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PERMANENTLY RESIDING UNDER COLOR OF LAW: A PRACTITIONER'S GUIDE TO AN AMBIGUOUS DOCTRINE

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INTRODUCTION

During oral argument in *United States v. Texas*, Chief Justice Roberts and Justice Alito expressed—or feigned—confusion about the nature of the status of non-citizens granted deferred action, respectively asking the Solicitor General, incredulously, "Lawfully present does not mean you're legally present in the United States[?]"[1] and "[H]ow is it possible to lawfully work in the United States without lawfully being in the United

[1] Transcript of Oral Argument at 27:23-25, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674), https://perma.cc/N7GS-69C4.

States?"[2] The Solicitor General tried to explain to the conservative justices that "lawfully present" has a very non-literal meaning under immigration law, but without much success.[3] He could have responded that there is well-established precedent in American courts[4] recognizing that "[u]nlawful presence can be inconclusive in several ways. It can change, it can occupy a gray area between lawful and unlawful, and its consequences are highly uncertain."[5] There is perhaps no more reflective an example of this than the doctrine called "permanently residing under the color of law," abbreviated by the peculiar acronym PRUCOL.

Designed by the 92nd Congress, PRUCOL designates eligibility for federal public benefits for those non-citizens whose status is "both outside the law and inside the law."[6] PRUCOL, therefore, does not describe a non-citizen's immigration status but rather the public benefits eligibility that a non-citizen enjoys as a product of their immigration status or lack thereof. It is distinguished from two other immigrant eligibility categories: "qualified aliens"[7] and "lawfully present" immigrants. Qualified aliens are lawful permanent residents, refugees, and those with similar longer-term statuses,[8] while lawfully present immigrants include those with usually shorter-term statuses, such as temporary or non-immigrant visa holders.[9] The former category, along with PRUCOL, applies to several kinds of benefits, whereas the lawfully present category applies only to health insurance under the Affordable Care Act. PRUCOL, however, generally describes someone without immigration status or in the process of obtaining such status.[10] The PRUCOL doctrine was meant to be "adaptable and to be interpreted over time in accordance with experience, developments in the law, and the like"—that is, "organic and fluid, rather than prescriptive or formulaic."[11] In other words, PRUCOL was designed to be vague.

The vagueness of the doctrine creates challenges of applicability to the real-world circumstances of non-citizens who are applying for public assistance benefits, not just those who are before courts. The doctrine also presents challenges for the social service agencies that must determine

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[2] *Id.* at 28:12-14.

[3] *Id.* at 27:9-22, 29:6-16, 19-25.

[4] *See, e.g.*, Berger v. Heckler, 771 F.2d 1556, 1576 (2d Cir. 1985); Holley v. Lavine, 553 F.2d 845, 849 (2d Cir. 1977).

[5] HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 52 (2014).

[6] Castillo v. Jackson, 566 N.E.2d 404, 410 (Ill. App. Ct. 1990).

[7] Please note the term "alien" is used here as a direct quote of the law. The authors of this article do not endorse the use of this term.

[8] 8 U.S.C. § 1641(b) (2018).

[9] 45 C.F.R. § 152.2(4)(i)-(iii) (2020).

[10] *See infra* Part III.

[11] Berger v. Heckler, 771 F.2d 1556, 1571 (2d Cir. 1985).

immigrant eligibility for said benefits, and also for attorneys who may represent such individuals in immigration cases, public benefit cases, and sometimes both.

This article aims to provide guidance for legal practitioners and representatives of PRUCOL non-citizens attempting to qualify for public assistance benefits in those limited jurisdictions that still use the PRUCOL doctrine to determine benefit eligibility. Part I provides a history of the doctrine. Part II provides a summary of the very limited scholarship on the PRUCOL doctrine, noting that no comprehensive discussion of PRUCOL has been written in the last two decades. Part III is a practitioner's guide to applying the PRUCOL doctrine. It presents a taxonomy of all judicial, and many administrative, decisions at the state and federal level on the PRUCOL doctrine. Part III is meant to provide practitioners with authority to support arguments for PRUCOL eligibility for real-world clients stuck "both outside and inside" the vague boundaries of lawful immigration status. Part IV concludes by encouraging practitioners to use Part III to advance their arguments for PRUCOL client benefit access.

