

# Aliens, Criminal Law and Public Benefits

Robert F. McDonnell  
Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

(804) 786-2071  
[www.vaaq.com](http://www.vaaq.com)

# Access to Federal, State, and Local Benefits in Virginia

- Who is a Qualified Alien?
- What are Federal Public Benefits?
- What federal benefits are qualified aliens entitled to?
- Are aliens entitled to state and local benefits?
- Virginia Benefits
- Attorney General Opinions
- Relevant Virginia Statutes

# Who is a Qualified Alien?

Notwithstanding any other provision of law and except as provided in subsection (b) of this section, an alien who is not a qualified alien is not eligible for any federal public benefit.

## An alien who is not:

1. A qualified alien (as defined in § 1641)
2. A nonimmigrant under the Immigration and Nationality Act, or
3. An alien who is paroled into the United States under § 212(d)(5) of such Act [8 U.S.C. 1182 (d)(5)] for less than one year

...is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

8 U.S.C. § 1621(a)

# Who is a “Qualified Alien”?

- Legal Permanent Residents
- Asylees
- Refugees
- Aliens paroled into the U.S. for at least one year
- Aliens whose deportations are being withheld

# Who is a Qualified Alien?

- Aliens granted conditional entry (prior to April 1, 1980)
- Battered alien spouses, battered alien children, the alien parents of battered children, and alien children of battered parents who fit certain criteria
- Cuban/Haitian entrants
- Victims of a severe form of trafficking

# Federal Public Benefits

Generally, non-qualified aliens cannot receive federal public benefits (FPB).

# What is a Federal Public Benefit?

- Any grant, contract, loan, professional license, or commercial license provided by a U.S. government agency or by appropriated federal funds; and
- Any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by a U.S. government agency or by appropriated federal funds.



# What is NOT a FPB?



- Medical assistance under Title XIX of the Social Security Act for care and services that are necessary for the treatment of an emergency medical condition.
- Short-term, non-cash, in-kind emergency disaster relief.
- Public health assistance for immunizations.
- Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development.



# What is NOT a FPB?

- Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) which:
  - deliver in-kind services at the community level, including through public or private nonprofit agencies;
  - do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and
  - are necessary for the protection of life or safety.

# States Have Some Discretion

- With many important exceptions, “Qualified Aliens” are ineligible for Food Stamps and SSI.
- States have the authority to determine their eligibility for TANF, SSBG, and Medicaid.
- With some exceptions, “Qualified Aliens” entering the country after August 22, 1996, are denied “Federal means-tested public benefits” for their first five years in the U.S. as qualified aliens.

# State & Local Public Benefits

Generally, aliens who are not “qualified” cannot receive any state or local public benefit (SLPB).

# What are State & Local Benefits?

- Any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
- Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

# Exceptions

- Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (but not organ transplants).
- Short-term, non-cash, in-kind emergency **disaster relief**.
- Public health assistance for **immunizations**
- Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, which:
  - Deliver in-kind services at the community level, including through public or private nonprofit agencies;
  - Are not conditioned on the individual recipient's income or resources; and
  - Are necessary for the protection of life or safety.

# The “BIG” Exception

A state may provide that an alien who is not lawfully present in the United States is eligible for any SLPB through the enactment of a state law after August 22, 1996, which affirmatively provides for such eligibility.

# Plyler v. Doe



The U.S. Supreme Court's decision in *Plyler v. Doe* requires public schools to accept children who are undocumented immigrants without charge.

457 U.S. 202 (1982)

# Plyler v. Doe

- Extrapolation from Doe
- Applicability to other services provided to children?
  - Parks
  - Libraries
  - After School Programs



# Virginia Legislation

- In 2005, Governor Warner signed a bill sponsored by Del. Albo and Sen. Hanger requiring that no person who is not a U.S. citizen or legally present in the United States is eligible for any SLPBs.
- Enacted Virginia Code §§ 32.1-325.03 and 63.2-503.1

# Virginia Code § 32.1-325.03

- Requires the legal presence for certain state and local public benefits.
- In addition to meeting the existing eligibility requirements of the benefits applied for, no person who is not a United States Citizen or legally present in the United States shall receive medical services under this chapter, **except for the following:**
  - (1) Medicaid benefits for those residing in long-term institutional facilities or participating in home and community based waivers on June 30, 1997, who were eligible for full Medicaid benefits shall continue to be eligible for Medicaid benefits at state expense if federal financial participation is not available;

# Virginia Code § 32.1-325.03

- (2) Medicaid benefits for those who because of alien requirements pursuant to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193) (i) are under the age of 19 years and (ii) would be eligible for full Medicaid benefits if the alien requirements prior to the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 were still in effect. However, such person upon reaching the age of 19 years shall comply with the provisions of this section; and
- (3) State or local public benefits that are mandated by Federal Law pursuant to 8 U.S.C. § 1621.

The determination of eligibility for public benefits as provided in this chapter shall be subject to the provisions of § [63.2-503.1](#), as applicable.

# Virginia Code § 63.2-503.1

Legal presence required for public assistance; exceptions; proof of legal presence.

- In addition to meeting the existing eligibility requirements of the benefits applied for, no person who is not a United States Citizen or legally present in the United States shall receive state or local public assistance pursuant to this subtitle, except for state or local public assistance that is mandated by Federal Law pursuant to 8 U.S.C. § 1621.
- An applicant who is 19 years of age or older shall provide affirmative proof that he is a U.S. citizen or is legally present in the United States. Such proof shall consist of documentary evidence as required pursuant to § [46.2-328.1](#) or a verifiable social security number.

