

NLWJC - Kagan

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**Charitable Organizations –
Verification**

121713CW.txt

From: Stacy L. Dean@EOP@LNGTWY@EOPMRX@LNGTWY
*To: BENAMI_J@A1@CD@LNGTWY
*cc: Jack A. Smalligan@EOP@LNGTWY@EOPMRX@LNGTWY
*cc: Keith J. Fontenot@EOP@LNGTWY@EOPMRX@LNGTWY
*cc: Barry White@EOP@LNGTWY@EOPMRX@LNGTWY
Date: 12/17/96 12:41pm
Subject: This afternoon's meetings
Message Creation Date was at 17-DEC-1996 12:41:00

Jack and I are stuck working out appeal issues this afternoon and we won't be able to attend the meetings. Sorry about that, Ken is interested in these issues and does want to be involved. I just wanted to leave two thoughts with you for the meetings:

First, on the issue of charitable institutions. Jack and I have been discussing this one and what the exemption should mean. We agreed with HHS that a charitable hospital might provide services without doing an immigration status check and then later be unable to seek reimbursement from the Medicaid. That was the case under prior law too. Many hospitals provided services to illegals and then later discovered that the individual does not qualify for Medicaid, leaving the hospital with no federal reimbursement.

The question is whether the charitable institution exemption should be read to mean that the hospital or foster care provider can be reimbursed for these services after the fact. Jack and I haven't settled the question amongst ourselves. However, we do feel that there is a difference between

121713CW.txt

n a
non-profit
hospital seeking reimbursement for Medicaid and a non-profit clinic
operating
with a grant providing public health benefits ability to check for
status. It
is this distinction that may drive the final resolution. I don't
think this one
will get settled right away.

Second, I am curious whether HHS and the agencies plan to propose
a
definition
of "federal public benefits" equal to or very similar to "federal
means tested
benefits". I don't think that is reasonable or practical. Please
keep your
eye out for this one.



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FAX MEMORANDUM

TO: Elena Kagan
FROM: Chai Feldblum
David Rapallo
PAGES: 5 (including cover)
DATE: December 16, 1996
RE: Draft of Text for Regulation on Charity Exemption

We took a crack this weekend at drafting a possible preamble and regulation—just to see if it would all hang together. What do you think?

Handwritten notes and signatures:
Vick
Vagstad
#6 387
[Signature]
[Signature]
2/11

SECTION 432(d): NONPROFIT CHARITABLE ORGANIZATIONS

PREAMBLE

The verification provisions in the regulations above are authorized by §432(a) of the Personal Responsibility and Work Opportunity Act of 1996 ("Welfare Act"). In the Immigration Control and Financial Responsibility Act of 1996 ("Immigration Act"), Congress amended §432 to add a new section exempting nonprofit charitable organizations from these requirements. Subsection (d) of §432 states that, "[s]ubject to subsection (a), a nonprofit charitable organization, in providing any Federal public benefit (as defined in section 401(c)) or any State or local public benefit (as defined in section 411(c)), is not required under this title to determine, verify, or otherwise require proof of eligibility of any applicant for such benefits."

We interpret this subsection to exempt nonprofit charitable organizations from the verification requirements promulgated under subsection 432(a). Nonprofit charitable organizations will be held harmless if they deliver benefits to applicants who do not meet the immigration status and sponsor deeming requirements set forth in title V of the Welfare Act. However, subsection (d) does not provide an exemption to program eligibility requirements or immigration restrictions established outside this title, and nonprofit charitable organizations must abide by verification determinations if made by the Federal government.] ?

Limitations on Exemption

As the language of subsection (d) makes clear, nonprofit charitable organizations are not required to determine the "eligibility" of applicants for benefits under subsections 401(c) or 411(c). At first glance, this provision may appear to be a broad exemption for nonprofit charitable organizations to provide Federal, State, or local public benefits to any person, regardless of all program eligibility requirements (e.g., income-level). The term "eligibility," however, is limited to immigration and sponsor eligibility requirements "under this title," referring to title V of the Welfare Act. Moreover, for purposes of this title, "eligibility" is defined in §433 as relating "only to the general issue of eligibility or ineligibility on the basis of alienage."