I. A HISTORY OF THE PRUCOL DOCTRINE

A. The Term "Color of Law"

The phrase "under color of law" goes back at least as far as the 13th century, when it was used to describe those actions of state officials that appeared to be authorized by law but were not.[12] The phrase has been used in American law since the 19th century, notably in civil rights statutes such as 42 U.S.C. § 1983, which "provides a civil remedy for the deprivation of constitutional rights perpetrated 'under color of law'" or with its ostensible authorization.[13] "Color" refers to that which seems to be lawful but is not.[14] In this context, the Supreme Court has defined "under color of law" as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[15]

It is this part of the definition, "clothed with the authority of state law," that most applies to the phrase "color of law" as it is used in the

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[12] *See* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 327 (1992).

[13] *See* Sarah T. Biolsi, *Civil Rights/Tax Law—"Under Color of" Internal Revenue Laws: The Role of United States v. Temple and Section 7214 in the "Under Color of Law" Debate*, 31 W. NEW ENG. L. REV. 115, 117-21 (2009); *see also* Gillar v. Emp't Div., 717 P.2d 131, 135 (Or. 1986) (en banc).

[14] *See* Winter, *supra* note 12, at 327-28.

[15] United States v. Classic, 313 U.S. 299, 326 (1941).

PRUCOL doctrine.[16] The Second Circuit has described such an action as "that which an official does by virtue of power, as well as what he does by virtue of right."[17] In the immigration law context, it is usually the execution of prosecutorial discretion that renders a non-citizen someone who is residing under "color of law," that is to say, clothed by the power of the state with permission to remain in the United States, if not the legal right to do so.[18] In 1972, Congress first applied the "color of law" language to non-citizen recipients of the government's discretionary permission to remain as a way of designating which non-citizens could enjoy access to public assistance while they were permitted to remain in the United States.

B. The Statutory Origins of "PRUCOL"

The Supreme Court has treated decisions by the federal political branches to deny public benefits to non-citizens as an inherent part of the political branches' "plenary power" over immigration policy.[19] Congress exercised that power in 1972 when it amended the Social Security Act to create the first restriction of benefits based on citizenship status, excluding anyone who was not PRUCOL from the Supplemental Security Income (SSI) cash benefit program.[20] As professor Janet M. Calvo explained in her 1987 article on non-citizen eligibility for federal entitlements, lawmakers originally intended to restrict SSI to legal permanent residents, but some worried about states bearing the financial burden of caring for the disabilities of non-citizens who lacked permanent residence but were still in the United States with the government's permission.[21] Calvo explained that senators from Florida addressed this problem by proposing an amendment that eventually became the intentionally

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[16] See a thorough discussion of the history of the "color of law" language as it applies to the PRUCOL doctrine in *Gillar*, 717 P.2d at 135-37.

[17] Holley v. Lavine, 553 F.2d 845, 849 (2d Cir. 1977).

[18] *E.g.*, *id.* ("[P]laintiff is in . . . a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice stating that the Immigration and Naturalization Services 'does not contemplate enforcing [their] departure from the United States at this time.'"); *cf.* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7 (2015) ("A favorable exercise of prosecutorial discretion in immigration law identifies the agency's authority to refrain from asserting the full scope of the agency's enforcement authority in a particular case.").

[19] Mathews v. Diaz, 426 U.S. 67, 81-83 (1976).

[20] *See* Social Security Amendments of 1972, § 1614, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1471; Lewis v. Gross, 663 F. Supp. 1164, 1182 (E.D.N.Y. 1986).

[21] Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 411 (1987).

broadly applicable "permanently residing in the United States under color of law" status.[22]

Between the original enactment of Medicaid in 1965 and 1973, there were actually no citizenship-based restrictions on Medicaid, the federal public health insurance program for low-income people.[23] At one point, the Department of Health, Education, and Welfare (the administrator of Medicaid and predecessor of the Department of Health and Human Services) even recommended that the law stay that way.[24] However, in 1973, the Department implemented a new regulation placing restrictions on non-citizen Medicaid eligibility.[25] This first regulation on non-citizen eligibility limited non-emergency care to the PRUCOL category, borrowing its language straight from the SSI statute passed during the previous year.[26]

