is only assigned to those documents that would be the most vulnerable to being created for the purpose of meeting Medicaid eligibility requirements. This requirement helps protect the integrity of these documents. We also note that not all documents are subject to this requirement. CMS has made available a wide spectrum of documents to establish citizenship and identity.

*Comment:* One commenter requested that CMS define the circumstances when fourth-level documentation is permissible to prove citizenship. The commenter stated that this evidence should only be used when primary, secondary, and third-level evidence does not exist.

*Response:* A State may accept fourth level evidence when primary, secondary, and third level evidence is not available within the reasonable opportunity period and, with the exception of the affidavit process, the applicant alleges a U.S. place of birth. In our above response to comments, we provide additional guidance on what it means for a document to be available. In accordance with such guidance, the State should make the decision of whether documents of a given level of reliability are available to the applicant or recipient (see 71 FR 39215).

*Comment:* One commenter requested that CMS take into account the circumstances of homeless persons when reviewing States for accepting third or fourth level evidence of citizenship. The commenter noted that there are significant reasons why documentation may not exist for homeless individuals and that providers and States should be assured that they will not be penalized for providing services to these individuals.

*Response:* If the individual or person working on the individual's behalf requires assistance, States are required to aid these individuals and locate and obtain whatever documentation exists. For instance, the State may be able to conduct electronic data matching that renders unnecessary the need for the applicant or recipient to submit paper documentation.

*Comment:* One commenter requested that for purposes of using third tier evidence, CMS specify that the place of birth on the nongovernmental document agree with the place of birth on the application at the State level. The commenter noted that names of small towns and rural areas often change. The commenter stated that these minor inconsistencies should not have any bearing on the application for Medicaid.

*Response:* While we understand the commenter's concern, this does not necessitate a modification to the regulations. The State is responsible for ensuring the authenticity of the documents.

*Comment:* One commenter requested that CMS accept as primary evidence of citizenship any identity cards issued by the Texas Vital Statistics Office to migrant workers, which show date and place of U.S. birth along with photo identification.

*Response:* We have worked with the Texas Department of State Health Services, Office of Vital Statistics to determine what these cards are, what they are used for, and if they might serve as appropriate evidence of citizenship and/or identity. However, we were unable to locate an example of the identification card. Until such time that we can review a sample document, we are unable to accept as evidence of citizenship and identity such document.

*Comment:* Several commenters requested that CMS define "near the time of birth" as found in § 435.407(c) and (d). The commenters requested CMS clarify whether the States were entitled to make this determination.

*Response:* States are best able to make this determination and are responsible for the authenticity of the document.

*Comment:* One commenter requested that CMS review the language pertaining to the recording of birth certificates to ensure that the appropriate terminology was used. The commenter stated that in § 435.407 and § 436.407 the word "issued" should be replaced with "recorded." The commenter stated that by using the word "issued," CMS is requiring applicants or recipients to have requested copies of birth certificates 5 years before the date of application. The commenter also recommended that the

word "amended" be replaced with "delayed." The commenter stated that an amended record is one that was changed based on a court order or some other documentary evidence based upon the items and nature of the change. A delayed record is one that was filed more than 5 years after birth. The commenter stated that these changes better reflect the intent of the regulations.

*Response:* We agree with the commenter and are making the necessary revisions to the regulations text at § 435.407 and § 436.407.

*Comment:* In the regulations at § 435.407(b)(1) and § 436.407(b)(1), a birth record may be accepted as secondary evidence of citizenship if it was recorded prior to five years of age; a birth record that was recorded more than five years after birth is considered fourth level documentation of citizenship. One commenter recommended that CMS permit States to accept any birth certificate, regardless of when it was recorded or whether it was delayed as secondary evidence of citizenship.

*Response:* We adopted limits on the acceptability of birth certificates in accordance with SSA practice when issuing SSNs. These limits were established to assure that when establishing citizenship, the oldest documents would be used in preference to more recent documents of the same degree of reliability. Therefore, it is appropriate to distinguish between a birth certificate that was recorded within five years of birth and one that delayed more than 5 years after the birth.

*Comment:* One commenter requested that CMS clarify that immunization records maintained by parents or schools are not considered to be medical records but that immunization records maintained by a clinic, doctor, or hospital are considered to be medical records.

*Response:* We agree with the commenter.

*Comment:* One commenter requested that CMS clarify whether citizens who are unable to produce the designated documentation are eligible to receive emergency medical assistance under Title XIX.

*Response:* Coverage for treatment of an emergency medical condition provided for under section 1903(v)(2) is only available to non-qualified aliens and qualified aliens subject to the five-year bar. Therefore, citizens are not eligible for coverage under this provision.

Section 1867 of the Act requires that hospitals with emergency departments

must screen any individual who presents to the hospital emergency room requesting treatment of an emergency medical condition. The hospital must provide an appropriate medical screening examination. If the hospital determines that an emergency medical condition exists, the hospital must provide or arrange for stabilizing treatment of the emergency medical condition without regard to insurance or ability to pay.

*Comment:* Several commenters stated that it is a felony under Federal law (18 U.S.C. 1426(h)) for any person to copy Certificates of Naturalization and Certificates of Citizenship. Therefore, the commenters requested that CMS address what State agencies should do to document that an individual presented a Certificate of Naturalization or Citizenship.

*Response:* Any person who, without lawful authority, makes a likeness of various immigration or naturalization documents is committing a crime under 18 U.S.C. 1426(h). The Department of Homeland Security and the Department of Justice investigate and prosecute such offenses. However, the limitation "without lawful authority" would appear to exclude State employees, as well as Federal employees and agents, acting within the scope of their official duties, from the ambit of the offense. Accordingly, we do not believe that this criminal offense provision should be considered an impediment to the State's records retention needs and making photostatic or xerographic copies of such documents, duly marked as copies retained for official purposes, for their records.

#### *Tribal Documents*

*Comment:* Many commenters requested that CMS modify the regulations to permit American Indian/Alaska Natives to submit documentation establishing membership in a federally-recognized Tribe as a first tier document to verify U.S. citizenship and identity. The commenters noted that American Indian/Alaska Natives frequently do not have the type of documents required under CMS' regulations implementing section 6036 of the DRA. In particular, the commenters stated that many elderly American Indian/Alaska Natives do not have birth certificates, as they were born in remote rural locations where no healthcare facilities existed.

*Response:* We have carefully considered the commenters' concerns and recommendations and have concluded that we cannot accept additional tribal documents as proof of U.S. citizenship at this time. First, we note that elderly individuals, if enrolled

in Part A or B of Medicare, will be exempt from the citizenship documentation requirements. Second, certain Tribal documents, such as those listed in § 435.407(d)(2) and § 436.407(d)(2), are already accepted as evidence of citizenship. However, not all Tribes require members to be U.S. citizens or to have been born in the U.S. Therefore, we cannot ensure that all Tribal members are U.S. citizens. In many instances, Tribes indicated that they require individuals to present a birth certificate to obtain a Certificate of Indian Blood. In these cases, the individual should be able to submit the same birth certificate to the State Medicaid Agency as evidence of citizenship. However, some Tribes indicated that they relied on lineage documentation to establish membership in the Tribe. Establishing tribal membership confirms the heritage and blood linkage of the individual to an ancestor who was a member of the Tribe. Determining lineage does not necessarily establish U.S. citizenship of the individual applying for or receiving Medicaid and therefore, does not meet the requirements under section 1903(x) of the Act.

*Comment:* Several commenters noted that in 1924, the Congress granted U.S. citizenship to members of federally-recognized Tribes through the Indian Citizenship Act. They stated that the Department of the Interior approves tribal constitutions, including membership provisions. The commenters therefore concluded that when the Federal government approved the membership guidelines, it automatically conferred U.S. citizenship on any individual granted membership in a federally-recognized Tribe. The commenters therefore concluded that tribal documents verifying tribal membership should be accepted as evidence of citizenship.

*Response:* The Indian Citizenship Act conferred U.S. citizenship on American Indians who were born in the United States. The Act did not grant U.S. citizenship to all members of Federally-recognized Tribes. The individual must not only be a member of a Federally-recognized Tribe, but also have been born in the United States. Therefore, demonstration of Tribal membership is not equivalent to demonstration of U.S. citizenship.

*Comment:* In the case of Alaska Natives, the commenters requested that States be permitted to refer to the Roll of Alaska Natives composed by the Secretary of the Interior in 1971 to verify citizenship. Section 1604(a) of the Alaska Native Claims Settlement Act of 1971 required the Secretary to prepare

a roll of all Natives who were born before December 18, 1971. In section 1602 of this act, "Native" is defined as a " \* \* \* citizen of the United States who is a person of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof." The commenters therefore conclude that inclusion on this list is documentation of U.S. citizenship.

*Response:* We agree with the commenters and have accepted the Roll of Alaska Natives as fourth level evidence of citizenship.

The purpose of the Roll was to identify individuals with whom the Federal government was to settle a claim of aboriginal title to land. Individuals submitted applications to be included on the Roll. As part of the application, individuals had to demonstrate that they were U.S. citizens. We have confirmed with the Bureau of Indian Affairs (BIA) that the documentation submitted as part of the application for inclusion on the Roll could have included birth certificates, ancestry information, marriage documents, official name change documents, adoption information and information on siblings. Such documentation is sufficient evidence of citizenship under these regulations.

The Roll is not continually updated; it only contains information for individuals who were born prior to December 18, 1971. With the applicant's or recipient's approval, the State Medicaid Agency may contact the BIA's regional office in Juneau to request information on the individual from the Roll.

This is consistent with the Social Security Administration's policies. We have added corresponding regulations at § 435.407(d)(vi) § 436.407(d)(vi).

*Comment:* Several commenters stated that not all American Indian/Alaska Natives are required to be U.S. citizens or meet one of the specific immigration statuses to be eligible for Medicaid. The commenters noted that Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA," Pub. L. 104-193), enacted on August 22, 1996, exempted American Indians from the citizenship requirements for Medicaid eligibility. The commenters therefore concluded that American Indian/Alaska Natives are exempt from the citizenship documentation requirements.

*Response:* We are aware that American Indians who are not U.S. citizens may be eligible for Federal public benefits under PRWORA (and the amendments made thereto through section 5303 of the Balanced Budget Act of 1997, Pub. L. 105-33, enacted August

5, 1997). As amended, PRWORA provided that non-citizen American Indian/Alaska Natives born outside of the U.S., who either (1) were born in Canada and are at least 50 percent American Indian blood, or (2) are members of a federally-recognized Tribe as defined in Sec. 4(e) of the Indian Self-Determination and Education Assistance Act, are eligible for Medicaid, even if they are not U.S. citizens. In other words, individuals who meet one of the above requirements may be considered to be in satisfactory immigration status for purposes of determining eligibility for Federal public benefits. PRWORA specifically created an exception for American Indian/Alaska Native individuals who are not United States citizens. An American Indian/Alaska Native who declares him- or herself to be a citizen is not affected by PRWORA and is subject to this provision.

*Comment:* A representative from one Tribe asked that CMS delay implementation of section 6036 of the DRA until the issue of adequate documentation for American Indian/Alaska Natives has been further discussed and a solution reached.

*Response:* In section 6036(b) of the DRA, Congress required the citizenship documentation requirements to apply July 1, 2006, specifically stating that the "amendments made by subsection (a) shall apply to determinations of initial eligibility for medical assistance made on or after July 1, 2006, and to redeterminations of eligibility made on or after such date."

*Comment:* In contrast, several commenters agreed with CMS' proposal to not accept tribal membership cards as first tier documentation verifying U.S. citizenship.

*Response:* We appreciate the comment and have not made any changes at this time with respect to Tribal documents that will be accepted for purposes of verifying United States citizenship.

#### *Evidence of Citizenship for Children*

*Comment:* One commenter asked that CMS clarify what constitutes sufficient documentation of citizenship for children under age 16. One commenter noted that some documents will not be available for children. For instance, one State prohibits children under the age of 18 from obtaining a certified copy of their own birth certificates.

*Response:* As stated earlier, we believe the statute requires children who have either declared U.S. citizenship or have had such a declaration made on their behalf to meet the documentation requirements under

1903(x) of the Act. There are numerous ways to document citizenship for children as outlined in this final rule.

*Comment:* One commenter requested that CMS reconsider whether documentation is necessary to document the citizenship and identity of very young children. They stated that there is very little question about the citizenship of children born to parents who have documented their own citizenship. They also request that CMS expand the list of satisfactory documents for young children.

*Response:* As stated above, we interpret the statute as requiring that every individual who has declared to be a U.S. citizen or had a declaration made on his or her behalf must document such U.S. citizenship in order for the State to receive FFP. The State cannot assume a child's citizenship status based on the parents' information.

*Comment:* One commenter recommended that CMS permit States to accept birth records to satisfy both the citizenship and identity requirements for children.

*Response:* Section 1903(x)(3) of the Act requires that when an individual submits a birth certificate to establish citizenship, the individual must submit a second document to verify identity.

*Comment:* Many commenters disagreed with CMS' requirement that infants born to non-status aliens receiving "emergency Medicaid" in a U.S. hospital be required to submit documentation verifying citizenship. The commenters noted that individuals born in the U.S. are U.S. citizens, regardless of the citizenship of the mother. The commenters stated that, otherwise, many eligible citizen newborns risk a delay in health coverage to which they are entitled.

Several commenters also stated that some eligible infants may not have applications made on their behalf and that CMS should make the process as simple and direct as possible for those responsible for this vulnerable population.

*Response:* We have considered the comments received and are modifying the regulations to clarify that a child born to a woman who has applied for, has been determined eligible and is receiving Medicaid on the date of the birth of the child is deemed Medicaid-eligible for a period of one year so long as the mother also remains (or would remain if pregnant) eligible and the child is a member of the woman's household.

Under section 1902(e)(4) of the Act and 42 CFR 435.117, a Medicaid agency must provide Medicaid eligibility to a child born to a woman who has applied

for, has been determined eligible and is receiving Medicaid on the date of the child's birth. The child is deemed to have applied and been found eligible for Medicaid on the date of birth and remains eligible for one year so long as the woman remains (or would remain if pregnant) eligible and the child is a member of the woman's household. Citizenship and identity documentation for the child would be obtained at the next redetermination of eligibility. This policy also applies to a citizen child born to a non-qualified or 5-year bar qualified alien mother eligible for and receiving Medicaid on the date of the child's birth.

In order for an individual to be determined eligible for Medicaid (with the exception of newborns deemed eligible under section 1902(e)(4) of the Act), he or she must complete a full Medicaid application. This is also the case for non-qualified or 5-year bar qualified aliens seeking coverage for emergency medical services (including labor and delivery) only. While non-qualified aliens are not required to meet the citizenship or satisfactory immigration status requirements or to submit a social security number, they must be determined otherwise-eligible, including but not limited to meeting residency, income and resource requirements. All standard Medicaid application procedures apply, including timely determination of eligibility and adequate notice of the agency's decision concerning eligibility. Qualified aliens subject to the 5-year bar must demonstrate that they are in satisfactory immigration status, submit a valid social security number, and meet all other eligibility requirements including but not limited to the residency, income and resource requirements as part of being determined otherwise-eligible for emergency medical services under Medicaid. All Medicaid application procedures apply, such as timely determination of eligibility and adequate notice of the agency's decision concerning eligibility.