Nonprofit charitable organizations thus must honor program eligibility requirements set forth in statutes other than title V. For example, if a nonprofit charitable organization operates a means-tested drug counseling program established under a separate statute, subsection (d) does not provide an exemption to the separate statute's requirement to verify income level.

The phrase "under this title" also restricts the application of this exemption to the immigration verification requirements in title V. If a separate statute requires verification of immigration status, subsection (d) does not provide an exemption to that statute's requirements. Essentially, the exemption in subsection (d) is a narrow exemption for nonprofit charitable organizations from the immigration status and sponsor deeming restrictions set forth in this new title of the Welfare Act. Requirements and restrictions that existed prior to the Welfare Act, if not repealed, continue to apply to nonprofit charitable organizations.

“Subject to Subsection (a)”

In addition to the limitations implicit in the phrase “under this title,” the phrase “subject to subsection (a)” further limits the exemption from verification for nonprofit charitable organizations. This phrase provides the Attorney General authority to establish alternative verification procedures for governmental agencies to perform outside the context of the nonprofit charitable organizations if such alternative procedures are deemed necessary and appropriate.

Under this subsection, the Attorney General reserves the authority to examine the types of programs, services, and institutions exempted, and to establish alternate verification procedures to be conducted by governmental agencies. For some benefits, such as those delivered by nonprofit charitable organizations such as hospitals or educational institutions, the Attorney General may choose to exercise its discretion and establish a system to verify the requirements of title V. If the Attorney General chooses to exercise this reserved authority, nonprofit charitable organizations will be required to honor the determinations made under these alternate verification procedures.

All nonprofit charitable organizations are also required to honor verification determinations currently required to be performed by Federal, State, or local governmental entities. For example, an applicant for services under Medicaid is ordinarily required to go to a State Medicaid office to complete an eligibility determination. This process includes a determination of income-level, health status, and, now, immigration status. Applicants who meet these criteria will be issued a Medicaid card. If an applicant then goes to a nonprofit charitable organization to obtain services under a Medicaid program, the nonprofit charitable organization must request proof of Medicaid eligibility (e.g., the Medicaid card), which, because of the process already performed at the State office, will include a determination of immigration status.

Nonprofit Charitable Organization Held Harmless

Within the scope of this narrow exemption, nonprofit charitable organizations will not be required to verify the requirements for immigration status or sponsor deeming. It is therefore possible that nonprofit charitable organizations may provide benefits to some applicants who are not eligible for such benefits. Congress envisioned this result and accepted it in light of the unique nature of nonprofit charitable organizations, as well as the types of benefits they typically provide.

Nonprofit charitable organizations deliver services primarily through social workers and volunteers with few resources and little expertise in navigating through the bureaucracies of immigration, asylum, labor, and tax law. Placing new administrative requirements and immigration verification procedures on such individuals would make it very difficult for nonprofit charitable organizations to continue to provide these services in a cost-effective manner.

Nonprofit charitable organizations also provide different types of services than government agencies. For the most part, these programs provide "in kind," community-based and tangible benefits. They tend to be provided for short periods to help those in need. These are not the types of services for which lengthy verification procedures make sense. Although many of these services, if they are not means-tested, will be exempted under the Attorney General specification of programs necessary for life or safety, the exemption in subsection (d) applies to means-tested programs that do not fall under the Attorney General specification.

Finally, these short-term, temporary benefits go to all in need, not just to immigrants. Congress realized that extending the verification provisions to nonprofit charitable organizations would have impeded services to all who need them. Nonprofit charitable organizations would have had to verify the status of every person who applied for services, including U.S. citizens who may be destitute, homeless, mentally ill, or fleeing domestic violence, many of whom do not have easy access to birth certificates, driver's licenses, or social security cards.

For these reasons, nonprofit charitable organizations will not be required to verify immigration requirements under title V, and will not be held accountable for a subsequent discovery that an applicant failed to meet such requirements. Although other previously existing requirements must still be honored, title V places no new requirements on nonprofit charitable organizations.