The PRUCOL restriction on Medicaid eligibility was a mere regulation, and Congress did not pass a statute to apply the PRUCOL restriction to non-emergency Medicaid until 1986, when the Omnibus Budget Reconciliation Act codified the Medicaid PRUCOL restriction into federal law.[27] As the House Budget Committee report expressly said, "The Committee intends that the Secretary [of Health and Human Services] and the States broadly interpret the phrase 'under color of law' to include all of the categories recognized by immigration law, policy and practice in effect at the time."[28]

Aid to Families with Dependent Children ("AFDC")—called Temporary Assistance for Needy Families ("TANF") after 1996—is a cash entitlement program for low-income adults with children who did not become subject to PRUCOL restrictions until 1981.[29] Thus, AFDC became

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[22] *Id.* (quoting 42 U.S.C. § 1382c(a)(1)(B)(i) (2018)).

[23] *See* Lewis v. Grinker, 965 F.2d 1206, 1211 (2d Cir. 1992); *see also Lewis*, 663 F. Supp. at 1181-82 (referring to 1973 as the beginning of federal citizenship requirements for Medicaid eligibility and discussing a 1972 proposal that would have outright banned such citizenship requirements for state Medicaid plans).

[24] *Lewis*, 663 F. Supp. at 1182 ("In fact, on June 16, 1972, the Secretary proposed a regulation that would require rejection of any state Medicaid plan that would 'exclude an otherwise eligible individual on the basis . . . of his alien status'") (quoting 37 Fed. Reg. 1977 (1972)).

[25] *See Grinker*, 965 F.2d at 1211-13 (discussing the evolution of citizenship requirements for Medicaid in light of Congressional amendments to the SSI program and the codification of such exclusions in the Consolidated Omnibus Budget Reconciliation Act of 1986).

[26] *See Lewis*, 663 F. Supp. at 1182 (citing language incorporated in 42 C.F.R. § 435.402 as originating from the SSI's alienage requirement in the Social Security Amendments of 1972).

[27] H.R. REP. NO. 99-727, at 111 (1986).

[28] *Id.*

[29] 45 C.F.R. § 233.50(b); *see* Omnibus Budget Reconciliation Act of 1981, Pub. L. No 97-35, § 2320(a), 95 Stat. 357; *Lewis*, 663 F. Supp. at 1182.

the fourth entitlement program to be set by the PRUCOL designation. It likewise borrowed the PRUCOL language from its SSI and Medicaid regulation predecessors.[30] The Supplemental Nutritional Assistance Program ("SNAP"), more colloquially known as food stamps,[31] is one of the few major federal benefit programs that does not currently use the PRUCOL standard for determining eligibility.[32]

By 1977, the Department of Labor administered the Federal Unemployment Tax Act ("FUTA"), the program that exacts a tax from employers to pay for unemployment insurance for employees who lose their jobs, with the same PRUCOL restrictions.[33] The federal law required state recipients of FUTA money to enact, among other provisions, identical PRUCOL restrictions in their equivalent state laws.[34]

C. The First PRUCOL Cases: Holley v. Lavine and Berger v. Heckler

It was only a matter of time before the PRUCOL benefit eligibility category, crafted with such vague language, would land in a federal court where the parties could contest—and for the first time define—what PRUCOL meant and to whom it referred. That time came in 1977, when the Second Circuit decided the seminal PRUCOL case of *Holley v. Lavine* and for the first time articulated a definition of PRUCOL.[35] *Holley* was followed by *Berger v. Heckler*, which built substantially on *Holley*'s definition.[36] Together the two cases formed the PRUCOL doctrine and have been relied upon by dozens of courts[37] in cases where the definition of who is and is not PRUCOL has continued to take shape.

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[30] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No 97-35, § 2320(a), 95 Stat. 357; *cf.* 42 U.S.C. § 1382c(a)(1)(B) (2018).

[31] See, for example, the U.S. Census Bureau's equivalent treatment of the two names in the agency's FAQ section. *Food Stamps/Supplemental Nutrition Assistance Program*, U.S. CENSUS BUREAU, https://perma.cc/9KC5-BR27 (last visited May 17, 2020).

[32] Robert Rubin, *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits*, 24 SAN DIEGO L. REV. 411, 420, 420 n.53 (1987).