In most cases affected by this rule, States have up to 45 days to make an eligibility determination. Once an applicant is determined eligible, the effective date of eligibility may be the date of application, the first date of the month of application or up to 3 months prior to the month of application. Under retroactive eligibility authorized under section 1902(a)(34) of the Act, an applicant may be determined eligible for services rendered up to 3 months prior to the date of application. In order for a service to be covered by Medicaid in the 3 month period prior to the application, the applicant must be

determined to have been Medicaid-eligible either on the date of service or during the month in which retroactive eligibility is provided. This applies to all applicants, including non-qualified or 5-year bar qualified aliens seeking coverage for emergency services (including labor and delivery) only. If a woman is found to be retroactively eligible for labor and delivery services, the newborn child would be deemed Medicaid-eligible from the date of birth.

With respect to whether the mother remains (or would remain if pregnant) eligible for Medicaid after the birth of the child, the State must determine whether a non-qualified or 5-year bar qualified alien would remain eligible for emergency services under § 435.139 or § 436.139. In determining whether the woman would remain eligible for such services, the State must consider whether the woman would remain otherwise-eligible if pregnant.

If a woman does not apply for Medicaid or applies for Medicaid and is not determined eligible, her labor and delivery services will not be covered by Medicaid and the child would not benefit from the provisions under section 1902(e)(4) of the Act. In these cases, an application must be filed on behalf of the child and the citizenship documentation requirements would apply at the time of application.

We note that certain children born in the United States do not benefit from deemed eligibility because the mother will be ineligible for both emergency and regular Medicaid. For example, foreign diplomats and their children (including those born in the United States) are not eligible for either emergency or regular Medicaid. (See section 3211.10 of the State Medicaid Manual, Publication 45.) In addition, some non-qualified aliens are not eligible for Medicaid coverage of an emergency medical condition because they do not meet all eligibility criteria, such as residence in a State. For example, individuals present in the United States on a current visitor's visa are not considered residents of a State. Such individuals are admitted to the U.S. for temporary periods, and upon applying for the visa declared under penalty that they are not abandoning their primary residences abroad. While a child born in the United States to such an individual is a U.S. citizen and may be eligible for Medicaid, deemed eligibility does not apply. In these instances, a full Medicaid application for the child would be required to determine Medicaid eligibility.

We are modifying the regulations text at § 435.117 and § 436.117 to reflect these changes in policy.



We note that CMS has not initiated action against any State to disallow FFP based on implementation of the deemed newborn provision under the policy in the interim final regulation. However, we expect that all States will be in compliance with the deemed newborn policy described above upon the effective date of the final regulation. We continue to provide States with ongoing outreach and technical assistance on this matter.

*Comment:* Many commenters requested that States should be permitted to accept record of payment, and especially a State Medicaid agency's record of payment, of an individual's birth in a U.S. hospital as satisfactory documentation of both citizenship and identity. In addition, several commenters suggested that States be permitted to accept U.S. hospital records of birth as primary evidence of citizenship and identity for newborns.

*Response:* A record of payment is not sufficient to document citizenship. We reviewed several hospital claims and determined that they do not contain sufficient information to establish citizenship. For example, the information provided on a labor and delivery claim is particular to the mother and does not contain any information on the infant. For instance, such claims do not indicate whether or not the labor resulted in a live birth.

However, as stated in § 435.407(c)(1) and § 436.407(c)(1) of this final rule, an individual may use an extract of a hospital record of birth to verify an infant's citizenship if higher tier documentation is unavailable. This document must be on hospital letterhead and created near the time of birth. We recommend that State eligibility workers work with the parents or caretakers of infant children to ensure that they are aware of these requirements and request the appropriate records from the hospital.

*Comment:* One commenter requested that CMS clarify the regulations text at § 435.407(b)(8), which states that, when an adoption has not been finalized, a State may accept a certification of the child's U.S. place of birth from an adoption agency as long as the adoption agency can certify that the source of the birth information was an original birth certificate. The commenter recommended that CMS permit States to accept any information provided by the adoption agency pursuant to the regulations at § 435.407(b)(1), (d)(2)(iv), or (h)(1) (now (i)(1)) of the July 12, 2006 interim final rule, including a match with a State vital statistics agency.

*Response:* We note that if the adoption is for a child eligible for Title IV–E Adoption Assistance, the child would be exempt from these requirements as authorized under section 405(c)(1)(A) of Division B of the TRCHA. If the exemption does not apply, a State may accept birth information from an adoption agency if the adoption agency certifies that it obtained the information from an original birth certificate or certified copy of a birth certificate. The State may also conduct a match with the appropriate vital statistics agency using the information provided by the adoption agency, or work with another State to conduct such a match with that State's vital statistics agency.

*Comment:* One commenter requested that CMS clarify how the regulations apply to children born outside of the U.S. They recommended that CMS recognize the automatic citizenship of any child affected by the Child Citizenship Act of 2000.

*Response:* All individuals claiming U.S. citizenship or who have had a declaration made on their behalf, including children, must provide evidence of citizenship and identity. As previously stated, if the adoption is for a child eligible for Title IV–E Adoption Assistance, the child would be exempt from these requirements as authorized under section 405(c)(1)(A) of Division B of the TRCHA. Otherwise, and as stated in the preamble to the July 12, 2006 interim final rule, a child born outside the U.S. and adopted by a U.S. citizen may establish citizenship under section 320 of the Immigration and Nationality Act (8 U.S.C. 1431), as amended by the Child Citizenship Act of 2000 (see 71 FR 39218). This also applies to certain children born abroad whose parents are naturalized citizens. The State must obtain documentary evidence that verifies that at any time on or after February 27, 2001, the following conditions have been met: (1) The child has at least one U.S. citizen parent (by either birth or naturalization); (2) the child is under the age of 18; (3) the child is residing in the United States in the legal and physical custody of the American citizen parent; (4) the child was admitted to the United States for lawful permanent residence; and (5) if adopted, the child satisfies the requirements of section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. 1101(b)(1)) pertaining to international adoptions (i.e., the child must have been admitted as an IR–3 if adopted outside the United States, or been admitted as an IR–4 with a final adoption having taken place in the United States).

The U.S. citizenship of the parent should be verified as otherwise provided in this rulemaking. Admission of the child as a lawful permanent resident should be verified in the manner provided for a determination of "qualified alien" status, including SAVE verification. More detailed information about documentary evidence that can be used to satisfy elements of a section 320 claim to U.S. citizenship is provided in DHS regulations at 8 CFR Part 320 (especially section 320.3(b)) and in the instructions for DHS Form N–600, Application for Certificate of Citizenship (available on the USCIS Web site at <http://uscis.gov>).

Note that these provisions apply to claims of "automatic" citizenship under section 320 of the Immigration and Nationality Act only. The Child Citizenship Act also amended section 322 of that Act (8 U.S.C. 1433). Section 322 is, however, a naturalization provision that requires a grant of citizenship by DHS. Determination of citizenship of a section 322 claimant should be made in the manner provided by this rulemaking for other naturalized citizens.

We have modified our regulations at §§ 435.407(b)(12) and 436.407(b)(12) to codify this rule, as stated in the preamble to the July 12, 2006 interim final rule.

#### *Affidavit Process*

*Comment:* Several commenters requested that CMS clarify what it means when it uses the term "affidavit." According to the commenters, the term "affidavit" may have different definitions under State law. The commenters were particularly concerned with whether the affidavit must be notarized. They stated that CMS did not intend to require applicants to notarize the affidavit, as this could pose problems for people in more remote areas.

*Response:* We understand from the commenters that under many State laws an affidavit must be notarized. We note that for purposes of meeting the requirements of section 6036 of the DRA, an "affidavit" is a signed written declaration made under penalty of perjury. This document does not need to be notarized. We have modified the regulations text at § 435.407(f) and § 436.407(f) to clarify that these identity affidavits are not required to be notarized.

*Comment:* Several commenters disagreed with CMS' decision to require that the individuals submitting supporting affidavits on behalf of a recipient or applicant be citizens and verify their own citizenship. The

commenters do not agree that it is necessary for an individual to be a citizen to know the circumstances of another individual's citizenship. They stated that this requirement does not ensure greater authenticity of the applicant's or recipient's claim but only makes the process more burdensome. One commenter requested that CMS clarify whether this policy applies to parents or guardians filing affidavits on behalf of a child. One commenter further requested that CMS exempt supporting affiants from verifying their own citizenship for purposes of the affidavit process if they are exempt from verifying citizenship for purposes of Medicaid (e.g. individuals in receipt of SSI or SSDI).

*Response:* We do not believe accepting supporting affidavits from a non-citizen individual is appropriate. The intent of the law is for citizens to document their citizenship status; therefore, we believe it is counter-intuitive and does not accord with the overall purpose of the law to permit non-citizens to establish another individual's citizenship, including the non-citizen parents of a citizen child. Therefore, the policy continues to be that States may only accept supporting affidavits from a citizen who has personal knowledge of the events determining another individual's citizenship.

*Comment:* Several commenters stated that the affidavit process was overly burdensome. The commenters stated that affidavits should be accepted when appropriate, and not just in the rarest of circumstances. In addition, the commenters stated that it is unrealistic to expect that two individuals, including one non-relative, will be able to provide information on the facts establishing citizenship. Another commenter requested that CMS not require a third affidavit from a second witness. The commenter argued that the affidavits from the other two individuals already establish the information on the absence of other documentary evidence and that further evidence is unnecessary.

*Response:* The process established for affidavits is necessary to protect the integrity of the Medicaid program. We believe that requiring two affidavits is a safeguard that ensures consistency in the accounts and prevents against fraud. We believe that it is less likely that an applicant or recipient who can obtain two corroborating affidavits by other individuals to support his own affidavit will be engaged in fraud. It is important that at least one of the affidavits be from a non-relative to diminish the possibility of conflict of interest.

In addition, we note that there are numerous documents available to an individual to verify citizenship status. Most applicants should not have to resort to an affidavit.

*Comment:* One commenter requested that CMS permit States to accept affidavits to document both citizenship and identity.

*Response:* As we previously stated, the statute requires that when an individual does not use a first tier document to establish both citizenship and identity, the individual must provide two distinct documents to verify citizenship and identity. We have only allowed identity affidavits in the rare circumstances where we believe there is a reasonable possibility that the individual will not be able to obtain other documents proving identity. Populations eligible to use identity affidavits are children under the age of 16 (18 in limited circumstances) and disabled individuals living in residential care facilities.

*Comment:* Several commenters recommended that CMS change the regulations to permit naturalized citizens to submit signed affidavits accompanied by copies of any supportive documents and/or information, such as the date of naturalization, alien registration number, or information on a parent's naturalization. The commenter noted that all naturalization cases can be verified by DHS.

*Response:* We have considered the commenters' request and agree that it is appropriate to permit naturalized citizens to submit an affidavit to verify citizenship. While we believe that electronic verification with the SAVE Program will eliminate the need for many naturalized citizens to utilize the affidavit process, we believe that such individuals should have a recourse available to them when their information cannot be located in the SAVE database. Such affidavits should of course be considered carefully for their probative value in light of the fact that they are offered as proof that the U.S. Government has conferred a status (and that it is a continuing status, i.e., that the person has not been denaturalized) absent any other evidence of that grant of status.

*Comment:* One commenter requested that CMS remove from the regulations the use of affidavits. The commenter stated that the intent of the Congress was to move away from self-attestation of citizenship and that CMS is not meeting that intent by allowing an individual to prove citizenship through a written affidavit. The commenter also stated that if an individual cannot prove

citizenship based on one of the other methods, that is a strong indication that person is not a citizen.

The commenter recommended that if CMS is to retain the affidavit provision, it be modified. The commenter recommended that CMS explicitly state in the regulations that an affidavit may only be used if higher-tier documentation does not exist, not that it cannot be obtained. The commenter also recommended that a second affidavit explaining why the documentary evidence does not exist should be required, not requested. The commenter stated that the second affidavit will help the State Medicaid Offices keep track of why applicants are relying on an affidavit and possibly help them verify the applicant's citizenship.

One commenter strongly opposed the use of affidavits as proof of citizenship. The commenter stated his opinion that affidavits blur the lines between clear verification of citizenship and an honor system. The commenter requested that if CMS is to maintain use of affidavits, CMS should clarify what constitutes "personal knowledge" and "rarest circumstances."

*Response:* We do not agree that we should delete the affidavit process. We fully agree that the Congress intended that we no longer rely on self-declaration alone as sufficient evidence of citizenship. However, we do not agree that our affidavit process is the same as the process of self-declaration. The conditions under which a person may utilize the affidavit process are strictly limited to rare instances when higher level documentation is not available, and affiants declare their status under penalty of perjury.

We also disagree with the commenter who stated that we should require States to obtain from a second affiant information on why citizenship documentation is not available to an individual. If this information is available, as stated in the regulations at § 435.407(d)(5)(iv) and § 436.407(d)(5)(iv), it should be contained in the affidavit. However, it is possible for States to determine whether the individual has provided sufficient evidence of citizenship without information on why other documents may not be available.

For purposes of the affidavit process, an individual has "personal knowledge" of circumstances if he or she has knowledge about the event that established a person's citizenship or has personally seen a document establishing citizenship—such as a passport that burned in a fire. The individual should be able to share details such as when and where the event occurred, who was

involved and whether there were any special circumstances surrounding the event.

For this same purpose, we consider "rare circumstances" to be instances when none of the acceptable documents are available to the individual.

*Comment:* One commenter requested that CMS clarify the degree of relationship that is meant by "related" with respect to the affidavit process. The commenter requested that CMS clarify whether two people in a relationship by marriage are considered "related."

*Response:* States are in the best position to determine degrees of relationships that fall into the term "related." However, we would expect States to consider spouses to be related.

*Comment:* One commenter requested that CMS delete from § 435.407(d)(5)(v) the parenthetical reference to "guardian or representative" and allow for this affidavit to be signed by "the applicant or recipient or other knowledgeable individual."

*Response:* We have considered the commenter's request; however, it is important that the individual submitting an affidavit of citizenship on behalf of an incapacitated person be the guardian or representative of that individual. It is sufficiently reliable that another person attest to the circumstances of the individual's citizenship status when a guardian or representative has been legally appointed to care for the individual's affairs.

#### *Identity Documentation*

*Comment:* Several commenters noted that evidence of identity will be very difficult for certain populations to obtain. In particular, the commenters expressed concern about the ability to obtain identification for children. One commenter recommended that CMS revise the regulations to permit States to accept school records, and not just photo ID, as acceptable identification for children under the age of 16, as many schools do not issue photo ID. Several commenters recommended that CMS permit States to accept photos contained in yearbooks for purposes of identification. Several commenters requested that CMS revise the regulations to exempt children under the age of 18 from submitting photo identification.

*Response:* We understand the commenters' concerns regarding identity documentation for children. For this reason, we permitted identity affidavits to be submitted on behalf of children under the age of 16. In most locations, children 16 and above have access to either a school ID card with a

photograph, or a driver's license that contains a photograph or other identifying information listed in the regulations at § 435.407(e)(1) and § 436.407(e)(1). However, we understand from the commenters that this is not universally true. Therefore, in areas where both a school ID card with a photograph that meets the criteria at § 435.407(e)(1)(ii) or § 436.407(e)(1)(ii) or a driver's license that meets the criteria at § 435.407(e)(1)(i) or § 436.407(e)(1)(i) are not available to an individual before the age of 18, States will be permitted to accept affidavits establishing the identity of children up to age 18.

We have revised the regulations text at § 435.407(f) to include school records such as report cards. If the State accepts such records, it must verify them with the issuing school.

*Comment:* One commenter requested that the regulations be revised to permit States to accept affidavits to establish identity for all children under the age of 18. In addition, the commenter requested that CMS permit caretaker relatives to submit affidavits on behalf of children.

In contrast, one commenter stated that CMS inappropriately approved the use of affidavits for children under the age of 16 to establish identity. The commenter noted that use of affidavits for these purposes violate the DRA, the INA, and the Attorney General's regulations. The commenter requested that CMS revise the regulations to eliminate this use of affidavits.

