

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
TDHCA Governing Board Approved Draft of
10 TAC, Subchapter D, Uniform Guidance for Recipients of Federal and State Funds, §1.410
Determination of Alien Status for Program Beneficiaries

Disclaimer

Attached is a draft of proposed new rule at 10 TAC, Subchapter D, Uniform Guidance for Recipients of Federal and State Funds, §1.410 Determination of Alien Status for Program Beneficiaries, that was approved by the TDHCA Governing Board on November 8, 2018. This document, including its preamble, is expected to be published in the November 23, 2018, edition of the Texas Register and that published version will constitute the official version for purposes of public comment and can be found at the following link: <https://www.sos.texas.gov/texreg/index.shtml>.

Public Comment

Public Comment Period: Start: 8:00 a.m. Austin local time on November 23, 2018
End: 5:00 p.m. Austin local time on December 27, 2018

Comments received after 5:00 p.m. Austin local time on December 27, 2018, will not be accepted.

Written comments may be submitted, in hard copy/fax or electronic formats to:

Texas Department of Housing and Community Affairs
Attn: Brooke Boston
Rules Comments
P.O. Box 13941
Austin, Texas 78711-3941
Email: brooke.boston@tdhca.state.tx.us

Written comments may be submitted in hard copy or email formats within the designated public comment period. Those making public comment are encouraged to reference the specific draft rule, policy, or plan related to their comment as well as a specific reference or cite associated with each comment.

Please be aware that all comments submitted to the TDHCA will be considered public information.

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Attachment 1: Preamble for proposing new 10 TAC §1.410 Determination of Alien Status for Program Beneficiaries.

The Texas Department of Housing and Community Affairs (the "Department") proposes new §1.410 Determination of Alien Status for Program Beneficiaries. The purpose of the proposed section is to address concerns identified by the U.S. Department of Health and Human Services ("HHS") in a recent monitoring of the Department for the Low Income Home Energy Assistance Program ("LIHEAP") and to provide clear guidance to any private nonprofit subrecipients doing business with the Department that receive funds from the Department for a federal program for which the federal oversight agency has indicated that legal status is required to receive a benefit as further provided for in Personal Responsibility and Work Opportunity Reconciliation Act of 1986 ("PRWORA").

Tex. Gov't Code §2001.0045(b) does not apply to the new rule because it is exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law. Compliance with the new rule is intended to ensure adherence to federal law, Tex. Gov't Code Chapter 2306, Subchapter E, and provide for the implementation of this activity.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but provides interpretation and guidance for how the Department, and its subrecipients of certain federal funds, will comply with PRWORA.
2. The new rule does not reduce work load such that any existing employee positions can be eliminated. The new rule may create a change in work that could require the temporary or permanent creation of new employee positions. The rule as drafted provides options for how the Department will ensure verification of legal status is occurring, if required by the federal oversight agency, when the Department's subrecipient organization is a private nonprofit, who is exempt under PRWORA from having to perform such verification. One of the options provided for how a private nonprofit subrecipient might elect to ensure compliance is occurring with the households they serve would be for the nonprofit to gather and transmit client information to the Department (or a third party procured by the Department) so that verification can occur. If the Department in fact is unable to identify a third party to perform such verifications, it may have to perform them which would require staffing. It is estimated that this option could require from two to four FTEs.
3. The new rule does not require additional future legislative appropriations. If employee positions are needed as noted above, resources to cover the costs of those positions would come from federal LIHEAP administrative funds, not additional appropriations. If a third party is procured by the Department as referenced above, that also would be funded through federal LIHEAP administrative funds.
4. The new rule does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The new rule is creating a new regulation, but only to the extent that it formalizes the methods by which a federal program requirement is implemented. The requirement prompting the rule is a condition of receiving federal LIHEAP and DOE funds.
6. The new rule will not expand or repeal an existing regulation, but formalizes the methods by which a federal program requirement is implemented. The federal program requirement could be considered to "limit" this activity because the new rule will require verification of legal status of household members applying for assistance from certain programs. Those programs are federally limited to be provided only to those applicants who are United States Citizens, United States Nationals, or Qualified Aliens. Applicants not able to provide proper documentation of United States legal status (i.e., Unqualified Aliens) will not receive assistance and households containing Unqualified Aliens may receive a lesser amount of assistance, or be denied assistance altogether depending on the income level of the household.