[33] For a discussion of the history of FUTA as a whole and how it pertains to the PRUCOL doctrine, see Castillo v. Jackson, 594 N.E.2d 323, 324-26 (Ill. 1992); *see also* 26 U.S.C. § 3304(a)(14)(A) (2018).

[34] 26 U.S.C. § 3304(a)(14)(A) (2018). For examples of state laws enacting PRUCOL restrictions in their unemployment insurance laws, see the Illinois Unemployment Insurance Act, § 614, 820 ILL. COMP. STAT. ANN. 405/614 (West 2020) (previous version at Ill. Rev. Stat. 1987, ch. 48, par. 444); MINN. STAT. ANN. § 268.085(12) (West 2020); OHIO REV. CODE ANN. § 4141.29(J) (West 2020).

[35] 553 F.2d 845 (2d Cir. 1977).

[36] Berger v. Heckler, 771 F.2d 1556, 1571 (2d Cir. 1985).

[37] *See infra* Part III.

The Western District of New York was the first court to ask what PRUCOL meant before the case was appealed to the Second Circuit Court of Appeals in *Holley v. Lavine*.[38] Gayle McQuoid Holley was a Canadian national who entered the United States at the age of 12 in 1954 as a non-immigrant student and practically resided in the United States ever since.[39] Ms. Holley became a resident of Monroe County, New York, and eventually had six U.S. citizen children.[40] Sometime on or before 1974, Ms. Holley began receiving AFDC for herself and her six children through the Monroe County Department of Social Services ("DSS").[41] In 1974, however, New York State enacted now-repealed Social Services Law § 131-k-1, which said that every person "unlawfully residing in the United states . . . is not eligible for aid to dependent children."[42] In an effort to comply with § 131-k-1, the Monroe County DSS stopped paying AFDC to Ms. Holley herself, although they continued payments to her six children, as they were U.S. citizens.[43] Ms. Holley sued the Monroe Country DSS and then-Commissioner of the New York State DSS Abe Lavine for her AFDC benefits.[44] Ms. Holley argued that § 131-k-1 was preempted by the federal "color of law" standard, and that § 131-k-1 ran afoul of the federal Equal Protection Clause.[45] The Western District of New York found that the New York law was not in conflict with the federal "color of law" standard.[46] On appeal, the Second Circuit questioned that ruling.[47] The Circuit's decision turned on "the meaning of 'permanently residing in the United States under color of law.'"[48]

The Second Circuit lamented that neither party could furnish legislative intent behind the federal statute.[49] New York argued that allowing persons like Ms. Holley to be in the United States unlawfully reflected a problem of "horrendous proportions," alleging financial ruin if states were charged with supporting people like Ms. Holley financially.[50] The

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[38] *Holley*, 553 F.2d at 847.

[39] *Id.* at 848. She resided continuously in the United States since 1954 "except for three months in 1958," although the opinion does not say why she left during that time. *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Holley*, 553 F.2d at 848.

[44] *Id.*

[45] Incidentally, the first time *Holley v. Lavine* went before the Second Circuit it produced a much shorter opinion wherein the Second Circuit overturned the district court judge's initial dismissal of these federal and constitutional claims. *See* Holley v. Lavine, 529 F.2d 1294, 1295-96 (2d Cir. 1976).

[46] *Holley*, 553 F.2d at 848.

[47] *Id.* at 848-49.

[48] *Id.* at 848 (quoting 45 C.F.R. § 233.50(b) (1977)).

[49] *Id.* at 849.

[50] *Id.*

court's response was that, although Ms. Holley did not have lawful immigration status, she was in the country "not . . . without the knowledge or permission of the Immigration and Naturalization Service."[51] The Second Circuit reasoned that Ms. Holley was in the United States with the government's knowledge and permission because "a responsible official" of the Immigration and Naturalization Service ("INS")—whose functions were transferred to three new entities under the newly formed Department of Homeland Security ("DHS") in 2003—had notified New York State that "'deportation proceedings have not been instituted . . . for humanitarian reasons' and the 'Service does not contemplate enforcing her departure from the United States at this time.'"[52] The court described some form of humanitarian deferred action, or special permission to defer her deportation, which Ms. Holley had been granted because she was the parent to six U.S. citizen dependents.[53]

After noting that Ms. Holley was present with the government's knowledge and permission, the Second Circuit provided a thoughtful definition of the phrase "color of law":

> It embraces not only situations within the body of the law, but also others enfolded by a colorable imitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.[54]

The court concluded that "official assurance that [a] parent will not be deported" rendered that parent someone residing "under color of law."[55] Reasoning that the INS had the discretion to not enforce the law against persons it had reason to allow to remain, such an assurance was evidence that the agency was exercising that discretion.[56]

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[51] *Holley*, 553 F.2d at 849.