*Response:* As we stated in the previous comment, we are revising the regulations to permit States to accept affidavits establishing the identity of children up to age 18 in areas where school ID cards and driver's licenses establishing identity in accordance with our regulations are not available to an individual before the age of 18.

We have reconsidered whether identity affidavits for children must be signed by a parent or legal guardian and agree with the commenter who requested that CMS permit caretaker relatives to sign identity affidavits on a child's behalf. We have revised the regulations at § 435.407(f) and § 436.407(f) to reflect this change.

In response to the commenter who stated that the use of identity affidavits violate the DRA, we note that section 1903(x)(3)(D)(ii) permits the Secretary to approve additional documents as evidence of identity.

*Comment:* Several commenters requested that CMS accept many additional documents as proof of identity. Among these, commenters requested that CMS accept court-issued

documents for individuals of any age; facility medical records for any institutionalized individuals who are not receiving SSI or Medicare; current employer ID cards; ID cards with photos issued by a private agency providing social services (for example, Salvation Army); government-issued papers not related to public assistance (e.g. tax returns); bank statements; utility bills; IDs or documents from correctional institutions; military discharge papers; certified copies of marriage certificates or judgments of divorce; and checks issued by the Department of Veterans' Affairs.

*Response:* We have expanded the use of additional identity documents to include a combination of three or more of the following official documents: Employer identification cards, high school and college diplomas from accredited institutions (including general education and high school equivalency diplomas), marriage certificates, divorce decrees, and property deeds/titles. A combination of three or more of these documents must corroborate one another and must not conflict, and may only be used to verify identity if the individual used secondary or third level evidence of citizenship and the document was not used to verify citizenship. A State may permit an individual to submit such documents only when it has determined that no other evidence of identity is available to the individual prior to accepting these documents. The documents should be originals or certified copies. This is similar to SSA policy in that SSA may accept an employer identification card or marriage document as secondary level evidence of identity along with additional supporting documentary evidence for purposes of issuing an SSN (see POMS RM 00203.200 Evidence of Identity for an SSN Card). We have added regulations text at § 435.407(e)(3) and § 436.407(e)(3) to reflect this change.

*Comment:* Several commenters stated that the July 12, 2006 interim final rule failed to include several identity documents found in the Immigration and Nationality Act. The commenters noted that section 1903(x)(3)(D)(i) of the Act states that "any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act" is acceptable proof of identity. The commenters stated that under the regulations at 8 CFR 274a2(b)(1)(v)(B), which implement section 274A(b)(1)(D) of the Immigration and Nationality Act, voter registration cards and Canadian driver's licenses are acceptable proof of identity for anyone 16 years of age or older. The commenters therefore

conclude that the Congress has deemed these documents as reliable forms of identity. The commenter further notes that section 1903(x)(3)(D)(ii) of the Act authorizes the Secretary to expand the list of acceptable evidence of identity, rather than restrict the list established by the Congress.

*Response:* We do not agree that voter registration cards and Canadian driver's licenses are acceptable evidence of identity for the purpose of Medicaid eligibility. The DRA required CMS to accept as evidence of identity any document described in section 274A(b)(1)(D) of the INA. Section 274A(b)(1)(D)(i) of the INA says that a document is a "driver's license or similar document issued by a State if it contains a photograph of the individual or other such personal identifying information relating to the individual." We do not believe either voter registration cards or Canadian driver's licenses meet this requirement. Voter registration cards do not contain photographs or other personally identifying information. Canadian driver's licenses are not issued by a State.

We recognize that regulations implementing this requirement under the Immigration and Nationality Act long have included a much wider variety of documents than the statute would appear to permit, and that Congress undoubtedly was aware of this implementation when cross-referencing the provision, and have taken that consideration into account in listing all the regulatory documents but these two. However, the section 1903 reference is to the statute and does not require us to designate documents with no personal identifying information or foreign-issued documents as evidence of identity to establish U.S. citizenship.

*Comment:* One commenter requested that CMS clarify whether identity documents may be used even if they recently expired.

*Response:* States may accept identity documents that have recently expired as long as there is no reason to believe that the document does not match the individual.

*Comment:* One commenter requested that CMS extend the permissible use of affidavits to establish the identity of disabled individuals. Several commenters requested that CMS permit States to accept affidavits from providers of long term care or rehabilitation service facilities to demonstrate the identity of individuals in their care.

*Response:* We agree with the commenters. A State may accept an identity affidavit on behalf of a disabled

individual made by a director or administrator of a residential care facility where the individual resides. However, the State should first pursue all other means of verifying identity prior to accepting such an affidavit. The affidavit is not required to be notarized. We have modified the regulations at § 435.407(g) and § 436.407(g) to incorporate this policy.

*Comment:* One commenter requested that States be permitted to accept an identity affidavit for adults in certain limited circumstances.

*Response:* As stated above, we have permitted the use of identity affidavits for disabled adults in residential care facilities.

*Comment:* One commenter requested that CMS clarify which Native American tribal documents will satisfy the identity requirement and what kind of information the document must include.

*Response:* Documents establishing identity must include a photograph or other personally identifying information such as height, weight, hair color, eye color, sex, or race. We have revised the language at § 435.407(e)(1)(vi) to reflect this.

*Comment:* One commenter requested that CMS clarify the list of identity documents. The commenter stated that the list in the regulations text at § 435.407(e)(8) and § 436.407(e)(8) appears to be duplicative of the documents described in § 435.407(e)(1)–(7) and § 436.407(e)(1)–(7) and its presence is therefore confusing.

*Response:* We inadvertently repeated the list of documents from the INA twice. For this reason, we have removed the regulations text at § 435.407(e)(8). In addition, we have removed § 435.407(e)(9), which was a duplicate of the new § 435.407(e)(1)(vi). The regulations text at § 435.407(e)(10) in the interim final regulations is now at § 435.407(e)(2).

*Comment:* One commenter stated that each of the identity and citizenship documents presented by CMS is vulnerable to fraud at the enrollment, issuance, and usage phases. Therefore, the commenter recommended that information-based identity authentication be included as a requirement to bolster the identity authentication process.

*Response:* We appreciate the commenter's technical expertise and will keep this in mind as we approve databases and processes for electronic matching. We note that States are required to protect against fraud under the regulations at 42 CFR 431 Subpart P Quality Control.

*Comment:* One commenter requested that CMS clarify whether identification cards issued by the Federal, State or local government must have the same information as is actually included on some unspecified drivers' licenses, or whether they must simply have the same information as is required by the July 12, 2006 interim final rule for drivers' licenses as documentation of identity. The commenter recommended that CMS accept the latter. In addition, the commenter requested that CMS clarify whether a State is to compare all government-issued identification cards to its own drivers' licenses or should it compare these identification cards to the drivers' licenses in the State in which the card was issued. Similarly, the commenter requested that CMS identify the drivers' licenses to which Federal identification cards are to be compared.

*Response:* Identification cards issued by the Federal, State, or local government must contain a photograph or personally identifiable information such as height, weight, age, and sex. States may determine whether or not a particular identification card meets their standard for establishing identity. Generally, drivers' licenses contain at least a photograph or, if not, detailed information on the person's physical appearance. We intended the reference to comparing identification cards to drivers' licenses to mean that a State would consider whether the information provided on the identity card was comparable to what is provided on drivers' licenses generally.

#### *Requests for Assistance*

*Comment:* Several commenters requested that CMS require States to extend assistance to indigent individuals who cannot afford to pay for obtaining the required documents. One commenter requested that States be required to pay the cost of obtaining original and certified copies of citizenship documents. One commenter requested that the Federal government reimburse States for 100 percent of any costs the State incurs while attempting to secure documents for recipients or applicants. One commenter requested that CMS require States to waive fees for individuals seeking documents in the State's control to prove their identity and citizenship for Medicaid purposes.

*Response:* As we stated in the interim final rule with comment period, FFP for administrative expenditures is available at the current match rate to assist States with these costs.

*Comment:* Several commenters noted that the phrase "incapacity of mind" is vague and undefined. They suggested

that CMS modify the change to the regulations to require States to assist individuals who “due to a physical or mental condition” are unable to comply with the requirements. One commenter requested that CMS replace the term with a more specific definition of who is being targeted. One commenter suggested that we replace the term with “individuals with mental or physical impairments.”

*Response:* We accept the comment and have revised the regulations text at § 435.407(h) and § 436.407(h) (formerly § 435.407(g) and § 436.407(g)) to reflect this change.

*Comment:* Several commenters noted that the new regulation text does not specifically require States to assist homeless persons or individuals whose documentation may have been lost or destroyed due to a natural or man-made disaster to verify their citizenship. The commenters suggested that CMS modify the regulations to explicitly require States to aid these groups. One commenter requested that CMS expand the list of reasons why a person may require assistance at the outset, making specific reference to both the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act and including specific people who are limited English proficient (LEP). The commenters also requested that CMS indicate in the final rule the steps States must take to assist populations with special needs. One commenter recommended that these individuals be designated as a State representative who will have the primary responsibility of obtaining the required documentation.

*Response:* All of the protections offered under the Civil Rights Act, the Americans with Disabilities Act and the Rehabilitation Act apply. As we stated in the interim final rule with comment period, States must assist individuals who are trying in good faith to obtain satisfactory documentation but cannot do so within the reasonable opportunity period (see 71 FR 39216).

*Comment:* Several commenters requested that CMS permit States to institute a Hardship Provision to account for personal and natural disasters. The commenters stated that often these individuals are in critical need of medical care, but due to their circumstances are unable to provide the necessary documentation. The commenters stated that these individuals should be afforded benefits upon application, if otherwise Medicaid-eligible.

*Response:* States must assist individuals who are trying in good faith to obtain satisfactory documentation but

cannot do so within the reasonable opportunity period (see 71 FR 39216).

*Comment:* One commenter requested that CMS modify the reasonable opportunity definition to include an affirmative obligation on States to provide assistance and guidance to any recipient or applicant actively trying to procure documentation.

*Response:* The statute has provided that many of the vulnerable individuals are exempt from these requirements. Under the regulations at § 435.407(h) (formerly § 435.407(g)), we have required States to assist special populations. In addition, as stated above, we clarified in the preamble to the interim final rule with comment period that States must assist any individual who is trying in good faith to obtain satisfactory documentation but cannot do so within the reasonable opportunity period (see 71 FR 39216).

In any case, we have always expected States to help individuals requiring assistance. Under the regulations at § 435.908 “Assistance with application” a State Medicaid Agency must allow an individual the choice of having someone accompany, assist, and/or represent him or her during the application or redetermination process. In addition, States are required under the regulations at § 435.905 to provide written information on eligibility requirements. We expect States to incorporate into written information which documents are acceptable to verify citizenship.

*Comment:* One commenter stated that the policy set forth in the July 12, 2006 interim final rule violates the Federal Medicaid statute by treating applicants and recipients differently. The commenter expressed particular concern with respect to terminating the reasonable opportunity period for applicants at 45 or 90 days while allowing recipients an indefinite amount of time to produce the documents.

*Response:* We have not changed the long-standing reasonable opportunity periods afforded applicants and recipients during application and redetermination. For this reason, we stated in the preamble to the interim final rule with comment period that the reasonable opportunity period should be consistent with the State’s administrative requirements such that the State does not exceed the time limits established in Federal regulations for timely determination of eligibility in § 435.911. The regulations permit exceptions from the time limits when an applicant or recipient in good faith tries to present documentation but is unable

to do so because the documents are not available.

#### *Further Exemptions*

*Comment:* Many commenters acknowledged their support of CMS’ change to the regulations to exempt recipients of Medicare and SSI from the citizenship documentation requirements. Several commenters recommended that CMS modify the change to exempt individuals who are not currently in receipt of both Medicare and SSI but had been in the past. The commenters also requested that if CMS exempts these individuals, it should specify in the regulations how far back the States may look for Medicare and SSI eligibility. One commenter recommended that CMS exempt SSI applicants who were denied for reasons other than citizenship. One commenter requested that CMS clarify whether only the citizenship documentation process is waived for Medicare and SSI recipients or if the identity documentation process is waived as well.

*Response:* Section 1903(x)(2) of the Act exempts only those individuals who are currently entitled to or enrolled in Medicare or in receipt of SSI. Further, SSA does not make available to CMS the bases for denial. Therefore, we would not be able to determine whether an individual was terminated or denied based on immigration status. Both the identity and the citizenship documentation requirements do not apply in the case of exempted individuals.

*Comment:* Many of the commenters suggested that CMS modify the regulations to exempt additional groups from the citizenship verification requirements, including groups of individuals for whom the commenters believe SSA has already verified citizenship status.

*Response:* The TRHCA amended section 1903(x)(2) to exempt individuals receiving disability insurance benefits under section 223 of the Act or monthly benefits under section 202 of the Act, based on such individual’s disability (as defined in section 223(d) of the Act). The State may also confirm such receipt with SSA through established data matches. As stated earlier, we do not have the authority to exempt groups that were not exempted by the statute unless they meet the statutory requirements in section 1903(x)(2)(D) of the Act.

*Comment:* One commenter requested that we exempt all SSI recipients and not just those in the section 1634 States where SSI recipients are automatically eligible for Medicaid.

*Response:* As previously stated, the TRHCA amended section 1903(x) of the Act to exempt all individuals in receipt of SSI.

*Comment:* Many commenters requested that CMS exempt individuals currently covered or otherwise eligible for services under a family planning waiver. The commenters noted that these individuals should be exempt from the documentation requirements due to the timely nature of their need for services.

*Response:* We believe it is consistent with the intent of the law that individuals receiving medical assistance through a State Medicaid program declare citizenship or immigration status and provide documentation of that status including individuals receiving medical assistance through an 1115 demonstration. Such individuals must apply for coverage and be determined to meet all other Medicaid requirements, such as providing a valid social security number.

We note that PRWORA requires that any individual receiving Federal public benefits be a citizen or qualified alien, with limited exceptions. We note that CMS would not be able to waive this requirement for purposes of eligibility for an 1115 demonstration program or family planning waiver.

*Comment:* Several commenters requested that CMS exempt foster children from the citizenship documentation requirements.

*Response:* Section 405(c)(1)(A) of Division B of the TRHCA amended section 1903(x) of the Act to exempt children in foster care who are assisted under Title IV-B of the Act and children who are recipients of foster care maintenance or adoption assistance payments under Title IV-E of the Act. We note however, that section 405(c)(1)(B) of Division B of the TRHCA requires the State title IV-E agency to have procedures to verify the citizenship or immigration status of any child in foster care under the responsibility of the State under titles IV-B or IV-E.

*Comment:* Several commenters recommended that CMS revise the regulations to exempt all foster children upon initial placement, at which time Title IV-E eligibility may not yet have been determined. Several commenters requested that these exceptions also be made for children in informal placements and State and tribal-run foster care systems.

*Response:* As previously stated, section 405(c)(1)(A) of Division B of the TRHCA exempted children in foster care who are assisted under Title IV-B of the Act and children who are

recipients of foster care maintenance or adoption assistance payments under Title IV-E of the Act. For purposes of this provision, foster care includes any child assisted under Title IV-B in the placement and care responsibility of a State or Tribe that is in an out-of-home placement, regardless of licensing or payment status of the provider.

*Comment:* One commenter requested that CMS exempt abandoned babies from the requirements. The commenter stated that because parents are not required to provide personal information, little is known about these infants.

*Response:* To the extent these children are in foster care, they would be exempt from these requirements based on the TRHCA's exemption of children in receipt of Title IV-B services or IV-E assistance. However, we do not have the authority to exempt groups that were not exempted by the statute unless they meet the statutory requirements in section 1903(x)(2)(D) of the Act.