Definition of "Nonprofit Charitable Organization"

An additional point in need of clarification is the definition of "nonprofit charitable organization." As passed, there is no definition for this term in either the Welfare Act or the Immigration Act. We choose to define this term to track the definition in §501(c)(3) of the Internal Revenue Code. This definition is useful because it provides uniformity, precedential value and verifiability. The already extensive reliance upon the tax code definition in other contexts creates a uniform understanding of the characteristics of a charitable organization. It also provides a simple and clear standard that has been refined by precedential case law.

XXX. NON-PROFIT CHARITABLE ORGANIZATIONS

(a) EXEMPTION FOR NONPROFIT CHARITABLE ORGANIZATIONS.—A nonprofit charitable organization that delivers any Federal public benefit (as defined in [other reg by AG]) or any State or local public benefit (as defined in [other reg by AG]) is not required by these regulations [referring to the regs accompanying this promulgated under subsection (a)] to determine, verify, or otherwise require proof of eligibility of any applicant for such benefits.

(b) CONTINUED APPLICABILITY OF OTHER PROGRAM ELIGIBILITY AND IMMIGRATION REQUIREMENTS.—The exemption in section (a) does not apply to program eligibility or immigration requirements for the provision of any Federal public benefit or State or local public benefit established outside this title.

(c) HONORING GOVERNMENTAL VERIFICATION.—If the Attorney General determines it is necessary and appropriate to establish procedures for governmental agencies to verify immigration and sponsor deeming status under title V, nonprofit charitable organizations are required to honor such verification determinations.

(d) NONPROFIT CHARITABLE ORGANIZATIONS HELD HARMLESS.—

(1) Nonprofit charitable organizations shall not be found liable in any criminal or civil action, and shall not otherwise be held responsible in any way for failing to perform any verification procedure promulgated pursuant to subsection 432(a).

(2) No adverse action (i.e., canceling or failing to renew contract or grant) by any Federal, State, or local entity shall be taken against a nonprofit charitable organization for:

(A) refusal to provide documentation under this exemption, whether pursuant to an audit, a formal or informal request for documentation, a court order, or an administrative proceeding (i.e., deportation hearing); or

(B) a subsequent finding that applicants who received benefits from a nonprofit charitable organization failed to prove their eligibility under this title.

(e) NONPROFIT, CHARITABLE ORGANIZATION DEFINED.—The term “nonprofit charitable organization” means any corporation, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Randy Moss 12/17/96

1. Charitable org.

Simple - medicare -

present card to hosp.

st or local ag issues card

so hosp will know - elig or not?

Chai lit memo - 3 readings

1. (a) swallows rest of provision

2. (a) grants AG discretion to
req c.o.'s to verify

3. (a) AG may req verif by
st or local ags before
bens. are provided by co's

Any diff in who gets
the benefits? -
real consequences?

Dith views at HHS

They want us to adopt fairly lib'l view

Def of charit nonprofit ^{or} Chai says use tax code
Do nothing.

DOT proposal -

(a) - we're not doing anything in 18 mos.
not promulgating regs

So - right now - no auth to tell c.o.'s

Just track it -

Also - otherwise will hold up guidance

2. Fed'l Public Benefits

Ed - wants to say ed bens (but not college) are not
pub bens. Lists post-sec, but not other.

Also - leg history

Makes sure it flows to school.

What about e.g. - tutoring/lunches for partic
students?

Disabil. projs?

Say sthng gen'l about this??

→ Ed has language??

[Don't like] why not use language?

HHS - wants narrow intent of "indiv. household,
or family elig unit"

DRAFT

HHS

DRAFT 3
December 3, 1996DEFINITION OF "NONPROFIT CHARITABLE ORGANIZATION"

The following is guidance interpreting section 508 of the Department of Defense Appropriations Act of 1997 (the "Appropriations Act"), Pub. L. 104-208.