[52] *Id.*

[53] *Id.* at 850. The opinion notes that the letter from INS actually specified that, "[s]hould the dependency of the children change, her case would be reviewed for possible action consistent with circumstances then existing," showing that Ms. Holley was granted deferred action at least in large part because she was caring for six U.S. citizen children.

[54] *Id.* at 849-50.

[55] *Id.* at 849.

[56] *Holley*, 553 F.2d at 850.

The respondents argued that the word "permanent" in "permanently residing under color of law" meant exactly that: the status had to be conceived of as one that would last indefinitely.[57] But the *Holley* court disagreed, invoking the doctrine of statutory interpretation known as *noscitur a sociis* and divining the meaning of "permanently" by looking at other parts of the Immigration and Nationality Act ("INA") to which the statute in question made reference.[58] From this the court concluded that "[a] relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual."[59] The court found that even though the government explicitly said that Ms. Holley could lose her PRUCOL status if she no longer had dependents, Ms. Holley's status was still permanent as the INA defined the term.[60] Today, as codified in federal law, the definition of "permanent" reflects the *Holley* court's interpretation.[61]

Ms. Holley was PRUCOL, the court held, and thus the INA preempted New York Social Services Law § 131-k-1 such that Ms. Holley remained eligible for AFDC.[62] The district court's opinion was reversed and remanded. As a result, New York was enjoined from enforcing § 131-k-1 and ultimately ordered to pay Ms. Holley all overdue AFDC back payments.[63] The U.S. Supreme Court denied New York's petition for a writ of certiorari.[64]

Holley laid the ground rules of PRUCOL. First, PRUCOL status is established when the non-citizen is in the United States with the government's knowledge and permission, and the government does not currently contemplate their deportation. Second, as described by the *Holley* court, "color of law" encompasses those cases that are, by definition, outside the

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[57] *Id.*

[58] *Id.* at 850-51.

[59] *Id.* (quoting 8 U.S.C. § 1101(a)(31) (1974)). The court noted that an extension was "highly probable" because, given Ms. Holley's attachments to the United States, in the court's opinion, "no executive department [was] likely to require her to return to a land she [had] left." *Id.* at 851.

[60] *Id.* at 850.

[61] 8 U.S.C. § 1101(a)(31) (2018) ("The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.").

[62] *Holley,* 553 F.2d at 851.

[63] Holley v. Lavine, 464 F. Supp. 718, 722 (W.D.N.Y. 1979). The 1979 district court opinion also held that the state of New York was not liable for damages to Ms. Holley. *Id.* at 721-23. However, Ms. Holley appealed the decision on damages and the State filed a cross-appeal on the other decisions against it, resulting in a final Second Circuit opinion that found for Ms. Holley on all claims, including damages. Holley v. Lavine, 605 F.2d 638 (2d. Cir. 1979).

[64] Russo v. Holley, 446 U.S. 913 (1980).

law. Lastly "permanently" does not mean permanent in a literal English sense, but rather as it is used elsewhere in the INA, to wit, a relationship that may be dissolved eventually.

Even though *Holley* provided a definition of PRUCOL, the definition was nonetheless complex enough that its precise application remained opaque. If *Holley* was the first time we received a definition of PRUCOL, *Berger v. Heckler* was the first time we received examples of circumstances that fall into *Holley*'s definition.

Manny Berger was a national of the Soviet Union who overstayed a visitor visa, surrendered to the INS in 1967, and was subsequently ordered deported.[65] The INS was unable to obtain travel documents, however, and Mr. Berger was given an order of supervision ("OSUP"),[66] a form of special permission to remain in the United States under the "supervision" of immigration authorities.[67] At some point in this process, Mr. Berger's SSI benefits were cut off, prompting him to sue the Secretary of Health and Human Services (HHS) in a class action.[68] Mr. Berger argued his OSUP made him PRUCOL, and the district court case partially turned on this issue.