*Comment:* One commenter requested that CMS explain why some requirements only apply to children under 16 years old when a child is not normally considered an adult until age 18.

*Response:* In general, it is appropriate to require children over the age of 16 to present identification from the list. In general, individuals over the age of 16 will be able to obtain a driver's license or school ID. However, as we previously stated, in areas where identity documents are not available to individuals before the age of 18, a parent or guardian may provide an identity affidavit on a child up to age 18. We have changed the regulations text at § 435.407(f) to reflect this change.

*Comment:* One commenter recommended that CMS allow individuals and families who are victims of natural disasters to be given 5 months of coverage under Medicaid beginning on the date of the natural disaster's occurrence without regard to the citizenship documentation requirements. The commenter also recommended that additional coverage should be provided for pregnant women affected by natural disasters through 60 days postpartum.

*Response:* How to treat Medicaid eligibility in the event of a natural disaster is out of the scope of this regulation. Under reasonable opportunity, States must aid individuals in obtaining documentation if the individuals are making a good faith effort to procure the documents but are unable to do so within the reasonable opportunity period.

*Comment:* One commenter recommended that children, regardless of documentation of citizenship, be considered eligible for emergency services under the same circumstances that aliens may receive these services. One commenter recommended that children under the age of 5 be presumptively considered citizens and be covered under Medicaid for 6 months while the necessary documentation is being gathered.

*Response:* As previously stated, we do not have authority under the law to make citizens eligible for emergency services authorized for aliens only under section 1903(v)(3) of the Act, as well as PRWORA. In addition, we believe that providing medical assistance to individuals prior to collecting citizenship documentation requirements would violate the intent of section 1903(x), which requires States to have such documentation as a condition of receiving FFP.

*Comment:* One commenter requested that CMS include the Medicare/SSI exemption in § 436.406 as well as § 436.1004 to clearly establish that these populations are excluded from the documentation requirements.

*Response:* We agree with the commenter and have modified the regulations text at 42 CFR part 435 or 42 CFR part 436 to include these exemptions.

*Comment:* Several commenters recommended that CMS consider several additional populations to be presumptively eligible, including their status as citizens, because they will likely not have the capabilities to obtain the proper identification documents.

*Response:* Criteria for presumptively eligible is under sections 1920, 1920A and 1920B of the Act. Addressing modifications to these statutory provisions is outside the scope of this rule. We have previously addressed how States may help individuals requiring assistance.

#### Outreach

*Comment:* Several commenters requested that CMS work with the States to ensure that appropriate outreach efforts are made. The commenters noted that there exists considerable lack of awareness and confusion of what is required by section 6036 of the DRA on the part of eligibility workers, and applicants for and recipients of Medicaid. One commenter requested that CMS outline the extent of CMS' outreach program so that States can avoid any duplication of effort.

*Response:* We have been working with States on a comprehensive

outreach plan. Outreach to date includes meetings and open door forums with over 150 organizations comprised of States, advocacy groups, and technical advisory groups. We have also distributed the State Medicaid Director's Letter on the citizenship documentation requirement to 100 advocacy groups. Working in conjunction with these organizations, we have reached out to over 49,000 individuals.

We continue to provide education and outreach through speaking at conferences, conducting conference calls, and providing technical assistance to a number of our closest partners in reaching out to States and information intermediaries. 250 organizations participated in two Low-Income Open Door Forums including Indian Health Service, American Association of People with Disabilities, American College of Physicians, National Council on Aging, National Center for Children and Poverty, Public Hospital Pharmacy Association, and National Senior Citizens Law Center.

Finally, we have posted numerous outreach and education materials in both English and Spanish to the CMS Web site as part of the campaign. We encourage States, advocacy groups and individuals to use these materials to reach out to other organizations and people with Medicaid to provide more information about the new requirements. These documents include a brochure, PowerPoint presentation, poster, Questions and Answers sheet and a fact sheet.

*Comment:* One commenter requested that CMS and the States clarify in their outreach efforts that these new requirements apply only to Medicaid, not the Food Stamp Program.

*Response:* The statute only applies to Medicaid. In the interim final rule with comment period, we stated that these determinations are not binding on other Federal or State agencies for any other purpose (see 71 FR 39218).

*Comment:* Several commenters requested that CMS provide Federal grant assistance to the States to offset the cost of outreach.

*Response:* FFP is available to States for administrative costs; the match for these costs is 50 percent.

#### *Other Comments*

*Comment:* Several commenters expressed their support of CMS' change to the regulations to meet the requirements of section 6036 of the DRA. One commenter noted that Medicaid is not the only source of health care coverage in many communities; he stated that individuals

who are unable to produce the required documentation to establish citizenship should seek coverage of services from an alternate source.

*Response:* We appreciate the commenters' expressions of support for the rule. However, we can only comment on the Medicaid program. State and local agencies are best suited to address what additional sources of care in a community are available to an individual.

*Comment:* Several commenters inquired about the financial impact on the Medicaid program of non-eligible non-citizen individuals receiving coverage. The commenters stated that aliens without established immigration status are very careful to not make themselves known to government officials for fear of deportation. The commenters cited the Office of the Inspector General's July 2005 report "Self-Declaration of U.S. Citizenship for Medicaid" as evidence that non-status aliens are not falsely claiming citizenship for purposes of obtaining Medicaid. The commenters stated that unless CMS had evidence to suggest otherwise, the regulations were overly and unnecessarily strict and would result in eligible individuals failing to seek coverage or being deemed ineligible for lack of documentation.

*Response:* We emphasize that section 6036 of the DRA requires States to verify an individual's declaration of citizenship via documentation as a condition of receiving FFP. These regulations provide numerous additional documents not specified in the law that provide greater flexibility to individuals in meeting these requirements.

*Comment:* One commenter stated that the July 1, 2006 implementation date is unreasonable, especially considering the regulations have yet to be finalized. One commenter requested that CMS delay implementing section 6036 of the DRA until States can set up adequate processes. One commenter requested that CMS provide States with a grace period to enact the new regulations, including an opportunity for corrective action by States, through January 1, 2007.

*Response:* We note that the statute requires that State Medicaid Agencies obtain documentation of the citizenship and identity of applicants as of July 1, 2006, and for recipients at the time of the first redetermination occurring on or after July 1, 2006. The Secretary does not have the authority to modify this date. In addition, we note that the vast majority of States had begun implementing this provision on or before July 1, 2006.

*Comment:* One commenter requested that CMS include in the final rule specific standards for assuring agency and provider compliance with all applicable civil rights laws including section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and Title VI of the 1964 Civil Rights Act.

*Response:* Under the regulations at § 430.2 and § 435.901, all aspects of the Medicaid program must comply with Federal antidiscrimination laws.

*Comment:* One commenter stated that verifying both citizenship and identity was redundant.

*Response:* Federal law requires that State Medicaid Agencies verify and document both citizenship and identity if the individual does not use a first tier document.

*Comment:* Several commenters requested that CMS reverse the citizenship documentation requirements.

*Response:* CMS does not have the authority to reverse an act of the Congress.

*Comment:* Several commenters stated that because of the new regulations, citizen applicants are being required to provide more information than non-citizen applicants. For instance, a non-citizen can provide a photocopy of his or her resident alien registration card and other identification documents. In addition, a non-citizen applicant is required to be covered by Medicaid while locating the documents necessary to verify immigration status. Under these new regulations, citizen applicants are not covered by Medicaid during the reasonable opportunity period.

*Response:* Citizen applicants and recipients are not required to provide more documentation than non-citizens. Like citizens, aliens must provide documentation that they are in satisfactory immigration status, which the State is then required to verify with the SAVE database. While individuals in satisfactory immigration status may submit photocopies of the required document, this is permissible because States must verify all such documents with the Department of Homeland Security through a verification with the SAVE Program. Therefore, States are not expected to determine whether the documents are valid. In contrast, States are obligated to determine the validity of documents attesting to citizenship and such documents are extremely variable with no single issuer who could attest to their validity. Therefore, the most efficient and effective method for documenting citizenship is to require that documents submitted be originals.

Current recipients will be covered during the reasonable opportunity period. Once an applicant is determined eligible, eligibility may start on the date of application, the first day in the month of application, or up to 3 months prior to the month of application (under section 1902(a)(34) of the Act). Like aliens, citizens must be provided a reasonable opportunity period before the State Medicaid Agency can take action on the individual's eligibility.

*Comment:* One commenter noted that the new regulations will be exceptionally burdensome on the specific populations relying on Medicaid for health care. The commenter stated that the most affected groups will be the transient, minorities, and those with mental illnesses.

*Response:* The statute has exempted many of the most vulnerable populations, including those receiving Medicare and certain disabled populations. In addition, States are required under § 435.407(h) to assist individuals with incapacitating physical and mental conditions. As previously stated, States must assist any individual who cannot obtain the necessary documentation within the reasonable opportunity period and is making a good faith effort to do so.

*Comment:* One commenter expressed concern over CMS' legal interpretation of the word "alien" in section 6036(x)(2) as a congressional error.

*Response:* As we discussed previously, the TRCHA corrected this error by replacing the word "alien" in 1903(x)(2) with the phrase "individual declaring to be a citizen or national of the United States." The TRCHA made such change effective as if it had been included in the DRA.

*Comment:* One commenter asked CMS to clarify whether a State can terminate or deny an individual during the reasonable opportunity period if the person is deemed to not be making a good faith effort to comply with the requirements. They also asked whether they were permitted or required to extend the period if an individual is shown to be making a good faith effort. They also asked CMS to state the proper course of action to take with a child whose parents or guardians are uncooperative.

*Response:* States must follow standard application and redetermination processes. States' standard practices with respect to the reasonable opportunity period have not changed. Therefore, as is currently permissible, a State may deny an individual at any point in the application process if the State determines that the individual is

not making a good faith effort to comply with any part of the application process.

*Comment:* One commenter noted that States are not required to authenticate documents and should not be required to do so.

*Response:* Eligibility workers are trained to review and accept documents and we expect that for purposes of determining eligibility, they would accept only reliable documents.

A State should evaluate every document presented as evidence of citizenship and identity to determine whether it meets the published criteria for acceptance and whether the document appears to be genuine. A State is not obligated to accept any document submitted as evidence of either citizenship or identity if that document does not appear genuine.

Determining the authenticity of any document is a process of judgment the State agency must exercise. The State should consider, for example, whether the information on the document is consistent with other information the agency has on the individual, if the document contains any erasures or obvious signs of manipulation, if the issuing organization is a recognized organization in the United States, is there any irregularity in the size, style, printing, or use of capitalization, and whether the date of registration is later than the date of the event recorded.

If the State agency determines a document is questionable, the State may refuse to accept the document, or it could contact the issuing agency to determine whether the document is indeed authentic.

This description of evaluation questions is only a sample of the possible questions a State would need to answer to be assured the document is genuine and refers to the person named on it.

#### *Financial Aspects and Compliance*

*Comment:* One commenter requested that CMS explicitly identify which costs incurred by a State or county agency assisting applicants and recipients procure citizenship documentation will be considered allowable administrative costs for Federal Financial Participation (FFP). One commenter recommended that Federal funding for the costs of obtaining adequate documentation should be reimbursed to the State at 100 percent.

*Response:* Under the law, States are eligible for the standard 50 percent Federal match for administrative costs in connection with implementing the citizenship documentation provision, as defined under the regulations at § 435.1001.

*Comment:* One commenter requested that CMS indicate in the final rule how it will monitor the extent to which States are obtaining primary evidence.

*Response:* We will monitor compliance with these regulations following the standard reviews and audits as described in the regulations at 42 CFR Part 430.

*Comment:* One commenter asked CMS to clarify that agency oversight with respect to FFP is not intended to prevent eligible citizens from receiving Medicaid benefits. The commenter expressed concern that States will be overly cautious with respect to following the Federal guidelines and risk not enrolling eligible individuals.

*Response:* We are committed to ensuring that all eligible individuals receive the Medicaid benefits to which they are entitled. In no way are these new regulations intended to prevent eligible citizens from receiving Medicaid benefits. However, Federal law requires that citizens provide documentation verifying their citizenship. States are encouraged to assist individuals who have difficulty obtaining or locating such documentation.

*Comment:* One commenter requested that CMS give States a higher Federal Medicaid Assistance Percentage (FMAP) to cover the costs of implementing this DRA provision.

*Response:* CMS does not have the authority to alter FMAP rates, which are set in statute.

*Comment:* One commenter recommended that CMS give States the flexibility to designate qualified hospitals as agents of the State for purposes of collecting and certifying citizenship documentation for purposes of Medicaid applications. One commenter requested that CMS strongly recommend that States enter into these arrangements with hospitals and health centers to assist in expediting the citizenship verification process. One commenter requested that CMS confirm that agencies collecting eligibility applications on behalf of the State are permitted to copy documents and note on the copies that the original documents were viewed.

*Response:* It would promote proper and efficient administration of the Medicaid program for hospitals to perform this step in the application process of collecting and photocopying citizenship documentation. However, States already must have outstation locations for the initial processing of Medicaid application, under § 435.904. These locations must include all disproportionate share hospitals (DSH) and Federally qualified health centers



(FQHC), or, at State option, other outstation locations which include at least some DSH hospitals and FQHCs. The initial processing of applications includes obtaining required documentation, such as citizenship documentation. Outstationed provider or contractor employees or volunteers could collect and photocopy the required certification, and would be required to certify that original documentation was seen as with any other Medicaid eligibility worker.

#### Technical

*Comment:* One commenter asked that CMS clarify the statement in the preamble to the July 12, 2006 interim final rule which reads, "We are removing § 435.408 and § 436.408 because the immigration status described as permanently residing in the United States *under color of law* no longer has any effectiveness because of the enactment of 1996 of the Personal Responsibility and Work Opportunity Act which provides that "notwithstanding any other law" an alien who is not a qualified alien as defined in 42 U.S.C. 1641 is not eligible for any Federal public benefit" (71 FR 39220). The commenter would like CMS to clarify whether this statement regards the Immigration Reform and Control Act (IRCA) only or also Persons Residing Under Color of Law (PRUCOL) in general.

*Response:* The term "permanently residing in the U.S. under color of law" (PRUCOL) is not defined in the Immigration and Nationality Act. The changes made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) define the classes of aliens eligible for Federal public benefits in section 431 of that act consistent with the definitions in the Immigration and Nationality Act. Thus, the definition of qualified alien excludes any alien not defined in section 431. In addition, the conference report accompanying PRWORA states on page 383 that: "Persons residing under color of law shall be considered to be aliens unlawfully present in the United States \* \* \*." Therefore, we are reflecting the changes made by PRWORA.

*Comment:* One commenter noted that the citation to the Immigration Regulations in § 435.407(e)(8) of the rule appears to be incorrect. The commenter stated that the citation should be 8 CFR 1274a.2(b)(1)(v)(B).

*Response:* The regulations text at 8 CFR 1274a.2(b)(1)(v)(B) and 8 CFR 274a.2(b)(1)(v)(B) is identical. The difference between them is that 8 CFR Part 274 contains Department of

Homeland Security (DHS) regulations, while Part 1274 represents Department of Justice (DOJ) regulations. Duplicate regulatory provisions were promulgated effective March 1, 2003 by DOJ to complement the existing Part 274A which shifted to DHS jurisdiction, because the authorities previously exercised on behalf of the Attorney General relating to section 274A of the INA by two DOJ components (the Immigration and Naturalization Service (INS) with respect to 274A enforcement and the Executive Office for Immigration Review (EOIR) for adjudication of contested 274A cases) were as of that date exercised by DHS as the successor to INS with DOJ retaining its EOIR jurisdiction. DOJ therefore deemed it appropriate to establish separate regulations for continuing EOIR purposes. We have utilized this citation to reflect only the Department of Homeland Security regulations in § 435.407(e)(1) (formerly § 435.407(e)(8)), as this is the most appropriate citation given DHS jurisdiction over designation of acceptable documents for Form I-9 purposes; as noted, though, the provisions are substantively identical.