Section 508 of the Appropriations Act amends section 432 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. 104-193, to exempt "nonprofit charitable organizations" that provide "any Federal public benefit (as defined in section 401(c)) or any State or local public benefit (as defined in section 411(c))" from having "to determine, verify, or otherwise require proof of eligibility of any applicant for such benefits." To determine whether an organization qualifies as a "nonprofit charitable organization" under the amendment, the definitions described below are instructive.

The term "nonprofit" is generally interpreted to refer to a corporation or association no part of the net earnings of which inures to the benefit of any individual having a personal and private interest in the activities of the organization. See Airlie Foundation v. United States, 826 F. Supp. 537, 549 (D.D.C. 1993). Similar definitions are used in numerous federal laws including the Internal Revenue Code (26 U.S.C. § 501(c)(3)), and the Public Health Service Act. (42 U.S.C. 291o(e)).

The definition of "charitable" is less straightforward and involves more subjective concepts that may be difficult to apply in practice. Generally, an organization is "charitable" if it provides a public benefit, rather than a private one, and its mission is consistent with established public policy. First, a public benefit is one "which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues." Bob Jones University v. United States, 461 U.S. 574, 591 (1983). Second, a public benefit will be charitable if it furthers public policy. For example, in Bob Jones University v. United States, the Supreme Court held that a school that prohibited interracial dating and marriages among its students violated established public policy. The Court upheld an IRS decision denying the school tax-exempt status noting that "the institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." Id. at 592. The Court further observed: "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy." Id.

Charitable Organization Meeting

1) gen'l stat -
CO's - don't have to verify.

2) Who's a c.o.?
- 501(c)(3)
- go to st/loc of

3) If prog currently
verifies then of -
continue to do that

?? 4) st/loc may establish
verif. proc's when they
do verif - + c.o. ~~→~~
honors.

assuming st/loc admin prog
consistent w/ law.

Thursday phone call.



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FAX COVER MEMORANDUM

DATE: 12/13/96

NUMBER OF PAGES, INCLUDING THIS SHEET: 8

TO: Elena Kagan

FAX NUMBER: 456-1647

FROM: Chai Feldblum

COMMENT: The latest missive from our Clinic -- I'd love to know who the hell put in "subject to subsec. a" in the first place (what we sent over to the White House that frantic weekend of negotiations is the text that appears on pp. 5-6 of this memo -- + then somehow the final language emerged...). Anyway, attached is our best efforts in dealing with the final language. Can



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**EXEMPTION FROM IMMIGRATION
VERIFICATION REQUIREMENTS FOR
NONPROFIT CHARITABLE ORGANIZATIONS**

I. Introduction

The Personal Responsibility and Work Opportunity Act of 1996 (8 U.S.C. §1642 et seq.) (hereinafter "Welfare Act") establishes an intricate scheme of restrictions and bars on social welfare and health benefits for immigrants. Whether an immigrant is permitted to receive such benefits will depend on a number of factors, including the type of benefit at issue, the length of time the immigrant has been in the country, the number of years the immigrant has worked, the income level of the immigrant's sponsor, and whether the immigrant falls into one of the many program or personal exceptions set forth in the statute.

In order to implement a system to verify this information, §432 of the Welfare Act requires the Attorney General to establish verification procedures to determine the status of applicants for a wide range of benefits and services covered by the Act. The Act also requires States to implement verification systems that comply with the Federal regulations.

Following passage of the Welfare Act, Congress passed the Immigration Control and Financial Responsibility Act of 1996 (hereinafter "Immigration Act"). The Immigration Act amended §432 of the Welfare Act to exempt "nonprofit charitable organizations" (hereinafter "charities") from the verification requirements.

Unfortunately, because of hasty drafting in the last hours of negotiation, the charity exemption states that "subject to subsection (a) [of §432], charities are not subject to verification requirements. Subsection (a) of §432 refers to the Federal verification procedures. Although there are several possible interpretations of the phrase "subsection to subsection (a)," the most reasonable interpretation is that charities are exempt from the verification requirements, but that the Federal government retains discretion to establish alternate procedures to verify that individuals who receive services from charities are eligible for such services.