# Virginia Code § 63.2-503.1

- An applicant who is under the age of 19 years shall not be required to provide such affirmative proof; however, such person upon reaching the age of 19 years shall comply with the provisions of this section.
- Without proof of legal presence, an applicant shall sign an affidavit under oath attesting that he is a U.S. citizen or legally present in the United States in order to receive temporary benefits. The affidavit shall be on or consistent with forms prepared by the Commissioner, and shall be subject to and include an explanation of the provisions of § [63.2-502](#) relating to penalties for knowingly providing false information on a public document. The agency shall report in writing to the appropriate attorney for the Commonwealth those who are determined to have falsely attested to lawful presence.

# Virginia Code § 63.2-503.1

Once an applicant has provided the sworn affidavit required by this subsection, he shall be eligible to receive temporary benefits for either:

1. 90 days or until it is determined that he is not legally present in the United States, whichever is earlier, or
2. Indefinitely if the applicant provides a copy of a completed application for a birth certificate that has been filed and is pending and being actively pursued in accordance with § [32.1-259](#) or [32.1-260](#) or any substantially similar law of another state, the District of Columbia, or United States territory or commonwealth. Such extension shall terminate upon the applicant's receipt of a birth certificate or a determination that a birth certificate does not exist because the applicant is not a United States citizen.

# Services Already Restricted

- Food Stamps
- Temporary Assistance for Needy Families  
– TANF
- Medicaid funding
- Employment Services
- Others

# Prince William County

- Services Currently Recommended for Restriction Subsequent to Services Analysis:
  - Homeless Intervention Programs
  - Drug Offender Rehab Module
  - HIDTA Prevention Program
  - Adult Services to allow elderly and disabled to remain in homes (DSS)
  - Aging In-Home Care
  - Bluebird Bus Tours
  - Senior Centers

# Access to SCHIP for Expectant Mothers

The U.S. Department of Health and Human Services (HHS) has issued regulations allowing states to provide SCHIP coverage to fetuses. Because the immigration status of the parent is not relevant in determining eligibility for SCHIP (and because fetuses, the “recipients,” do not have an immigration status), states can use this option to provide prenatal care services to women, regardless of their immigration status.

# Business Licenses

- Prince William County model
  - Over \$100k
  - Under \$100k (no license required)

# Attorney General Opinions

- Massie, July 2006
- Rust, May 2007
- Stolle-Albo, October 2007

# Massie Opinion

- Opinion given at the request of the Campbell County Commissioner of the Revenue.
- This opinion advises that federal and state laws prohibit issuance of a local business license to a person not legally present in the United States. Further, it is the responsibility of commissioners to determine residency status prior to issuance of the license.

July 24, 2006

# Rust Opinion

This opinion clarifies that authority currently exists in Virginia for local law enforcement officials to enter into memorandums of agreement with the Department of Homeland Security to enforce federal immigration laws.

May 10, 2007

# Stolle-Albo Opinion

- This opinion clarifies that Virginia law-enforcement have the authority, generally, to make arrests for violations of the laws of sister states and of the United States.
- That authority extends to violations of federal immigration law; however the law remains unclear with respect to enforcement of civil violations of federal immigration law.

October 15, 2007

# Relevant Code Sections

- **§ 15.2-1726** – Authorizes localities to enter into agreements for cooperation in the furnishing of police services. It includes other localities, the State Police, as well as federal law enforcement authorities. It provides that local law enforcement cannot enforce federal law pursuant to this section unless authority is provided by statute.
- **§ 16.1-309.1 (H.)** – Provides that an intake officer shall report to ICE a juvenile that the officer has probable cause to believe is an illegal alien who has been detained in a secure facility based on an allegation that the juvenile committed a violent juvenile felony.

# Relevant Code Sections

- **§ 19.2-81.6** – Formalizes in Virginia law the authority of local and state enforcement granted by 8 USC § 1252c to detain those confirmed with ICE to be illegal aliens who are encountered in the course of an officer's normal duties that 1) is illegally present in the U.S., and 2.) has previously been convicted of a felony and deported or left the country upon such conviction.
- **§ 19.2-82 (B.)** – Provides the procedure to be followed in processing someone arrested under the authority granted by § 19.2-81.6. Places a 72 hour limitation on how long someone can be held under that authority.

# Relevant Code Sections

- **§ 19.2-120 (C.)** – Provides for a rebuttable presumption against bail for those detained pursuant to § 19.2-81.6.
- **§ 19.2-294.2** – Citizenship status must be requested by a probation officer of someone convicted of a felony requiring a PSR pursuant to §19.2-299. If it is determined that person may be an alien, that information must be reported to the Virginia State Police-CCRE. Form SP-229 should be used. The State Police is then required to review and submit that report to ICE within 60 days of final disposition of sentence.

# Relevant Code Sections

- **§ 53.1-218** – Requires officials in charge of all correctional facilities (including local and regional jails) to inquire into the citizenship status of anyone in their custody. Form SP-229 should be used. If it appears that the person is an alien, they are required to notify CCRE, unless this has already been done pursuant to § 19.2-294.2.
- **§ 53.1-220.1** – Enables ICE to take custody of persons convicted of certain offenses and permits those officials in charge of the correctional facility to enter into agreements, including provisions for reimbursement, with ICE to retain custody or supervision of the person until he is deported or custody is transferred to ICE.

# Relevant Code Sections

- **Department of State Police Suspected Alien Reporting Form.** This is the form required by the State Police to be used to report those suspected to be aliens in accordance with §§ 19.2-294.2 and 53.1-220.1.

# Contact Information

Martin L. Kent, Esquire  
Chief Counsel to the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-2071

Matthew A. Conrad, Esquire  
Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-5741