*Comment:* One commenter requested that CMS clarify how a State may verify identity documents while also not requiring applicants to appear in person.

*Response:* Ultimately, States are responsible for verifying an individual's declaration of U.S. citizenship, including verifying the identity of the individual. If a State does not feel confident it can verify a person's identity without having the individual present documentation in-person, it may require that the applicant or recipient do so.

*Comment:* One commenter requested that CMS clarify whether or not verifying citizenship is a one-time activity. The commenter notes that CMS has indicated that there may be a need to reevaluate this information if a 3-year gap in coverage occurs.

*Response:* Generally, once an individual has verified his or her citizenship for Medicaid purposes, he or she will not have to verify it again unless there is a 3-year gap in enrollment and the State has subsequently destroyed the prior records or if doubt is raised about the authenticity of the previously submitted documents. If the records no longer exist, the individual would be required to submit verifying documentation again. We note that a State may decide to retain records beyond the 3-year minimum requirement at its discretion.

*Comment:* One commenter requested that CMS clarify the following sentence from the Regulatory Impact Statement: "\* \* \* with respect to those States that elect to review documents through the routine eligibility and redetermination process, we recognize there will be some increased burden on eligibility workers." The commenter requested that CMS clarify what alternatives States have to this election.

*Response:* States may use electronic records matching in place of requiring that an individual submit paper documentation.

*Comment:* One commenter requested that CMS clarify whether the omission from the July 12, 2006 interim final regulations that certain documents must have been created 5 years before the date of application for Medicaid was an oversight or a change to the policy.

*Response:* We reviewed the SMD and the interim final rule and found one instance where the policy as stated differed with respect to the criteria that the documents must have been created 5 years before the date of application. We intended to require that institutional admission papers from a nursing facility, skilled care facility or other institution have been created at least 5 years prior to the date of application for Medicaid. We are updating the regulations text at § 435.407(d)(3) and § 436.407(d)(3) to reflect this.

*Comment:* One commenter requested that CMS clarify whether or not an electronic indicator from a prior period can be used to verify citizenship if the 3-year period of document retention has expired and paper copies of documentation are no longer available.

*Response:* We are interpreting the electronic indicator mentioned by the commenter to be an electronic file with a checkbox indicating whether or not acceptable evidence of citizenship and identity had been viewed.

As we stated in the interim final rule with comment period, records of citizenship and identity documents must be kept in the Medicaid file in either paper or electronic format (e.g., a scan of a document). An electronic marker from a prior period indicating that the citizenship verification process was completed will not meet this standard. However, a State may opt to keep records for a longer period of time if the State believes this better serves its program needs.

*Comment:* One commenter requested that CMS clarify whether the omission from the July 12, 2006 interim final regulations of the clinic, doctor, or hospital record showing date of birth as proof of identity for children that was included in the Medicaid Fact Sheet

June 9, 2006 was an oversight or a change in policy.

*Response:* The absence of this document from the regulations at § 435.407(f) was an oversight. We have revised the regulations text to include these documents.

*Comment:* One commenter requested that the reference to Medicare in the preamble of the July 12, 2006 interim final rule (71 FR 39215) is confusing because it does not specify whether the exemption applies to an individual who is entitled to or enrolled in Medicare Part A only or to individuals entitled to or enrolled in both Medicare Part A and Part B.

*Response:* The law states that this exemption applies to individuals entitled to or enrolled in any part of Medicare. The individual need not be enrolled in all parts of Medicare.

*Comment:* One commenter noted that the July 12, 2006 interim final rule contains two citation errors. The reference to 42 U.S.C. 1641 should be 8 U.S.C. 1641 and the reference to 42 CFR Part 74 should be part 92.

*Response:* We have corrected the citation to 8 U.S.C. 1641 and the citation to 45 CFR part 74.

#### IV. Provisions of the Final Regulations

We are maintaining the majority of the provisions in the July 12, 2006 interim final rule with several exceptions. The provisions of this final rule that differ from the interim final rule with comment period are as follows:

(1) We are modifying the regulations to provide Medicaid eligibility to a child born to a woman who has applied for, has been determined eligible and is receiving Medicaid on the date of the child's birth so long as the woman remains eligible and the child is member of the woman's household. The child is deemed to have applied and been found eligible for Medicaid on the date of birth and remains eligible for up to one year. This provision applies to all newborn children as long as the mother is receiving Medicaid on the date of the child's birth. A non-qualified alien or 5-year bar qualified alien receiving emergency Medicaid services as provided under § 435.139 is considered to be Medicaid-eligible and receiving Medicaid for purposes of this provision. Citizenship and identity documentation for the child must be obtained at the next redetermination of eligibility. As required by law and regulation, a woman may be eligible under § 435.139 only if she submits a full Medicaid application showing she meets the requirements under § 435.406(b),

including income, residency and asset requirements.

(2) We have modified the regulations concerning citizenship and alienage to emphasize that individuals receiving services through an 1115 demonstration program, including a family planning waiver, must declare if they are a U.S. citizen and provide the required documentary evidence of citizenship and identity.

(3) We have modified the regulations to exempt individuals receiving SSDI benefits based on disability, children in foster care who are assisted under Title IV-B of the Act, and children who are recipients of foster care maintenance or adoption assistance payments under Title IV-E of the Act as authorized by section 405(c)(1)(A) of Division B of the TRHCA.

(4) We have included in the regulations the exemption of individuals entitled to or enrolled in Medicare or in receipt of SSI payments as authorized by the DRA and clarified by the TRHCA.

(5) We have made several technical corrections to the regulations text at § 435.406(a)(2) and (b) and § 436.406(a)(2) and (b) to clarify that non-qualified aliens and aliens subject to the 5-year bar may only be eligible for coverage of emergency services.

(6) We have modified the regulations text at § 435.406(b), (c) and (d) and § 436.406(b), (c) and (d) to clarify that a State may accept lower tier evidence of citizenship when a higher tier document is unavailable.

(7) We have modified the regulations text at § 435.407 and § 436.407 to clarify that for purposes of this regulation, the term "citizenship" includes status as a noncitizen national of the United States as well as a U.S. citizen.

(8) We have revised the language used to describe birth records to be consistent with the National Association for Public Health Statistics and Information Standards (NAPHSIS). This entails replacing the words "issued" with "recorded" and "amended" with "delayed." This language reflects our original intent of accepting birth records that were recorded with vital statistics within 5 years of birth as secondary evidence of citizenship and birth records that were recorded with vital statistics after 5 years of birth (a delayed birth record) as fourth level evidence of citizenship.

(9) We have corrected the regulations text at § 435.407(b)(5) and § 436.407(b)(5) to account for a drafting error in the DRA that incorrectly references the form number for U.S. citizen identification cards. This does

not change the policy as stated in the interim final regulations.

(10) We have approved the use of the Department of Homeland Security's Systematic Alien Verification for Entitlements (SAVE) Program for purposes of verifying citizenship for naturalized citizens, subject to DHS authorization. We have also codified in regulation the rule (already articulated in the interim final rule with comment) that a biological or adopted child born outside the United States may establish citizenship using the process established under section 320 of the INA, as amended by the Child Citizenship Act of 2000 (Pub. L. 106-395, enacted on October 30, 2000).

(11) We have expanded the list of appropriate documents to verify citizenship by including religious records recorded in the U.S. within 3 months of birth and early school records showing a U.S. place of birth as third level evidence of citizenship. We have noted that entries in a family bible are not considered recorded religious records. This is consistent with the Social Security Administration's policy.

(12) We have revised the regulations to clarify that institutional admission papers from a nursing facility, skilled care facility or other institution that indicates a U.S. place of birth must have been created at least 5 years before the initial application date to be accepted as fourth level evidence of citizenship. This is consistent with the Social Security Administration's policy.

(13) We have accepted the Roll of Alaska Natives maintained by the Bureau of Indian Affairs as fourth level evidence of citizenship.

(14) We have modified the regulations text at § 435.407(d) and § 436.407(d) to allow naturalized citizens to utilize the affidavit process.

(15) We have removed from the regulations text the duplicate list of documents under § 435.407(e)(8) and § 436.407(e)(8). This does not change the policy as stated in the interim final rule with comment period.

(16) We are modifying the language in the regulations describing what information Certificates of Degree of Indian Blood and other American Indian/Alaska Native Tribal documents must have to be considered evidence of identity. Specifically, we are clarifying that the document must have a photograph or other personally identifying information.

(17) We have modified the regulations to approve the use of three or more corroborating documents such as high school and college diplomas from accredited institutions, marriage certificates, property deeds/titles, and

employee ID cards to verify the identity of an individual.

(18) We have clarified in the regulations text at § 435.407(f) and § 436.407(f) that school records may be accepted for purposes of establishing the identity of children. This does not change the policy as stated in the interim final rule with comment period.

(19) We have modified the regulations text at § 435.407(f) and § 436.407(f) such that clinic, doctor and hospital records may be accepted as evidence of identity for children.

(20) We have expanded the list of acceptable identity documents at § 435.407(f) and § 436.407(f) to include the use of identity affidavits for children up to 18 years of age in limited circumstances. We have stated in the regulations text that these identity affidavits do not need to be notarized.

(21) We have modified the regulations text at § 435.407(f) and § 436.407(f) such that caretaker relatives may submit an identity affidavit on a child's behalf.

(22) We have expanded the list of acceptable identity documents to include the use of identity affidavits for disabled individuals in residential care facilities. This modification to the policy can be found at the new § 435.407(g) and § 436.407(g).

(23) We have revised the regulations text at § 435.1008 and § 436.1004 to identify the populations who are exempt from the citizenship documentation requirements.

## V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment when a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We solicited public comment on each of these issues for the following sections of this document that contain

information collection requirements (ICRs):

### *Citizenship and Alienage (§ 435.406)*

Section 435.406 requires States to obtain a declaration signed under penalty of perjury from every applicant for Medicaid that the applicant is a citizen or national of the United States or an alien in a satisfactory immigration status, and require the individual to provide acceptable documentary evidence to verify the declaration. (§ 435.407 describes the types of acceptable documentary evidence of citizenship.)

An individual should ordinarily be required to submit evidence of citizenship once unless the State receives evidence that evidence previously relied upon may be incorrect. States must maintain copies of that evidence in the case file or database.

We estimated it would take an individual 10 minutes to acquire and provide to the State acceptable documentary evidence and to verify the declaration.

We estimated it will take each State 5 minutes to obtain acceptable documentation, verify citizenship and maintain current records on each individual.

### *Citizenship and Alienage (§ 436.406)*

Sections 436.406 and 436.407 apply to Guam, Puerto Rico, and the Virgin Islands and are the corresponding sections to the regulations at § 435.406 and § 435.407. Section 436.406 requires Medicaid agencies to obtain a declaration signed under penalty of perjury from every applicant for Medicaid that the applicant is a citizen or national of the United States or an alien in a satisfactory immigration status, and require the individual to provide acceptable documentary evidence to verify the declaration. (§ 436.407 describes the types of acceptable documentary evidence of citizenship.)

An individual should ordinarily be required to submit evidence of citizenship once unless the State receives evidence that evidence previously relied upon may be incorrect. States must maintain copies of that evidence in the individual's case file.

We estimated it would take an individual 10 minutes to acquire and provide to the State acceptable documentary evidence and to verify the declaration.

We estimated it will take each State 5 minutes to obtain acceptable documentation, verify citizenship and

maintain current records on each individual.

*Comment:* Many commenters contended that the collection of information requirements were either significantly understated or estimated only for instances where an individual was already in possession of the required documents. The commenters also noted that in determining the amount of time the person would spend producing these documents, CMS must have expected that all individuals would be mailing the documents to the State. Many commenters expressed serious concern about sending original versions of important documents through the mail. Therefore, the commenters concluded that CMS failed to consider the amount of time associated with obtaining and personally presenting these documents to a State Medicaid Agency office, which they state will be the more likely scenario. The commenters stated that this requirement will be onerous on both the part of the individual producing the documents and on the States collecting and processing the documents. The commenters noted that it generally takes weeks to get a passport or birth certificate and months to a year to get a Certificate of Citizenship or Certificate of Naturalization.

*Response:* We based our estimate upon the average time it would take an individual who had the documents in his or her possession and brought those documents to the initial intake meeting or opted to mail those documents into the State Medicaid Agency office. We believe that in the vast majority of instances, this will be the likely scenario. We also considered that the people who would have the most difficulty obtaining documents (e.g. the disabled, elderly, and, since enactment of TRHCA, children in foster care) are exempt from these requirements.

We recognize that it may take certain applicants and recipients additional time to obtain the necessary documentation. We encourage States to work with all applicants and recipients to minimize this amount of time. We also encourage States to utilize electronic matching with State Vital Statistics agencies before requesting paper documentation. Through effective outreach, States can minimize delays caused by confusion or lack of awareness of the requirements.

In addition, at this time, we do not have evidence from States indicating we should revise the estimates.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group, Attn: Melissa Musotto [CMS-2257-F], Room C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Katherine Astrich, CMS Desk Officer, [CMS-2257-F], [katherine\\_astrich@omb.eop.gov](mailto:katherine_astrich@omb.eop.gov). Fax (202) 395-6974.

## VI. Waiver of the Delay in the Effective Date

The Administrative Procedure Act as codified in 5 U.S.C. section 553(d) ordinarily requires a 30-day delay in the effective date for final rules. In addition, the Congressional Review Act, at 5 U.S.C. section 801(a), requires that certain major rules not take effect until 60 days after publication. Both provisions permit the delay in effective date to be waived, however, if an agency for good cause finds that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the finding and its reasons in the rule issued. 5 U.S.C. 553(d)(3), 808(2). In addition, if the rule grants or recognizes an exemption or relieves a restriction, the agency may waive the delay in effective date. 5 U.S.C. 553(d)(1).

In this rule we have identified additional documentary evidence of citizenship and identity beyond that contained in the interim final rule with comment period. Thus, we consider this final rule as providing additional relief to potential restrictions that may have hindered receipt of Medicaid. Also, the addition of such documents may allow Medicaid eligible citizens lacking documents identified in the interim final rule to receive Medicaid without undue delay or without being denied or terminated. Without prompt publication of a rule, States will not have immediate authority to employ additional documentary evidence beyond that contained in the interim final regulations. Such additional documentary evidence will help to prevent loss of Medicaid eligibility. Because delaying the effective date of this regulation could either prevent or complicate eligible individuals from being able to demonstrate their citizenship, we find that good cause exists to waive this requirement. The attendant delay would be contrary to public interest.

## VII. Regulatory Impact Analysis

### A. Overall Impact

We examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). It is assumed that Medicaid enrollees who are citizens will eventually provide proof of that fact, and that the savings will come from those who are truly in the country illegally. Consequently, we estimated that the level of Federal savings from this provision will be under \$80 million, and State savings under \$60 million, per year over the next 5 years. By considering the impact on both Federal and State savings, this rule surpasses the economic threshold and is considered a major rule. The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of \$6.5 million to \$31.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We did not prepare an analysis for the RFA because we determined, and the Secretary certifies, that this rule will not have a significant economic impact on a substantial number of small entities. We also note that section 604 of the RFA applies only in cases where an agency promulgates a final rule after being required to publish a general notice of proposed rulemaking. As stated in the interim final rule, for this regulation, we found good cause to publish the interim final rule without prior publication of a proposed rule.