In June 1978, Mr. Berger's district court class action resulted in a consent decree which, *inter alia*, said that persons with OSUPs and persons with pending visa petitions were PRUCOL.[69] The initial consent decree, in fact, listed some 22 different PRUCOL categories[70] but was later amended to include 15 categories in total.[71] HHS was eventually ordered to publish a list of 15 agreed-upon categories of PRUCOL non-citizens.[72] Codifying a list of PRUCOL categories was a natural way of giving clarity to a stubbornly vague definition, and the strategy of better defining PRUCOL through a list of categories has been used by many statutes and state public assistance administrations ever since.[73] This article proposes a taxonomy of its own in Part III.

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[65] Berger v. Heckler*,* 771 F.2d 1556, 1559 (2d. Cir. 1985).

[66] *Id.*

[67] *See* 8 C.F.R § 241.5(a) (2020).

[68] *Berger*, 771 F.2d at 1559. Emma Mena, an SSI recipient and cancer survivor, moved to intervene in Mr. Berger's case after her SSI was terminated because HHS did not think that her pending application for an immediate relative visa petition made her PRUCOL. *Id.*

[69] *Id.* at 1559-60.

[70] *Id.* at 1560.

[71] *Id.* at 1576 n.33.

[72] *Id.* at 1560.

[73] *See, e.g.*, CAL. CODE REGS. tit. 22, § 50301.3 (2020); 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(6) (1997); 130 MASS. CODE. REGS. 504.003(C) (2020); N.M. CODE R. § 8.106.100.7(B)(16) (LexisNexis 2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii) (2020).

The consent decree parties also agreed to a definition of PRUCOL that, though the *Berger* court does not explicit say so, echoes *Holley*:

> Any other alien residing in the United States with the knowledge and permission of the INS and whose departure from the United States the [INS] does not contemplate enforcing is also permanently residing in the United States under color of law and may be eligible for SSI benefits.[74]

The court added: "[W]e find that the phrase, 'under color of law,' is designed to be an open vessel—to be given substance by experience."[75] *Berger* thus reaffirmed *Holley*'s core principal of PRUCOL, to wit, that the phrase "encircles the law, its shadows, and its penumbra" is not meant to be applied rigidly and should, by definition, include those who are outside the law.[76]

The definitions, guidance, and list-strategy laid out in *Holley* and *Berger* have been relied upon by courts in nearly every jurisdiction where PRUCOL has come before a court or administrative tribunal.[77] After *Holley* and *Berger*, more federal district and appellate courts, as well as state courts, have applied the PRUCOL definition to a variety of immigration circumstances of applicants who have been denied access to Medicaid, SSI, AFDC, and FUTA entitlement programs. In each of these instances, courts have decided whether an applicant's immigration circumstance, which was neither obviously lawful nor obviously unlawful, conferred PRUCOL eligibility for the entitlement program. All such cases are discussed *infra* in Part III, where they are organized by the applicant's immigration circumstances.

D. PRWORA and the End of the PRUCOL Doctrine at the Federal Level

By 1985, the PRUCOL category of benefit eligibility, now given a working definition by the Second Circuit in *Holley* and *Berger*, could be found in four different federal public benefit programs: SSI, Medicaid, AFDC, and FUTA. This would remain the status quo until 1996.

That year, Congress passed the infamous Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which effectively

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[74] *Berger*, 771 F.2d at 1560 (alterations omitted).

[75] *Id.* at 1574.

[76] Holley v. Lavine, 553 F.2d 845, 849 (2d Cir. 1977).

[77] *See infra* Part III.

gutted many public assistance programs[78] and "end[ed] welfare as we know it."[79] Just one of the many ways it cut off millions from federal assistance was by mostly abolishing the PRUCOL doctrine at the federal level.[80] Under PRWORA, the SSI, Medicaid, and AFDC entitlement programs would be limited to what are now termed "qualified aliens," a much smaller pool of non-citizens that consists only of lawful permanent residents (green card holders), asylees, refugees, some parolees, and a few other categories that together compose a smaller number of immigrants.[81] If a PRUCOL individual had been receiving SSI prior to August 22, 1996, the date PRWORA went into effect, they could continue to receive it thereafter.[82]

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[78] Katherine Anne Paddock Betcher, *Revisiting the Personal Responsibility and Work Opportunity Reconciliation Act and Calling for Equality: Problematic Moral Regulations and the Changing Legal Status of LGBT Families in a New Obama Administration*, 31 WOMEN'S RTS. L. REP. 104, 104-05 (2009).

