

ELIGIBILITY FOR PROBATION, WORK, BENEFITS, AND SERVICES

This bench card is designed to provide quick access for state criminal, family, and juvenile court judges to help them identify possible limitations on conditions that a judge might place on a non-citizen party in a criminal, family, or juvenile case in the context of a sentence to probation or requirements for counseling or treatment services. The purpose is twofold: (1) to help judges spot immigration issues that might affect the range of outcomes available in a case before them; and (2) to help judges identify people who might be referred for advice on immigration rights.

With regard to criminal cases, the bench cards are intended to help state trial court judges design probation conditions that are achievable. With regard to family and juvenile cases, the bench cards are designed to help state and local judges achieve appropriate outcomes for immigrant families and children by assuring that immigrant families and children are able to receive needed services and achieve court-imposed conditions for reunification.

This bench card is designed to help judges spot issues and is not meant to be an in-depth treatise on immigration law or intended to provide definitive answers regarding immigration rights. Judges using the bench cards should also be aware that immigration law is constantly changing, and electronic statutory materials on which the bench cards are based may not be up to date.

IMMIGRANTS SUBJECT TO MANDATORY ICE DETENTION

One limitation on the ability of a judge to place an immigrant into an alternative to detention program, either pre-trial or after conviction and sentencing, is the provision for of mandatory detention under federal immigration law for immigrants who are deportable for conviction of certain state crimes. An immigrant subject to mandatory detention may be placed into ICE detention when he or she is released from state or local incarceration into probation. This will make it impossible for the defendant to complete the terms of probation. The following are crimes for which a conviction mandates immigration detention:

- Recent aggravated felony;
- Drug crimes;
- Firearm offense;
- Prostitution;

- Crime involving moral turpitude with actual sentence of one year or more;
- Two crimes involving moral turpitude;
- Two or more crimes with aggregate sentence of five years or more;
- Human trafficking; and
- Money laundering.

IMMIGRANTS ELIGIBLE TO WORK

Eligibility to obtain employment in the United States may be an important factor for a family or juvenile judge in determining issues of alimony, child support, the ability to meet conditions of probation, or the ability to pay for services. In some instances, the state courts may have to take into account lack of employment authorization in setting alimony or child support. For example, if a court awards custody of a child to an immigrant parent who does not have the right to work, the court may have to require the non-custodial parent to pay sufficient alimony to assure that the custodial parent is able to provide an adequate home for the child.

The following are the most common types of aliens with legal eligibility to work in the United States who are likely to appear in a family or juvenile case. See 8 C.F.R. 274a.12(a) for the complete list of immigrants with legal eligibility to work and 8 C.F.R. 274a.12(c) for the complete list of immigrants who are eligible to apply for discretionary approval to work.

IMMIGRANTS WITH LEGAL ELIGIBILITY TO WORK

- Lawful permanent residents;
- Conditional immigrants;
- Refugees and Asylees;
- Aliens paroled by DHS into the U.S. as refugees;
- Juveniles who have been approved by DHS for Special Immigrant Juvenile (SIJ) status; and
- VAWA self-petitioners whose application has been approved.

IMMIGRANTS WHO REQUIRE DISCRETIONARY APPROVAL FROM USCIS TO WORK

- Conditional immigrants who fail to file a timely application for LPR status pending request for waiver if removal proceedings have been stayed;
- Aliens paroled into the U.S. for humanitarian reasons or for public benefit to pursue an application for admission;
- Aliens who have applied for asylum or withholding of removal may apply for employment authorization 150 days after completing the application for asylum; and
- Aliens who have applied for adjustment to LPR status.

There may be circumstances in which a family or juvenile judge might be able to identify a party who is in a category of immigrant that, with referral to appropriate outside assistance, could be eligible to apply to DHS for permission to work.

IMMIGRANTS ELIGIBLE FOR BENEFITS OR SERVICES

Federal immigration law limits the eligibility of immigrants, depending on their immigration status, for the following categories of benefits: (1) SSI and food stamps; (2) TANF, social services block grants, and Medicare; (3) Federal means-tested benefits; and (4) State and local benefits.

With regard to eligibility for benefits, there are two classes of immigrants, qualified aliens and non-qualified aliens. The terms are defined under Federal immigration law as listed below. An immigrant must be a qualified alien to be eligible for Federal public benefits, unless the alien falls under one of many enumerated exceptions. A Federal public benefit is defined as:

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

QUALIFIED ALIENS	NON-QUALIFIED ALIENS (MAY STILL BE ELIGIBLE FOR SOME BENEFITS)
<ul style="list-style-type: none"> ■ An alien who is lawfully admitted for permanent residence ■ An alien who is granted asylum ■ A refugee who is admitted to the United States ■ An alien who is paroled into the United States for a period of at least one year ■ An alien whose deportation is being withheld ■ An alien who is granted conditional entry ■ An alien who is a Cuban and Haitian entrant ■ An alien who has been approved or has a petition pending as a VAWA self-petitioner, but only if there is a connection between the battery or cruelty and the need for the benefits to be provided 	<ul style="list-style-type: none"> ■ Aliens who are veterans or on active duty and their spouses and unmarried dependent children ■ Certain Amerasians ■ American Indians born abroad and their spouses ■ Trafficking victims and their spouses and unmarried dependent children ■ Non-immigrants (temporary visa holders) ■ Aliens paroled into the U.S. for less than one year ■ Unauthorized immigrants

The law is highly complex, so the judge may want to question whether the requesting agency has had adequate advice regarding eligibility of the alien for the specific benefits required.

Federal programs not available even to an alien who is a qualified alien except in very limited circumstances:

- The supplemental security income (SSI) program under title XVI of the Social Security Act; and
- The food stamp program as defined in section 3(h) of the Food Stamp Act of 1977.

Federal programs for which the states are authorized to determine eligibility:

- Temporary assistance for needy families: the program of block grants to States for temporary assistance for needy families under part A of title IV of the Social Security Act;
- Social services block grant: the program of block grants to States for social services under title XX of the Social Security Act; and
- Medicaid: state plans approved under title XIX of the Social Security Act.

Federal means-tested benefits for which an alien is eligible without limitation:

- Emergency medical assistance;

- Short-term, non-cash, in-kind emergency disaster relief;
- Assistance or benefits under the Richard B. Russell National School Lunch Act;
- Assistance or benefits under the Child Nutrition Act of 1966;
- Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;
- Certain payments for foster care and adoption assistance;
- 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, 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;
- Certain programs of student assistance;
- Means-tested programs under the Elementary and Secondary Education Act of 1965;
- Benefits under the Head Start Act;
- Benefits under the Workforce Investment Act of 1998; and
- Assistance or benefits provided to individuals under the age of 18 under the Food Stamp Act of 1977.