In addition, section 1102(b) of the Act required us to prepare a regulatory impact analysis if a rule may have a

significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We did not prepare an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately \$120 million. This rule will have no consequential effect on State, local, or Tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Although each State is responsible for establishing its own procedures for reviewing the documentation, several States have already been reviewing these documents. For these States, there will be little or no added burden. There will also be no additional burden for the millions of individuals enrolled in Medicare who will be exempt. In addition, there will be no additional burden for the millions of individuals who receive SSI, SSDI, child welfare services under Title IV-B, or adoption or foster care assistance payments under Title IV-E. In the future, when additional data matches are available, the burden will continue to be minimized for other groups of Medicaid eligible individuals.

Finally, with respect to those States that elect to review documents through the routine eligibility and redetermination process, we recognize there will be some increased burden on eligibility workers. However, the Medicaid eligibility and redetermination process is ordinarily conducted by skilled interviewers who are trained and skilled in the review of documents related to income and identification; therefore, we do not anticipate that these added requirements will overburden the eligibility process.

*B. Anticipated Effects*

1. Effects on the Medicare and Medicaid Programs

As described in more detail below, we estimate that as a result of this provision, roughly 50,000 undocumented aliens will no longer receive full Medicaid. Based on this estimated decline in enrollment, we estimate that the level of Federal savings from this provision will be under \$80 million, and State savings under \$60 million, per year over the next 5 years.

In projecting these savings, we assumed that Medicaid enrollees who are U.S. citizens by birth or naturalization will eventually be able to provide proof of citizenship. Since the rule does not apply to legal immigrants, the impact would come from undocumented aliens who are receiving Medicaid benefits illegally.

We developed projections of the total undocumented population based on estimates by the Pew Research Center (about 12 million in 2007, rising to 14 million by 2011). From limited available evidence, we believe that very few of these undocumented individuals are currently receiving full Medicaid benefits. For these estimates we

assumed participation rates of one percent in states that allow self-declaration of citizenship and one-half percent in states with restricted self-declaration. States that do not permit self-declaration were not included in the savings estimates. We further assumed that the new documentation requirements would be effective in eliminating 75 percent of participating undocumented aliens from the full benefit Medicaid rolls. (Emergency services would, of course, continue to be available.) These assumptions result in an estimate of roughly 50,000 undocumented aliens who would no longer receive full Medicaid.

Savings per person were estimated using Medicaid per capita expenditure projections from the President's FY 2008 budget, adjusted to exclude exempt groups and emergency services that would continue to be available. The states' share of savings was calculated using an average federal matching rate of 57 percent. These savings are subsumed in the President's FY 2008 budget.

*C. Alternatives Considered*

Because CMS previously issued interim final regulations and not a

notice of proposed rule making, we were not required by law or regulation to issue a final regulation. However, in light of recent legislation that affected this policy and consideration of the public comments received in response to the interim final, we are changing several aspects of the policy as stated in the interim final. Therefore, we are publishing final regulations to announce these changes and have them codified in regulation.

*D. Accounting Statement and Table*

As required by OMB Circular A-4 (available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>), in the table below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. Table A provides our best estimate of the decrease in Medicaid payments as a result of the changes presented in this proposed rule. Savings are classified as transfers to the Federal Government and transfers to State Governments. Table B demonstrates the annualized savings for each the State and Federal government based on the discounted 3% and 7% rates as required by OMB.

TABLE A

	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
	\$ millions				
Federal .....	45	50	55	65	70
State .....	40	40	45	45	55
Total .....	85	90	100	110	125

TABLE B

Discount—	Annualized Federal savings (\$millions/year)	Annualized State savings (\$millions/year)
	FY 2007–2011	FY 2007–2011
0 percent .....	57.0	45.0
3 percent .....	56.6	44.8
7 percent .....	56.1	44.5

*E. Conclusion*

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

*Comment:* Several commenters disagreed with CMS' determination of the regulatory impact. The commenters stated that several assumptions under which the impact was calculated were incorrect. The commenters stated that it

is unlikely that all Medicaid applicants/recipients who are citizens will be able to provide proof of citizenship due to lack of documentation, extreme physical and/or mental illness and lack of adequate community support. The commenters stated that, accordingly, many recipients will leave the system and many eligible individuals may never apply. Many commenters stated that these individuals will seek care in

other settings such as the emergency department, charity care facilities and, in the case of American Indian/Alaska Natives, Indian Health Service facilities. Therefore, according to the commenters, the impact may be a significant reduction in Medicaid expenditures at the expense of other sources of care in the community.

Several commenters requested that CMS clarify how it determined its cost

estimate for States in a way that yields savings. The commenters stated that implementing the new regulations will create considerable new costs. Several States indicated that their analysis of this provision resulted in a significant increase in costs. Their estimates were partly based on hiring new staff to process more in-person applications. The States expect that most applicants will no longer complete phone-in or mail-in applications for fear of losing documents in the mail. The States also stated that they will incur significant costs as a result of purchasing documents for poor recipients and applicants who otherwise could not afford to obtain them.

One commenter stated that CMS should revise its regulatory impact statement. He stated that CMS has not provided any support for its decision to waive the Regulatory Flexibility Act requirement for an analysis of options to protect small entities. The commenter stated that it is imperative that the impact statements and cost-benefit analysis be done before these regulations are finalized.

*Response:* The regulatory impact statement was calculated to estimate changes in Medicaid expenditures for claims. It did not account for the administrative impact on States.

With respect to administrative costs, CMS provides federal match for administrative expenditures. We would expect States to experience higher administrative costs during the first year of implementation as they adjust to the new requirements. We also expect these costs to decrease in later years as current recipients meet the requirements and only new applicants are required to submit documentation. Furthermore, the exemption of several groups of individuals authorized under both the DRA and the TRHCA will significantly reduce the number of individuals from whom States must collect documentation. Administrative costs may be further reduced by the States' ability to cross-verify with the SAVE database, to which they already have access. Data matches with the State's vital statistics agency could further reduce administrative costs.

With respect to the commenter who stated that the savings to the Medicaid program will be significantly greater than those calculated based on many individuals either being unable to meet the requirements or being deterred from applying at all, we disagree. Nearly all States have implemented these requirements. While we heard some initial concerns about the impact of this provision on enrollment numbers, we expect this trend to reverse as States,

recipients and applicants become more familiar with the requirements.

In response to the commenter who believes that we must conduct an analysis of options to protect small entities, we note that State agencies are not considered small entities. The commenter did not identify other entities he believed should be taken into account. As stated above, we also note that section 604 of the RFA applies in cases where the Administrative Procedure Act requires a general notice of proposed rulemaking.

#### List of Subjects

##### 42 CFR Part 435

Aid to Families with Dependent Children, Grant programs-health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

##### 42 CFR Part 436

Aid to Families with Dependent Children, Grant programs-health, Guam, Medicaid, Puerto Rico, Virgin Islands.

##### 42 CFR Part 440

Grant programs-health, Medicaid.

##### 42 CFR Part 441

Aged, Family planning, Grant programs-health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirement.

##### 42 CFR Part 457

Administrative practice and procedure, Grant programs-health, Health insurance, Reporting and recordkeeping requirements.

##### 42 CFR Part 483

Grant programs-health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

■ Accordingly, the interim final rule amending 42 CFR parts 435, 436, 440, 441, 457, and 483, which was published July 12, 2006 at 71 FR 39214, is adopted as final with the following changes:

#### **PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA**

■ 1. The authority citation for part 435 continues to read as follows:

**Authority:** Section 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 435.117 is revised to read as follows:

#### **§ 435.117 Newborn children.**

(a) The agency must provide Medicaid eligibility to a child born to a woman who has applied for, has been determined eligible and is receiving Medicaid on the date of the child's birth. The child is deemed to have applied and been found eligible for Medicaid on the date of birth and remains eligible for one year so long as the woman remains (or would remain if pregnant) eligible and the child is a member of the woman's household. This provision applies in instances where the labor and delivery services were furnished prior to the date of application and covered by Medicaid based on retroactive eligibility.

(b) The agency must provide Medicaid eligibility in the same manner described in paragraph (a) of this section to a child born to an otherwise-eligible qualified alien woman subject to the 5-year bar so long as the woman has filed a complete Medicaid application, including but not limited to meeting residency, income and resource requirements, has been determined eligible, is receiving Medicaid on the date of the child's birth, and remains (or would remain if pregnant) Medicaid eligible. All standard Medicaid application procedures apply, including timely determination of eligibility and adequate notice of the agency's decision concerning eligibility. A 5-year bar qualified alien receiving emergency medical services only under § 435.139 is considered to be Medicaid-eligible and receiving Medicaid for purposes of this provision. With respect to whether the mother remains (or would remain if pregnant) eligible for Medicaid after the birth of the child, the State must determine whether a 5-year bar qualified alien would remain eligible for emergency services under § 435.139. In determining whether the woman would remain eligible for these services, the State must consider whether the woman would remain eligible if pregnant. This provision applies in instances where the labor and delivery services were furnished prior to the date of application and covered by Medicaid based on retroactive eligibility.

(c) The agency must provide Medicaid eligibility in the same manner described in paragraph (a) of this section to a child born to an otherwise-eligible non-qualified alien woman so long as the woman has filed a complete Medicaid application (other than providing a social security number or demonstrating immigration status), including but not limited to meeting residency, income and resource requirements, has been determined eligible, is receiving

Medicaid on the date of the child's birth, and remains (or would remain if pregnant) Medicaid eligible. All standard Medicaid application procedures apply, including timely determination of eligibility and adequate notice of the agency's decision concerning eligibility. A non-qualified alien receiving emergency medical services only under § 435.139 is considered to be Medicaid-eligible and receiving Medicaid for purposes of this provision. With respect to whether the mother remains (or would remain if pregnant) eligible for Medicaid after the birth of the child, the State must determine whether a non-qualified alien would remain eligible for emergency services under § 435.139. In determining whether the woman would remain eligible for these services, the State must consider whether the woman would remain eligible if pregnant. This provision applies in instances where the labor and delivery services were furnished prior to the date of application and covered by Medicaid based on retroactive eligibility.

(d) A redetermination of eligibility must be completed on behalf of the children described in this provision in accordance with the procedures at § 435.916. At that time, the State must collect documentary evidence of citizenship and identity as required under § 435.406.

- 3. Section 435.406 is amended by —
- A. Revising paragraph (a)(1)(iii).
- B. Adding paragraph (a)(1)(v).
- C. Revising paragraph (a)(2).
- D. Revising paragraph (b).

The revisions and addition read as follows:

**§ 435.406 Citizenship and alienage.**

(a) \* \* \*

(1) \* \* \*

(iii) An individual for purposes of the declaration and citizenship documentation requirements discussed in paragraphs (a)(1)(i) and (a)(1)(ii) of this section includes both applicants and recipients under a section 1115 demonstration (including a family planning demonstration project) for which a State receives Federal financial participation in their expenditures, as though the expenditures were for medical assistance.

\* \* \* \* \*

(v) The following groups of individuals are exempt from the requirements in paragraph (a)(1)(ii) of this section:

- (A) Individuals receiving SSI benefits under title XVI of the Act.
- (B) Individuals entitled to or enrolled in any part of Medicare.

(C) Individuals receiving disability insurance benefits under section 223 of the Act or monthly benefits under section 202 of the Act, based on the individual's disability (as defined in section 223(d) of the Act).

(D) Individuals who are in foster care and who are assisted under Title IV-B of the Act, and individuals who are recipients of foster care maintenance or adoption assistance payments under Title IV-E of the Act.

(2)(i) Except as specified in 8 U.S.C. 1612(b)(1) (permitting States an option with respect to coverage of certain qualified aliens), qualified aliens as described in section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641) (including qualified aliens subject to the 5-year bar) who have provided satisfactory documentary evidence of Qualified Alien status, which status has been verified with the Department of Homeland Security (DHS) under a declaration required by section 1137(d) of the Act that the applicant or recipient is an alien in a satisfactory immigration status.

(ii) The eligibility of qualified aliens who are subject to the 5-year bar in 8 U.S.C. 1613 is limited to the benefits described in paragraph (b) of this section.

(b) The agency must provide payment for the services described in § 440.255(c) of this chapter to residents of the State who otherwise meet the eligibility requirements of the State plan (except for receipt of AFDC, SSI, or State Supplementary payments) who are qualified aliens subject to the 5-year bar or who are non-qualified aliens who meet all Medicaid eligibility criteria, except non-qualified aliens need not present a social security number or document immigration status.

■ 4. Section 435.407 is amended by:

- A. Adding introductory text to the section.
- B. Removing the “;” and “or” at the end of paragraph (a)(4) and adding a period in its place.
- C. Removing paragraph (a)(5).
- D. Revising paragraph (b)(1).
- E. Revising paragraph (b)(5).
- F. Adding paragraphs (b)(11) and (b)(12).
- G. Revising paragraph (c).
- H. Revising paragraph (d) introductory text.
- I. Revising paragraph (d)(2).
- J. Revising paragraph (d)(3).
- K. Revising paragraph (d)(4).
- L. Revising paragraph (d)(5)(vi).
- M. Revising paragraph (e)(1).
- N. Removing paragraphs (e)(2) through (e)(9).

■ O. Redesignating paragraph (e)(10) as paragraph (e)(2).

■ P. Adding a new paragraph (e)(3).

■ Q. Revising paragraph (f).

■ R. Redesignating paragraphs (g), (h), (i), and (j) as paragraphs (h), (i), (j), and (k).

■ S. Adding a new paragraph (g).

■ T. Revising newly redesignated paragraph (i).

The revisions and additions read as follows:

**§ 435.407 Types of acceptable documentary evidence of citizenship.**

For purposes of this section, the term “citizenship” includes status as a “national of the United States” as defined by section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)) to include both citizens of the United States and non-citizen nationals of the United States.

\* \* \* \* \*

(b) \* \* \*

(1) A U.S. public birth certificate showing birth in one of the 50 States, the District of Columbia, Puerto Rico (if born on or after January 13, 1941), Guam (on or after April 10, 1899), the Virgin Islands of the U.S. (on or after January 17, 1917), American Samoa, Swain's Island, or the Northern Mariana Islands (after November 4, 1986 (NMI local time)). A State, at its option, may use a cross match with a State vital statistics agency to document a birth record. The birth record document may be issued by the State, Commonwealth, Territory, or local jurisdiction. It must have been recorded before the person was 5 years of age. A delayed birth record document that is recorded at or after 5 years of age is considered fourth level evidence of citizenship. (**Note:** If the document shows the individual was born in Puerto Rico, the Virgin Islands of the U.S., or the Northern Mariana Islands before these areas became part of the U.S., the individual may be a collectively naturalized citizen. Collective naturalization occurred on certain dates listed for each of the territories.) The following will establish U.S. citizenship for collectively naturalized individuals:

(i) *Puerto Rico:*

(A) Evidence of birth in Puerto Rico on or after April 11, 1899 and the applicant's statement that he or she was residing in the U.S., a U.S. possession, or Puerto Rico on January 13, 1941; or

(B) Evidence that the applicant was a Puerto Rican citizen and the applicant's statement that he or she was residing in Puerto Rico on March 1, 1917 and that he or she did not take an oath of allegiance to Spain.