[79] *Id.* at 104 (quoting Chris Black, *Clinton Says He'll Sign Welfare Bill President Sees 'Step Forward'*, BOSTON GLOBE, Aug. 1, 1996, at A1). By changing AFDC into the TANF program, PRWORA subjected qualifying families to greater qualification requirements, limited the availability of benefits to a maximum of five years, and required recipients to participate in work activities after receiving benefits for two years.

[80] In the opinion of at least one commentator, that legislation abolished the PRUCOL doctrine. Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 745-51 (1998).

[81] 8 U.S.C. § 1641(b) (2018). Other categories include Cuban and Haitian entrants. *Id.* § 1641(b)(7).

[82] 8 U.S.C § 1612(a)(2)(E) (2018); *see also* Forcelledo v. Colvi, No. 3:15-cv-00824-AA, 2016 WL 1718193, at *3 (D. Or. Apr. 29, 2016) ("[T]he 'permanently residing under color of law' standard no longer generally applies to aliens applying for SSI.").

However, PRWORA did not affect FUTA, and the PRUCOL doctrine appears to have lived on at the federal and state levels per that legislation.[83] The federal FUTA eligibility requirement for non-citizens remains PRUCOL,[84] and every state,[85] the District of Columbia,[86] and the Virgin Islands[87] has a statute that allows PRUCOL individuals to access unemployment insurance under the local FUTA scheme. However, in practice, some states seem to define PRUCOL eligibility in this context as being "available to work," that is, in possession of valid work authorization.[88]

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[83] *See* 8 U.S.C. § 1621(d) (2018); Megrabian v. Saenz, 30 Cal. Rptr. 3d 262, 265 (Ct. App. 2005).

[84] 26 U.S.C. § 3304(a)(14)(A) (2020).

[85] ALA. CODE § 25-4-78(14)(a)(2) (2020); ALASKA STAT. ANN. § 23.20.281(b) (2020); ARIZ. REV. STAT. ANN. § 23-781(B) (2020); ARK. CODE. ANN. § 11-10-511(a) (West 2020); CAL. CODE REGS. tit. 22, § 1264-1(a)(1), (3) (2020); COLO. REV. STAT. ANN. § 8-73-107(7)(a)(III) (West 2020); CONN. GEN. STAT. ANN. § 31-227(f)(A) (West 2020); DEL. CODE ANN. tit. 19, § 3314(10)(a) (West 2020); FLA. STAT. ANN. § 443.101(7) (West 2020); GA. CODE ANN. § 34-8-196(d)(1) (West 2020); HAW. REV. STAT. ANN. § 383-29(d) (West 2020); IDAHO ADMIN CODE r. 09.01.30.125(01) (2019); 820 ILL. COMP. STAT. ANN. 405/614(b) (West 2020); ILL. ADMIN. CODE tit. 56, § 2905.1 (2020); IND. CODE ANN. § 22-4-14-9(b) (West 2020); IOWA CODE ANN. § 96.5(10) (West 2020); IOWA ADMIN. CODE r. 871-24.60(96) (2020); KAN. STAT. ANN. § 44-706(m) (West 2020); KY. REV. STAT. ANN. § 341.360(3)(a) (West 2020); LA. STAT. ANN. § 23:1600(6)(c)(I) (2019); ME. REV. STAT. ANN. tit. 26, § 1192(11) (2019); 10-144-103 ME. CODE R. § 2.2-5 (LexisNexis 2020); MD. CODE ANN., LAB. & EMPL. § 8-905(a)(3) (West 2020); 151A MASS. CODE REGS. 25(h) (2020); MICH. COMP. LAWS ANN. § 421.27(k)(1) (West 2020); MINN. STAT. ANN. § 268.085(12)(b)(3) (West 2020); MISS. CODE ANN. § 71-5-511(j)(i) (West 2020); MO. ANN. STAT. § 288.040(8) (West 2020); MONT. CODE ANN.§ 39-51-2110(1) (West 2020); NEB. REV. STAT. ANN. § 48-628.04(1)(c) (West 2020); NEV. REV. STAT. ANN. § 612.448(1)(c) (West 2020); N.H. REV. STAT. ANN. § 282-A:41(I), (II) (2020); N.J. STAT. ANN. § 43:21-4(i)(1) (West 2020); N.M. STAT. ANN. § 51-1-5(A), (F) (West 2020); N.Y. LAB. LAW § 590(9) (McKinney 2020); N.C. GEN. STAT. § 96-13(f)(1) (2020); N.D. CENT. CODE ANN. § 52-06-02(14) (West 2020); OHIO ADMIN. CODE § 4141.29(J) (2020); OKLA. STAT. ANN. tit. 40 § 2-208(1) (West 2020); OR. REV. STAT. ANN. § 657.184 (West 2020); 43 PA. STAT. AND CONS. STAT. ANN. § 802.3(a) (West 2020); 28 R.I. GEN. LAWS ANN. § 28-44-67(a) (West 2020); S.C. CODE ANN. § 41-35-67(1) (2020); S.D. CODIFIED LAWS § 61-6-34 (2020); TENN. CODE ANN. § 50-7-302(b)(4) (West 2020); TEX. LAB. CODE ANN. § 207.043(a)(3) (West 2019); UTAH CODE ANN. § 35A-4-405(10)(a) (West 2020); VT. STAT. ANN. tit. 21, § 1343(f)(1) (West 2020); VA. CODE ANN. § 60.2-617(A) (West 2020); WASH. REV. CODE ANN. § 50.20.098(1) (West 2020); W. VA. CODE ANN. § 21A-6-3(8)(a) (West 2020); WIS. STAT. ANN. § 108.04(18)(a) (West 2020); WYO. STAT. ANN. § 27-3-309(a) (West 2020).