This potentially limiting action of verification is necessary to ensure compliance with §2605(b)(2) of the Low Income Home Energy Assistance Act (42 U.S.C. § 8624(b)(2)) which was identified by HHS in a recent monitoring of the Department.

7. The new rule will potentially decrease the number of individuals subject to the rule as described in 6 above.
8. The new rule will not negatively nor positively affect this state's economy. While some households currently eligible for the program may no longer qualify for assistance, there are other qualified households who will be eligible, so no reduction in actual program funding expended in communities is expected.

b. **ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.** The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code Chapter 2306, Subchapter E.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.
2. There are no small or micro-businesses subject to the rule for which the economic impact of the rule is projected to impact. There are no rural communities subject to the rule for which the economic impact of the rule is projected to impact.
3. The Department has determined that because this rule is only applicable to nonprofits and local governments that are designated as community action agencies there will be no economic effect on small or micro-business or rural communities.

c. **TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.** The new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. **LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).**

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule merely provides guidance on how existing subrecipients of the Department will handle a particular step in verification of household eligibility, and that the rule is applied statewide, the rule does not change issues affecting employment, there are no "probable" effects of the new rule on particular geographic regions.

e. **PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5).** Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be changes needed to address concerns identified by the U.S. Department of Health and Human Services ("HHS") in a recent monitoring and to ensure compliance with federal PRWORA requirements that ensure that no federal benefits are provided to Unqualified Aliens.

There may be a possible small economic cost to participating network organizations if they opt to bring their operations and processes into compliance with §2605(b)(2) of the Low Income Home Energy Assistance Act (42 U.S.C. § 8624(b)(2)) which was identified by HHS in a recent monitoring of the Department. If a current subrecipient is unable to agree to perform under one of the options provided by

the rule, the Department will have no other way to ensure verification is occurring as required by HHS. Because HHS has affirmed that the Department (and the Subrecipient) take on financial liability for any potential disallowed costs associated with serving an ineligible household, the Department cannot allow Subrecipients to opt out of all options and have no verifications performed as this increases the potential liability for the state. The Department would therefore be compelled to identify an alternate subrecipient that can ensure such verification. This would require rebidding those portions of the network that do not elect one of these options. If such a rebidding occurred, some costs would be involved as the new replacement provider is trained, and clients transitioned; however, such costs would be eligible federal program expenses covered by program administrative funds.

- f. **FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).** Mr. Irvine also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because any such costs related to this rule discussed above will be paid for with federal funds.
- g. **REQUEST FOR PUBLIC COMMENT** The public comment period will be held November 23, 2018, to December 27, 2018, to receive input on the proposed new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. **ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time DECEMBER 27, 2018.**
- h. **STATUTORY AUTHORITY.** The new section is adopted pursuant to TEX GOV'T CODE, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

§1.410 Determination of Alien Status for Program Beneficiaries

(a) Purpose. The purpose of this section is to provide uniform Department guidance on Section 401(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1986 ("PRWORA"), which provides that an alien who is not a Qualified Alien is not eligible for any federal or state public benefit.

(b) Definitions. The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise. Capitalized words used herein have the meaning assigned in the specific Chapters and Rules of this Title that govern the program under which program eligibility is seeking to be determined, or assigned by federal or state law.

(1) Nonprofit Charitable Organization--An entity that is organized and operated for purposes other than making gains or profits for the organization, its members or its shareholders, and is precluded from distributing any gains or profits to its members or shareholders; and is organized and operated for charitable purposes.

(2) Public Organization--An entity that is a Unit of Government or an organization established by a Unit of Government.

(3) Qualified Alien--A person that is not a U.S. Citizen or a U.S. National and is described at 8 U.S.C. §1641(b).

(4) State--The State of Texas or the Department, as indicated by context.

(5) Subrecipient--An entity that receives federal or state funds passed through the Department.

(6) Systematic Alien Verification for Entitlements ("SAVE")--Automated intergovernmental database that allows authorized users to verify the immigration status of program applicants.

(c) Applicability for Federal Funds.

(1) Applicability. The determination of whether a federal program, or activity type under a federal program, is a federal public benefit for purposes of PRWORA is made by the federal agency with administration of a program or activity, not by the Department. Only in cases in which the federal agency has given clear interpretation that it requires PRWORA to be applicable to a program or activity will this rule be applied by the Department.