(ii) *U.S. Virgin Islands:*

(A) Evidence of birth in the U.S. Virgin Islands, and the applicant's statement of residence in the U.S., a U.S. possession, or the U.S. Virgin Islands on February 25, 1927; or

(B) The applicant's statement indicating residence in the U.S. Virgin Islands as a Danish citizen on January 17, 1917 and residence in the U.S., a U.S. possession, or the U.S. Virgin Islands on February 25, 1927, and that he or she did not make a declaration to maintain Danish citizenship; or

(C) Evidence of birth in the U.S. Virgin Islands and the applicant's statement indicating residence in the U.S., a U.S. possession or Territory, or the Canal Zone on June 28, 1932.

(iii) *Northern Mariana Islands (NMI) (formerly part of the Trust Territory of the Pacific Islands (TTPI))*:

(A) Evidence of birth in the NMI, TTPI citizenship and residence in the NMI, the U.S., or a U.S. Territory or possession on November 3, 1986 (NMI local time) and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time); or

(B) Evidence of TTPI citizenship, continuous residence in the NMI since before November 3, 1981 (NMI local time), voter registration before January 1, 1975 and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time); or

(C) Evidence of continuous domicile in the NMI since before January 1, 1974 and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time).

(D) **Note:** If a person entered the NMI as a nonimmigrant and lived in the NMI since January 1, 1974, this does not constitute continuous domicile and the individual is not a U.S. citizen.

\* \* \* \* \*

(5) *A U.S. Citizen I.D. card.* (This form was issued until the 1980s by INS. Although no longer issued, holders of this document may still use it consistent with the provisions of section 1903(x) of the Act.) INS issued the I-179 from 1960 until 1973. It revised the form and renumbered it as Form I-197. INS issued the I-197 from 1973 until April 7, 1983. INS issued Form I-179 and I-197 to naturalized U.S. citizens living near the Canadian or Mexican border who needed it for frequent border crossings. Although neither form is currently issued, either form that was previously issued is still valid.

\* \* \* \* \*

(11) *A data verification with the Systematic Alien Verification for*

*Entitlements (SAVE) Program for naturalized citizens.* A State may conduct a verification with SAVE to determine if an individual is a naturalized citizen, provided that such verification is conducted consistent with the terms of a Memorandum of Understanding or other agreement with the Department of Homeland Security (DHS) authorizing verification of claims to U.S. citizenship through SAVE, including but not limited to provision of the individual's alien registration number if required by DHS.

(12) *Child Citizenship Act.* Adopted or biological children born outside the United States may establish citizenship obtained automatically under section 320 of the Immigration and Nationality Act (8 U.S.C. 1431), as amended by the Child Citizenship Act of 2000 (Pub. L. 106-395, enacted on October 30, 2000). The State must obtain documentary evidence that verifies that at any time on or after February 27, 2001, the following conditions have been met:

(i) At least one parent of the child is a United States citizen by either birth or naturalization (as verified under the requirements of this Part);

(ii) The child is under the age of 18;

(iii) The child is residing in the United States in the legal and physical custody of the U.S. citizen parent;

(iv) The child was admitted to the United States for lawful permanent residence (as verified under the requirements of 8 U.S.C. 1641 pertaining to verification of qualified alien status); and

(v) If adopted, the child satisfies the requirements of section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. 1101(b)(1) pertaining to international adoptions (admission for lawful permanent residence as IR-3 (child adopted outside the United States)), or as IR-4 (child coming to the United States to be adopted) with final adoption having subsequently occurred).

(c) *Third level evidence of citizenship.* Third level evidence of U.S. citizenship is documentary evidence of satisfactory reliability that is used when both primary and secondary evidence is unavailable. Third level evidence may be used only when the applicant or recipient alleges being born in the U.S. A second document from paragraph (e) of this section to establish identity must also be presented:

(1) *Extract of a hospital record on hospital letterhead established at the time of the person's birth that was created 5 years before the initial application date and that indicates a U.S. place of birth.* (For children under 16 the document must have been

created near the time of birth or 5 years before the date of application.) Do not accept a souvenir "birth certificate" issued by the hospital.

(2) *Life, health, or other insurance record showing a U.S. place of birth that was created at least 5 years before the initial application date that indicates a U.S. place of birth.* (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) Life or health insurance records may show biographical information for the person including place of birth; the record can be used to establish U.S. citizenship when it shows a U.S. place of birth.

(3) *Religious record recorded in the U.S. within 3 months of birth showing the birth occurred in the U.S. and showing either the date of the birth or the individual's age at the time the record was made.* The record must be an official record recorded with the religious organization. CAUTION: In questionable cases (for example, where the child's religious record was recorded near a U.S. international border and the child may have been born outside the U.S.), the State must verify the religious record and/or document that the mother was in the U.S. at the time of birth.

(4) *Early school record showing a U.S. place of birth.* The school record must show the name of the child, the date of admission to the school, the date of birth, a U.S. place of birth, and the name(s) and place(s) of birth of the applicant's parents.

(d) *Fourth level evidence of citizenship.* Fourth level evidence of citizenship is documentary evidence of the lowest reliability. Fourth level evidence should only be used in the rarest of circumstances. This level of evidence is used only when primary, secondary and third level evidence is unavailable. With the exception of the affidavit process described in paragraph (d)(5) of this section, the applicant may only use fourth level evidence of citizenship if alleging a U.S. place of birth. In addition, a second document establishing identity must be presented as described in paragraph (e) of this section.

\* \* \* \* \*

(2) *One of the following documents that show a U.S. place of birth and was created at least 5 years before the application for Medicaid.* (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) This document must be one of the following and show a U.S. place of birth:

(i) Seneca Indian tribal census.



(ii) Bureau of Indian Affairs tribal census records of the Navajo Indians.

(iii) U.S. State Vital Statistics official notification of birth registration.

(iv) A delayed U.S. public birth record that is recorded more than 5 years after the person's birth.

(v) Statement signed by the physician or midwife who was in attendance at the time of birth.

(vi) The Roll of Alaska Natives maintained by the Bureau of Indian Affairs.

(3) *Institutional admission papers from a nursing facility, skilled care facility or other institution created at least 5 years before the initial application date that indicates a U.S. place of birth.* Admission papers generally show biographical information for the person including place of birth; the record can be used to establish U.S. citizenship when it shows a U.S. place of birth.

(4) *Medical (clinic, doctor, or hospital) record created at least 5 years before the initial application date that indicates a U.S. place of birth.* (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.)

Medical records generally show biographical information for the person including place of birth; the record can be used to establish U.S. citizenship when it shows a U.S. place of birth. (Note: An immunization record is not considered a medical record for purposes of establishing U.S. citizenship.)

\* \* \* \* \*

(5) \* \* \*

(vi) The affidavits must be signed under penalty of perjury and need not be notarized.

(e) \* \* \*

(1) Identity documents described in 8 CFR 274a.2(b)(1)(v)(B)(1).

(i) Driver's license issued by State or Territory either with a photograph of the individual or other identifying information of the individual such as name, age, sex, race, height, weight or eye color.

(ii) School identification card with a photograph of the individual.

(iii) U.S. military card or draft record.

(iv) Identification card issued by the Federal, State, or local government with the same information included on drivers' licenses.

(v) Military dependent's identification card.

(vi) Certificate of Degree of Indian Blood, or other American Indian/Alaska Native Tribal document with a photograph or other personal

identifying information relating to the individual. Acceptable if the document carries a photograph of the applicant or recipient, or has other personal identifying information relating to the individual such as age, weight, height, race, sex, and eye color.

(vii) U.S. Coast Guard Merchant Mariner card.

**Note to paragraph (e)(1):** Exception: Do not accept a voter's registration card or Canadian driver's license as listed in 8 CFR 274a.2(b)(1)(v)(B)(1). CMS does not view these as reliable for identity.

\* \* \* \* \*

(3) At State option, a State may accept three or more documents that together reasonably corroborate the identity of an individual provided such documents have not been used to establish the individual's citizenship and the individual submitted second or third tier evidence of citizenship. The State must first ensure that no other evidence of identity is available to the individual prior to accepting such documents. Such documents must at a minimum contain the individual's name, plus any additional information establishing the individual's identity. All documents used must contain consistent identifying information. These documents include employer identification cards, high school and college diplomas from accredited institutions (including general education and high school equivalency diplomas), marriage certificates, divorce decrees and property deeds/titles.

(f) *Special identity rules for children.* For children under 16, a clinic, doctor, hospital or school record may be accepted for purposes of establishing identity. School records may include nursery or daycare records and report cards. If the State accepts such records, it must verify them with the issuing school. If none of the above documents in the preceding groups are available, an affidavit may be used. An affidavit is only acceptable if it is signed under penalty of perjury by a parent, guardian or caretaker relative (as defined in the regulations at 45 CFR 233.90(c)(v)) stating the date and place of the birth of the child and cannot be used if an affidavit for citizenship was provided. The affidavit is not required to be notarized. A State may accept an identity affidavit on behalf of a child under the age of 18 in instances when school ID cards and drivers' licenses are not available to the individual in that area until that age.

(g) *Special identity rules for disabled individuals in institutional care facilities.* A State may accept an identity affidavit signed under penalty of perjury

by a residential care facility director or administrator on behalf of an institutionalized individual in the facility. States should first pursue all other means of verifying identity prior to accepting an affidavit. The affidavit is not required to be notarized.

\* \* \* \* \*

(i) *Documentary evidence.* (1) All documents must be either originals or copies certified by the issuing agency. Uncertified copies, including notarized copies, shall not be accepted.

(2) States must maintain copies of citizenship and identification documents in the case record or electronic data base and make these copies available for compliance audits.

(3) States may permit applicants and recipients to submit such documentary evidence without appearing in person at a Medicaid office. States may accept original documents in person, by mail, or by a guardian or authorized representative.

(4) If documents are determined to be inconsistent with pre-existing information, are counterfeit, or altered, States should investigate for potential fraud and abuse, including but not limited to, referral to the appropriate State and Federal law enforcement agencies.

(5) Presentation of documentary evidence of citizenship is a one time activity; once a person's citizenship is documented and recorded in a State database subsequent changes in eligibility should not require repeating the documentation of citizenship unless later evidence raises a question of the person's citizenship. The State need only check its databases to verify that the individual already established citizenship.

(6) CMS requires that as a check against fraud, using currently available automated capabilities, States will conduct a match of the applicant's name against the corresponding Social Security number that was provided. In addition, in cooperation with other agencies of the Federal government, CMS encourages States to use automated capabilities to verify citizenship and identity of Medicaid applicants. Automated capabilities may fall within the computer matching provisions of the Privacy Act of 1974, and CMS will explore any implementation issues that may arise with respect to those requirements. When these capabilities become available, States will be required to match files for individuals who used third or fourth tier documents to verify citizenship and documents to verify identity, and CMS will make available

to States necessary information in this regard. States must ensure that all case records within this category will be so identified and made available to conduct these automated matches. CMS may also require States to match files for individuals who used first or second level documents to verify citizenship as well. CMS may provide further guidance to States with respect to actions required in a case of a negative match.

\* \* \* \* \*

■ 5. Section 435.1008 is revised to read as follows:

**§ 435.1008 FFP in expenditures for medical assistance for individuals who have declared United States citizenship or nationality under section 1137(d) of the Act and with respect to whom the State has not documented citizenship and identity.**

Except for individuals described in § 435.406(a)(1)(v), FFP will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship or national status, as described in § 435.407 that complies with the requirements of section 1903(x) of the Act.

**PART 436—ELIGIBILITY PART 436—ELIGIBILITY IN GUAM, PUERTO RICO, AND THE VIRGIN ISLANDS**

■ 6. The authority citation for part 436 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 7. Section 436.124 is revised to read as follows:

**§ 436.124 Newborn children.**

(a) The agency must provide Medicaid eligibility to a child born to a woman who has applied for, has been determined eligible and is receiving Medicaid on the date of the child's birth. The child is deemed to have applied and been found eligible for Medicaid on the date of birth and remains eligible for one year so long as the woman remains (or would remain if pregnant) eligible and the child is a member of the woman's household. This provision applies in instances where the labor and delivery services were furnished prior to the date of application and covered by Medicaid based on retroactive eligibility.

(b) The agency must provide Medicaid eligibility in the same manner described in paragraph (a) of this section to a child born to an otherwise-eligible qualified alien woman subject to the 5-year bar so long as the woman has filed a complete Medicaid application,

including but not limited to meeting residency, income and resource requirements, has been determined eligible, is receiving Medicaid on the date of the child's birth, and remains (or would remain if pregnant) Medicaid eligible. All standard Medicaid application procedures apply, including timely determination of eligibility and adequate notice of the agency's decision concerning eligibility. A 5-year bar qualified alien receiving emergency medical services only under § 435.139 of this chapter is considered to be Medicaid-eligible and receiving Medicaid for purposes of this provision. With respect to whether the mother remains (or would remain if pregnant) eligible for Medicaid after the birth of the child, the State must determine whether a 5-year bar qualified alien would remain eligible for emergency services under § 435.139 of this chapter. In determining whether the woman would remain eligible for these services, the State must consider whether the woman would remain eligible if pregnant. This provision applies in instances where the labor and delivery services were furnished prior to the date of application and covered by Medicaid based on retroactive eligibility.

(c) The agency must provide Medicaid eligibility in the same manner described in paragraph (a) of this section to a child born to an otherwise-eligible non-qualified alien woman so long as the woman has filed a complete Medicaid application (other than providing a social security number or demonstrating immigration status), including but not limited to meeting residency, income and resource requirements, has been determined eligible, is receiving Medicaid on the date of the child's birth, and remains (or would remain if pregnant) Medicaid eligible. All standard Medicaid application procedures apply, including timely determination of eligibility and adequate notice of the agency's decision concerning eligibility. A non-qualified alien receiving emergency medical services only under § 435.139 of this chapter is considered to be Medicaid-eligible and receiving Medicaid for purposes of this provision. With respect to whether the mother remains (or would remain if pregnant) eligible for Medicaid after the birth of the child, the State must determine whether a non-qualified alien would remain eligible for emergency services under § 435.139 of this chapter. In determining whether the woman would remain eligible for these services, the State must consider whether the woman would remain eligible if pregnant. This provision

applies in instances where the labor and delivery services were furnished prior to the date of application and covered by Medicaid based on retroactive eligibility.

(d) A redetermination of eligibility must be completed on behalf of the children described in this provision in accordance with the procedures at § 435.916. At that time, the State must collect documentary evidence of citizenship and identity as required under § 436.406.

■ 7a. Section § 436.406 is amended by:

■ A. Revising paragraph (a)(1)(iii).

■ B. Adding paragraph (a)(1)(v).

■ C. Revising paragraph (a)(2).

■ D. Revising paragraph (b).

The revisions and addition read as follows:

**§ 436.406 Citizenship and alienage.**

(a) \* \* \*

(1) \* \* \*

(iii) An individual for purposes of the declaration and citizenship documentation requirements discussed in paragraphs (a)(1)(i) and (a)(1)(ii) of this section includes both applicants and recipients under a section 1115 demonstration (including a family planning demonstration project) for which a State receives Federal financial participation in their expenditures, as though the expenditures were for medical assistance.

\* \* \* \* \*

(v) The following groups of individuals are exempt from the requirements in paragraph (a)(1)(ii) of this section:

(A) Individuals receiving SSI benefits under title XVI of the Act;

(B) Individuals entitled to or enrolled in any part of Medicare;

(C) Individuals receiving disability insurance benefits under section 223 of the Act or monthly benefits under section 202 of the Act, based on the individual's disability (as defined in section 223(d) of the Act); and

(D) Individuals who are in foster care and who are assisted under Title IV-B of the Act, and individuals who are recipients of foster care maintenance or adoption assistance payments under Title IV-E of the Act.