II. Verification Provision in the Welfare Act

The final Welfare Act contains a verification provision that requires the Attorney General to promulgate regulations to verify the immigration status of individuals applying for Federal public benefits. This provision had no specific language regarding charities, but delegated to the Attorney General the responsibility of determining specific verification requirements. The original provision read as follows:

SEC. 432 VERIFICATION OF ELIGIBILITY FOR FEDERAL PUBLIC BENEFITS.—

(a) **IN GENERAL.**—Not later than 18 months after the date of the enactment of this Act, the Attorney General of the United States, after consultation with the Secretary of Health and Human Services, shall promulgate regulations requiring verification that a person applying for a Federal public benefit (as defined in section 401(c)), to which the limitation under section 401 applies, is a qualified alien and is eligible to receive such benefit. Such regulations shall, to the extent feasible, require that information requested and exchanged be similar in form and manner to information requested and exchanged under section 1137 of the Social Security Act.

(b) **STATE COMPLIANCE.**—Not later than 24 months after the date the regulations described in subsection (a) are adopted, a State that administers a program that provides a Federal public benefit shall have in effect a verification system that complies with the regulations.

(c) **AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated such sums as may be necessary to carry out the purpose of this section.

Once the Welfare Act was enacted, Congress returned to consideration of the Immigration Bill. Before signing the Immigration Bill into law, Congress and the President negotiated a last-minute exemption for charities as an amendment to §432 of the Welfare Act. This exemption read as follows:

(d) **NO VERIFICATION REQUIREMENT FOR NONPROFIT CHARITABLE ORGANIZATIONS.**—Subject to subsection (a), a nonprofit charitable organization, in providing any Federal public benefit (as defined in section 401(c)) or any State or local public benefit (as defined in section 411(c)), is not required under this title to determine, verify, or otherwise require proof of eligibility of any applicant for such benefits.

As the heading and text of subsection (d) indicate, Congress intended to establish an exemption to the verification requirements for charities. Congress understood that the unique circumstances in which charities deliver services require significant flexibility in terms of verification requirements.

Charities deliver services primarily through social workers and volunteers with few resources and little expertise in navigating through the bureaucracies of immigration, asylum, labor, and tax law. Placing new administrative requirements and immigration verification procedures on such individuals would make it very difficult for charities to continue to provide services to those in need. This is of particular concern in light of the fact that many of Congress' reform proposals anticipated that private religious and charitable organizations would "pick up the slack" and ensure a basic social safety net when the federal government reduced services to those in need.

Charities also provide different *types* of services than government agencies. For the most part, these programs provide "in kind," community-based and tangible benefits. They are tend to be provided for short periods to help those in need get back on their feet. These are not the type of services for which lengthy verification procedures make sense.

Finally, these short-term, temporary benefits go to all in need, not just to immigrants. Congress realized that extending the verification provisions to charities would have impeded services to all who need them. Charities would have had to verify the status of every person who applied for services, including U.S. citizens who may be destitute, homeless, mentally ill, or fleeing domestic violence, many of whom do not have easy access to birth certificates, driver's licenses, or social security cards.

III. The Meaning of "Subject to Subsection (a)"

Although the legislative history to the charities exemption provision indicates that Congress intended to pass an exemption to the verification requirements for charities, last-minute alterations to the text has resulted in some ambiguity. In particular, the phrase "subject to subsection (a)." if misinterpreted, could undermine the exemption entirely.

There are three possible interpretations of the phrase "subject to subsection (a):" (1) that charities must verify the status of all applicants for benefits, just like all other entities; (2) that the Attorney General has discretion to require or exempt charities from verifying the status of applicants; or (3) that charities are exempt from verifying the status of applicants, but the Attorney General has discretion to establish alternative verification systems for individuals receiving services from charities.

The first interpretation is the least plausible, since it relegates the remainder of the text in subsection (d) to surplusage. The second interpretation is the reading closest to the plain meaning of the text, but is inconsistent with Congressional intent as manifested through the history and development of the provision at issue. The third interpretation is the most appropriate one because it is based in the language of the text, reflects Congress' intent to exempt charities from verification procedures, and takes into account the practical realities considered by Congress.