(2) The requirements of this section are applicable to Subrecipients of federal funds passed through the Department for which the federal program has made a determination that the activity performed by the Subrecipient requires compliance with PRWORA, even if certain exemptions under PRWORA may exist as further provided in this rule.

(d) Applicability for State Funds.

The Department has determined that State Housing Trust Funds that are provided to a Subrecipient that is a Public Organization to be distributed directly to individuals, are a state public benefit.

(e) No Applicable Exemptions under PRWORA. If no exemptions under PRWORA are applicable to the Subrecipient or to the activity type, as further detailed in this section, then the Subrecipient must verify U.S. Citizen, U.S. National, or Qualified Alien status ("legal status") using SAVE and evaluate eligibility using the rules for the applicable program under this Title.

(f) Exemptions Under PRWORA.

(1) In accordance with 8 U.S.C. §1642(d) a Subrecipient that is a Nonprofit Charitable Organization receiving funds from the Department for which the federal program or activity requirement is that a household be verified for eligibility status, is not required to verify that an individual is a U.S. Citizen, U.S. National, or Qualified Alien.

(2) For activities in the Low Income Housing Energy Assistance Program and the Department of Energy Weatherization Program performed by a Nonprofit Charitable Organization (identified as a Private Nonprofit Organization in the Subrecipient's Contract with the Department), where the Department must ensure that an individual is a U.S. Citizen, U.S. National, or Qualified Alien, a Subrecipient must ensure compliance with the verification requirement through electing to proceed under subparagraph (A), (B), or (C) of this

paragraph. Subrecipients will submit in writing to the Director of Community Affairs or his/her designee no later than six months prior to the beginning of a Contract Term its election under one of the subparagraphs in this subsection. If no such election is made by the deadline, Subrecipient will no longer be eligible to perform as a Subrecipient in the program as further provided for in paragraph (3) of this subsection. Failure by Subrecipient to select an option by the deadline is good cause for nonrenewal of a Contract.

(A) Subject to affirmation by U.S. Health and Human Services, the Subrecipient may voluntarily elect to request from the household and transmit to the Department, or a party contracted by the Department, sufficient information or documentation so that the Department is able to ensure an individual is a U.S. Citizen, U.S. National, or Qualified Alien.

(i) The Nonprofit Charitable Organization must provide and maintain a sufficient method of electronic transmittal system that allows for such information to be provided to the Department or its contractor, and ensures the secure safekeeping of such paper and/or electronic files, and receipt of subsequent response back from the Department or its contracted party.

(ii) Upon receipt of the results of the verification performed by the Department, or its contracted party, the Nonprofit Charitable Organization must utilize those results in determining household eligibility, benefits, income, or other programmatic designations as required by applicable federal program guidance or as determined by other program rules under this Title.

(B) The Subrecipient may voluntarily elect to perform verifications through the SAVE system, as authorized through the Department's access to such system.

(C) The Subrecipient may voluntarily elect to procure an eligible qualified organization to perform such verifications on their behalf, subject to Department approval.

(i) The Nonprofit Charitable Organization and/or its procured provider must maintain sufficient evidence and documentation that verification has taken place so that such verification can be confirmed by the Department, and must ensure the secure safekeeping of such paper and/or electronic files.

(ii) Upon receipt of the results of the verification performed by the procured provider, the Nonprofit Charitable Organization must utilize those results in determining household eligibility, benefits, income, or other programmatic designations as required by applicable federal program guidance or as determined by other program rules under this Title.

(D) If no election is made by the deadline in paragraph (2) of this subsection, the Subrecipient will be provided notification under Tex. Gov't Code Chapter 2105 that the Department does not intend to renew the Contract with Subrecipient at the end of the current Contract Term. The Subrecipient may have a right to request a hearing under Tex. Gov't Code Chapter 2105.

(3) Other activities that do not require verification by Public Organizations or Nonprofit Charitable Organizations are described in the August 5, 2016, HUD, HHS, and DOJ Joint Letter Regarding Immigrant Access to Housing and Services.

(g) The Department may further describe Subrecipient's responsibilities under PRWORA, including but not limited to use of the SAVE system, in its Contract with Subrecipient. Nothing in this rule shall be construed to be a waiver, ratification, or acceptance of noncompliant administration of a program prior to the rule becoming effective.