(2)(i) Except as specified in 8 U.S.C. 1612(b)(1) (permitting States an option with respect to coverage of certain qualified aliens), qualified aliens as described in section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641) (including qualified aliens subject to the 5-year bar) who have provided satisfactory documentary evidence of Qualified Alien status, which status has

been verified with the Department of Homeland Security (DHS) under a declaration required by section 1137(d) of the Act that the applicant or recipient is an alien in a satisfactory immigration status.

(ii) The eligibility of qualified aliens who are subject to the 5-year bar in 8 U.S.C. 1613 is limited to the benefits described in paragraph (b) of this section.

(b) The agency must provide payment for the services described in § 440.255(c) of this chapter to residents of the State who otherwise meet the eligibility requirements of the State plan (except for receipt of AFDC, SSI, or State Supplementary payments) who are qualified aliens subject to the 5-year bar or who are non-qualified aliens who meet all Medicaid eligibility criteria, except non-qualified aliens need not present a social security number or document immigration status.

■ 8. Section § 436.407 is amended by:

- A. Adding introductory text to the section.
- B. Revising paragraph (a)(4).
- C. Revising paragraph (b)(1).
- D. Revising paragraph (b)(5).
- E. Adding paragraphs (b)(11) and (b)(12).
- F. Revising paragraph (c).
- G. Revising paragraph (d) introductory text.
- H. Revising paragraph (d)(2).
- I. Revising paragraph (d)(3).
- J. Revising paragraph (d)(4).
- K. Revising paragraph (d)(5)(vi).
- L. Revising paragraph (e)(1).
- M. Removing paragraphs (e)(2) through (e)(9).
- N. Redesignating paragraph (e)(10) as paragraph (e)(2).
- O. Adding a new paragraph (e)(3).
- P. Revising paragraph (f).
- Q. Redesignating paragraphs (g), (h), (i) and (j) as paragraphs (h), (i), (j) and (k).
- R. Revising newly redesignated paragraph (i).
- S. Adding a new paragraph (g).

The revisions and additions read as follows:

**§ 436.407 Types of acceptable documentary evidence of citizenship.**

For purposes of this section, the term "citizenship" includes status as a "national of the United States" as defined by section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)) to include both citizens of the United States and non-citizen nationals of the United States.

\* \* \* \* \*

(a) \* \* \*

(4) A valid State-issued driver's license, but only if the State issuing the

license requires proof of U.S. citizenship before issuance of such license or obtains a social security number from the applicant and verifies before certification that such number is valid and assigned to the applicant who is a citizen. (This provision is not effective until such time as a State makes providing evidence of citizenship a condition of issuing a driver's license and evidence that the license holder is a citizen is included on the license or in a system of records available to the Medicaid agency. States must ensure that the process complies with this statutory provision in section 6036 of the Deficit Reduction Act of 2005. CMS will monitor compliance of States implementing this provision.)

(b) \* \* \*

(1) A U.S. public birth certificate showing birth in one of the 50 States, the District of Columbia, Puerto Rico (if born on or after January 13, 1941), Guam (on or after April 10, 1899), the Virgin Islands of the U.S. (on or after January 17, 1917), American Samoa, Swain's Island, or the Northern Mariana Islands (after November 4, 1986 (NMI local time)). A State, at its option, may use a cross match with a State vital statistics agency to document a birth record. The birth record document may be issued by the State, Commonwealth, Territory, or local jurisdiction. It must have been recorded before the person was 5 years of age. A delayed birth record document that is recorded at or after 5 years of age is considered fourth level evidence of citizenship. (**Note:** If the document shows the individual was born in Puerto Rico, the Virgin Islands of the U.S., or the Northern Mariana Islands before these areas became part of the U.S., the individual may be a collectively naturalized citizen. Collective naturalization occurred on certain dates listed for each of the territories.) The following will establish U.S. citizenship for collectively naturalized individuals:

(i) *Puerto Rico:*

(A) Evidence of birth in Puerto Rico on or after April 11, 1899 and the applicant's statement that he or she was residing in the U.S., a U.S. possession, or Puerto Rico on January 13, 1941; or

(B) Evidence that the applicant was a Puerto Rican citizen and the applicant's statement that he or she was residing in Puerto Rico on March 1, 1917 and that he or she did not take an oath of allegiance to Spain.

(ii) *U.S. Virgin Islands:*

(A) Evidence of birth in the U.S. Virgin Islands, and the applicant's statement of residence in the U.S., a U.S. possession, or the U.S. Virgin Islands on February 25, 1927; or

(B) The applicant's statement indicating residence in the U.S. Virgin Islands as a Danish citizen on January 17, 1917 and residence in the U.S., a U.S. possession, or the U.S. Virgin Islands on February 25, 1927, and that he or she did not make a declaration to maintain Danish citizenship; or

(C) Evidence of birth in the U.S. Virgin Islands and the applicant's statement indicating residence in the U.S., a U.S. possession, or Territory or the Canal Zone on June 28, 1932.

(iii) *Northern Mariana Islands (NMI) (formerly part of the Trust Territory of the Pacific Islands (TTPI)):*

(A) Evidence of birth in the NMI, TTPI citizenship and residence in the NMI, the U.S., or a U.S. Territory or possession on November 3, 1986 (NMI local time) and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time); or

(B) Evidence of TTPI citizenship, continuous residence in the NMI since before November 3, 1981 (NMI local time), voter registration before January 1, 1975 and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time); or

(C) Evidence of continuous domicile in the NMI since before January 1, 1974 and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time).

(D) **Note:** If a person entered the NMI as a nonimmigrant and lived in the NMI since January 1, 1974, this does not constitute continuous domicile and the individual is not a U.S. citizen.

\* \* \* \* \*

(5) *A U.S. Citizen I.D. card.* (This form was issued until the 1980s by INS. Although no longer issued, holders of this document may still use it consistent with the provisions of section 1903(x) of the Act.) INS issued the I-179 from 1960 until 1973. It revised the form and renumbered it as Form I-197. INS issued the I-197 from 1973 until April 7, 1983. INS issued Form I-179 and I-197 to naturalized U.S. citizens living near the Canadian or Mexican border who needed it for frequent border crossings. Although neither form is currently issued, either form that was previously issued is still valid.

\* \* \* \* \*

(11) *A data verification with the Systematic Alien Verification for Entitlements (SAVE) Program for naturalized citizens.* A State may conduct a verification with SAVE to determine if an individual is a naturalized citizen, provided that such

verification is conducted consistent with the terms of a Memorandum of Understanding or other agreement with the Department of Homeland Security (DHS) authorizing verification of claims to U.S. citizenship through SAVE, including but not limited to provision of the individual's alien registration number if required by DHS.

(12) *Child Citizenship Act*. Adopted or biological children born outside the United States may establish citizenship obtained automatically under section 320 of the Immigration and Nationality Act (8 U.S.C. 1431), as amended by the Child Citizenship Act of 2000 (Pub. L. 106-395, enacted on October 30, 2000). The State must obtain documentary evidence that verifies that at any time on or after February 27, 2001, the following conditions have been met:

(i) At least one parent of the child is a United States citizen by either birth or naturalization (as verified under the requirements of this Part);

(ii) The child is under the age of 18;

(iii) The child is residing in the United States in the legal and physical custody of the U.S. citizen parent;

(iv) The child was admitted to the United States for lawful permanent residence (as verified under the requirements of 8 U.S.C. 1641 pertaining to verification of qualified alien status); and

(v) If adopted, the child satisfies the requirements of section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. 1101(b)(1) pertaining to international adoptions (admission for lawful permanent residence as IR-3 (child adopted outside the United States)), or as IR-4 (child coming to the United States to be adopted) with final adoption having subsequently occurred).

(c) *Third level evidence of citizenship*. Third level evidence of U.S. citizenship is documentary evidence of satisfactory reliability that is used when both primary and secondary evidence is unavailable. Third level evidence may be used only when the applicant or recipient alleges birth in the U.S. A second document from paragraph (e) of this section to establish identity must also be presented:

(1) Extract of a hospital record on hospital letterhead established at the time of the person's birth that was created 5 years before the initial application date and that indicates a U.S. place of birth. (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) Do not accept a souvenir "birth certificate" issued by the hospital.

(2) Life, health, or other insurance record showing a U.S. place of birth that was created at least 5 years before the initial application date that indicates a U.S. place of birth. (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) Life or health insurance records may show biographical information for the person including place of birth; the record can be used to establish U.S. citizenship when it shows a U.S. place of birth.

(3) Religious record recorded in the U.S. within 3 months of birth showing the birth occurred in the U.S. and showing either the date of the birth or the individual's age at the time the record was made. The record must be an official record recorded with the religious organization. Caution: In questionable cases (for example, where the child's religious record was recorded near a U.S. international border and the child may have been born outside the U.S.), the State must consider verifying the religious record and/or documenting that the mother was in the U.S. at the time of the birth.

(4) Early school record showing a U.S. place of birth. The school record must show the name of the child, the date of admission to the school, the date of birth (or age at the time the record was made), a U.S. place of birth, and the name(s) and place(s) of birth of the applicant's parents.

(d) *Fourth level evidence of citizenship*. Fourth level evidence of citizenship is documentary evidence of the lowest reliability. Fourth level evidence should only be used in the rarest of circumstances. This level of evidence is used only when primary, secondary and third level evidence is unavailable. With the exception of the affidavit process described in paragraph (d)(5) of this section, the applicant may only use fourth level evidence of citizenship if alleging a U.S. place of birth. In addition, a second document establishing identity must be presented as described in paragraph (e) of this section.

(2) One of the following documents that show a U.S. place of birth and was created at least 5 years before the application for Medicaid. (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) This document must be one of the following and show a U.S. place of birth:

- (i) Seneca Indian tribal census.
- (ii) Bureau of Indian Affairs tribal census records of the Navajo Indians.
- (iii) U.S. State Vital Statistics official notification of birth registration.

(iv) A delayed U.S. public birth record that is recorded more than 5 years after the person's birth.

(v) Statement signed by the physician or midwife who was in attendance at the time of birth.

(vi) The Roll of Alaska Natives maintained by the Bureau of Indian Affairs.

(3) Institutional admission papers from a nursing facility, skilled care facility or other institution created at least 5 years before the initial application date that indicates a U.S. place of birth. Admission papers generally show biographical information for the person including place of birth; the record can be used to establish U.S. citizenship when it shows a U.S. place of birth.

(4) Medical (clinic, doctor, or hospital) record created at least 5 years before the initial application date that indicates a U.S. place of birth. (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) Medical records generally show biographical information for the person including place of birth; the record can be used to establish U.S. citizenship when it shows a U.S. place of birth. (**Note:** An immunization record is not considered a medical record for purposes of establishing U.S. citizenship.)

\* \* \* \* \*

(5) \* \* \*

(vi) The affidavits must be signed under penalty of perjury and need not be notarized.

(e) \* \* \*

(1) Identity documents described in 8 CFR 274a.2(b)(1)(v)(B)(1).

(i) Driver's license issued by State or Territory either with a photograph of the individual or other identifying information of the individual such as name, age, sex, race, height, weight, or eye color.

(ii) School identification card with a photograph of the individual.

(iii) U.S. military card or draft record.

(iv) Identification card issued by the Federal, State, or local government with the same information included on driver's licenses.

(v) Military dependent's identification card.

(vi) Certificate of Degree of Indian Blood, or other American Indian/Alaska Native Tribal document with a photograph or other personal identifying information relating to the individual. Acceptable if the document carries a photograph of the applicant or recipient, or has other personal identifying information relating to the

individual such as age, weight, height, race, sex, and eye color.

(vii) U.S. Coast Guard Merchant Mariner card.

**Note to paragraph (e)(1):** Exception: Do not accept a voter's registration card or Canadian driver's license as listed in 8 CFR 274a.2(b)(1)(v)(B)(1). CMS does not view these as reliable for identity.

\* \* \* \* \*

(3) At State option, a State may accept three or more documents that together reasonably corroborate the identity of an individual provided such documents have not been used to establish the individual's citizenship and the individual submitted second or third tier evidence of citizenship. The State must first ensure that no other evidence of identity is available to the individual prior to accepting such documents. Such documents must at a minimum contain the individual's name, plus any additional information establishing the individual's identity. All documents used must contain consistent identifying information. These documents include employer identification cards, high school and college diplomas from accredited institutions (including general education and high school equivalency diplomas), marriage certificates, divorce decrees, and property deeds/titles.

(f) *Special identity rules for children.* For children under 16, a clinic, doctor, hospital or school record may be accepted for purposes of establishing identity. School records may include nursery or daycare records and report cards. If the State accepts such records, it must verify them with the issuing school. If none of the above documents in the preceding groups are available, an affidavit may be used. An affidavit is only acceptable if it is signed under penalty of perjury by a parent, guardian or caretaker relative (as defined in the regulations at 45 CFR 233.90(c)(v)) stating the date and place of the birth of the child and cannot be used if an affidavit for citizenship was provided. The affidavit is not required to be notarized. A State may accept an identity affidavit on behalf of a child under the age of 18 in instances when school ID cards and drivers' licenses are not available to the individual in that area until that age.

(g) *Special identity rules for disabled individuals in institutional care facilities.* A State may accept an identity affidavit signed under penalty of perjury by a residential care facility director or administrator on behalf of an institutionalized individual in the facility. States should first pursue all other means of verifying identity prior to accepting an affidavit. The affidavit is not required to be notarized.

\* \* \* \* \*

(i) *Documentary evidence.* (1) All documents must be either originals or copies certified by the issuing agency. Uncertified copies, including notarized copies, shall not be accepted.

(2) States must maintain copies of citizenship and identification documents in the case record or electronic data base and make these copies available for compliance audits.

(3) States may permit applicants and recipients to submit such documentary evidence without appearing in person at a Medicaid office. States may accept original documents in person, by mail, or by a guardian or authorized representative.

(4) If documents are determined to be inconsistent with pre-existing information, are counterfeit, or altered, States should investigate for potential fraud and abuse, including but not limited to, referral to the appropriate State and Federal law enforcement agencies.

(5) Presentation of documentary evidence of citizenship is a one time activity; once a person's citizenship is documented and recorded in a State database subsequent changes in eligibility should not require repeating the documentation of citizenship unless later evidence raises a question of the person's citizenship. The State need only check its databases to verify that the individual already established citizenship.

(6) CMS requires that as a check against fraud, using currently available automated capabilities, States will conduct a match of the applicant's name against the corresponding Social Security number that was provided. In addition, in cooperation with other agencies of the Federal government, CMS encourages States to use automated capabilities to verify

citizenship and identity of Medicaid applicants. Automated capabilities may fall within the computer matching provisions of the Privacy Act of 1974, and CMS will explore any implementation issues that may arise with respect to those requirements. When these capabilities become available, States will be required to match files for individuals who used third or fourth tier documents to verify citizenship and documents to verify identity, and CMS will make available to States necessary information in this regard. States must ensure that all case records within this category will be so identified and made available to conduct these automated matches. CMS may also require States to match files for individuals who used first or second level documents to verify citizenship as well. CMS may provide further guidance to States with respect to actions required in a case of a negative match.

■ 9. Section 436.1004 is revised to read as follows:

**§ 436.1004 FFP in expenditures for medical assistance for individuals who have declared United States citizenship or nationality under section 1137(d) of the Act and with respect to whom the State has not documented citizenship and identity.**

Except for individuals described in § 436.406(a)(1)(v), FFP will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship or national status, as described in § 436.407 of this chapter that complies with the requirements of section 1903(x) of the Act.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: May 7, 2007.

**Leslie V. Norwalk,**  
*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: May 10, 2007.

**Michael O. Leavitt,**  
*Secretary.*

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