A. Interpretation One: Charities Required to Perform Verification

The most strict textualist reading of the phrase “subject to subsection (a)” would be that charities are exempt from the verification requirements *except for* the verification requirements established by the Attorney General in subsection (a). In other words, despite the language in subsection (d) that completely exempts charities from such verification, charities would be required to verify the status of applicants just like any other organization governed by the Attorney General regulations.

This interpretation is illogical and contrary to basic rules of statutory interpretation. Under these rules, all provisions are intended to have meaning and no provision is presumed to be superfluous. It is a “cardinal rule that no provision should be construed to be entirely redundant.” *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion by Scalia, J.); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Under the “whole act rule,” the presumption is that every word and every phrase adds something to the statutory command. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986). Clearly, if the interpretation above is adopted, subsection (d) would have no meaning whatsoever. To say that charities need not perform verification except for the regulations that require them to verify is an explicit contradiction. In addition, such an interpretation would be contrary to Congressional intent. In every previous incarnation of this provision, it had always been Congress’ intent to remove from charities the burden of immigration verification (see Interpretation Three below).

B. Interpretation Two: Attorney General Has Discretion to Require Charities to Verify

A plain (albeit not literalist) reading of the text would view the phrase “subject to subsection (a)” as giving the Attorney General *discretion* to exclude charities from verification requirements when drafting the regulations required under subsection (a). In other words, under §432, the Attorney General must require all entities that provide certain benefits to perform immigration verifications, but has the authority to exempt charities from these verification requirements, or to establish special procedures for verifications performed by charities.

Senator Grassley (R-IO), one of the original co-sponsors of the amendment, may have understood the final version of the provision in this way. As he stated, “[a]t least on the face of it, nonprofits will be exempt from the new provision. But the question of when and how people can be served by nonprofits and any resulting paperwork requirement will unfortunately be left to regulations promulgated by the Attorney General.” (Cong. Rec. S.11851, Sept. 30, 1996.)

If the Attorney General adopts this interpretation, we urge the Attorney General to use the discretion granted by subsection (d) to provide an exemption for charities from the verification requirements. The reasons for granting such an exemption have been noted above: charities rely on thousands of volunteers that cannot be expected to perform lengthy and complex verification

procedures,¹ and the type of short-term benefits provided by charities should not be held hostage to lengthy verification procedures.

There is, however, a third reading of "subject to subsection (a)" that is preferable to any other reading. This interpretation is consistent with the text of the provision, honors Congress' original intent in including this provision, and reflects the practical realities of the situation.

C. *Interpretation Three: Charities are Exempt, But the Attorney General Has Discretion to Establish Alternate Verification Systems*

The legislative development of the provision indicates that Congress has granted charities an exemption from the verification procedures to be promulgated by the Attorney General. The phrase "subject to subsection (a)" should be read as giving the Attorney General authority to establish alternative verification procedures (outside the context of the charities) if the Attorney General feels such alternative procedures are necessary and appropriate.

The earliest version of the charity exemption was co-sponsored by Senator Grassley (R-IO) and Senator Kennedy (D-MA) and was passed by the Senate Judiciary Committee in 1996. Under this provision, charities were exempt from the verification requirements of the proposed Immigration Bill. Senator Grassley strongly believed charities should be exempt from any verification procedures, and hence was a lead sponsor of the provision. At the same time, he was concerned that the provision not be misconstrued as restraining the authority of the *federal government* to engage in verification procedures if it felt such procedures were appropriate for applicants seeking services from charities. To that end, the provision passed by the Senate Judiciary Committee read as follows:

(e) NON-PROFIT CHARITABLE ORGANIZATIONS.—

(1) IN GENERAL.—Nothing in this Act shall be construed as requiring any non-profit charitable organization operating any program of assistance provided or funded, in whole or in part, by the Federal Government to—

(A) determine, verify, or otherwise require proof of the eligibility, as determined under this title, of any applicant for benefits or assistance under such program; or

(B) deem that the income or assets of any applicant for benefits or assistance under such program include the income or assets described in section 204(b).

(2) NO EFFECT ON FEDERAL AUTHORITY TO DETERMINE COMPLIANCE.— Nothing in this subsection shall be construed as prohibiting the Federal Government from determining the eligibility, under this section

¹ For example, Catholic Charities utilize 225,000 volunteers and 47,000 paid staff to serve over 11 million people. The Salvation Army has 1.3 million volunteers and only 43,000 paid staff, a ratio of 30 to 1.

or section 204, of any individual for benefits under a public assistance program (as defined in subsection (f)(3)) or for government benefits (as defined in subsection (f)(4)).

The committee report language accompanying this text stated simply: “[n]onprofit charitable organizations are exempt from the requirements under this title.”

The conferees on the Immigration Bill dealt peripherally with the charities verification exemption, but did not reach consensus on any alternative language. Ultimately, the entire title dealing with immigrant benefits was dropped from the Immigration Bill. Because of the importance and strong bipartisan support for the charities exemption, this provision was reinserted during negotiations with the Administration. Unfortunately, these negotiations were rushed and confused. As Senator Grassley described it, “the administration made the mistake of demanding the provision be changed in the last-minute negotiations last week on title V. . . . I might say at this point that my staff got a call about 1:30 Saturday morning to discuss some changes in this language. That is not a very good way to write a piece of legislation.” (Cong. Rec. S.11851, Sept. 30, 1996.)

Apparently, as a result of the negotiations, section (2) (the section retaining Federal authority to establish alternate verification systems) was deleted. In its place, the phrase “subject to subsection (a)” was inserted. It is possible, therefore, that the negotiators intended to achieve the same result as the language that was dropped, but to do so with a shorter, more pithy phrase (“subject to subsection (a)”).

It is unfortunate that the more pithy phrase creates ambiguity. The agency charged with implementation of the statute, however, must read the provision in a manner that best achieves the intent of its sponsors. As Senator Kennedy noted, his interpretation of the final text was that: “[i]t allows nonprofit organizations, such as Catholic Charities, church social service programs, or community-based organizations to continue to assist communities with Government funds, without having to check the citizenship and green cards of everyone who walks in their doors.” (Cong. Rec. S.11864, Sept. 30, 1996.)

Ultimately, a legislative amendment might be desirable to remove the ambiguity in the text of the provision. Until that time, however, the Attorney General should interpret the provision in a manner that best comports with Congress’ intent and the language of the provision. The third interpretation we propose best meets this standard.

IV. Definition of “Nonprofit Charitable Organizations”

An additional point in need of clarification is the definition of “nonprofit charitable organizations.” As passed, there is no definition for this term in either the Welfare Act or the Immigration Act. One option for defining this term is the definition in §501(c)(3) of the Internal Revenue Code, which includes the following groups:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

The tax code definition is useful, because it provides uniformity, precedential value and verifiability. The already extensive reliance upon the tax code definition in other contexts creates a uniform understanding of the characteristics of a charitable organization. It also provides a simple and clear standard that has been refined by precedential case law. Finally, since §501(c)(3) organizations are required to register with the Internal Revenue Service, verifying their status as nonprofit charitable organizations is simply a matter of consulting the IRS.

V. Conclusion

By amending §432 of the Welfare Act, Congress demonstrated its commitment to exempt nonprofit charitable organizations from the immigration verification requirements. When promulgating regulations, the Attorney General should clarify that Congress has exempted charitable organizations from the verification requirements. The Attorney General, by following this course, would not restrain the federal government from establishing alternative verification procedures outside the context of charities when appropriate.

If the Attorney General chooses not to accept this interpretation, but instead construes the statute as providing the Attorney General *discretion* to exclude charities from verification requirements when drafting its regulations under subsection (a) (Interpretation Two), we urge the Attorney General to exercise her discretion to provide an exemption for charities from the verification requirements. This interpretation, at a minimum, would recognize Congress' significant concern with volunteers being forced to perform lengthy and complex verification procedures, as well as Congress' attempt to recognize the short-term nature of the type of benefits charities provide.