[86] D.C. Code Ann. § 51-109(a)(9)(A) (West 2020).

[87] V.I. CODE ANN. tit. 24, § 12-304(a)(7)(A) (2020).

[88] *See, e.g.*, Matter of Diamond (HUDACS), 210 A.D.2d 835, 835-36 (N.Y. App. Div. 1994) (noting that N.Y. Labor Law 527(1)(a) disqualifies claimants from employment insurance if they are not "available for work," and looking to federal FUTA to define that as being in possession of valid work authorization). See also *infra* Section III.A.1 for other contexts in which PRUCOL status is limited to possession of valid work authorization.

In the wake of PRWORA and PRUCOL's federal demise for SSI, Medicaid, and AFDC (TANF after 1996), states were faced with a choice regarding citizenship eligibility for state-funded benefits. Under PRWORA, states could end the use of PRUCOL eligibility as the federal government had, or they could continue to provide state-funded benefits to PRUCOL individuals. To do so, they would need to pass a new law after PRWORA's effective date of August 22, 1996.[89] Some states did that.[90] Other states either abolished the PRUCOL doctrine or never updated their PRUCOL statutes or regulations, thereby allowing PRUCOL in their state to become preempted by PRWORA.[91]

At least seven states, including New York, have retained PRUCOL eligibility for state-funded Medicaid or Medicaid-like public health insurance schemes.[92] Virginia has retained PRUCOL eligibility for its HIV Premium Assistance program,[93] and Maryland has retained the doctrine

[89] 8 U.S.C. § 1621(d) (2018).

[90] *See* Megrabian v. Saenz, 30 Cal. Rptr. 3d 262, 265-67 (Ct. App. 2005) (discussing California's legislative efforts to retain PRUCOL eligibility for certain public benefits).

[91] *See e.g.*, 55 PA. CODE § 150.1(b)(3) (2020); S.C. CODE ANN. REGS. 126-515(B), 126-360(A), 114-1510(B)(3) (2020); S.D. ADMIN R. 67:12:01:14 (2020). New Jersey, for example, basically stayed in lockstep with the federal law. *See* Guaman v. Velez, 23 A.3d 451 (N.J. Super. Ct. App. Div. 2011) (discussing the comprehensive history of New Jersey Medicaid eligibility since PROWRA). Florida has also dropped its PRUCOL eligibility. *See* FLA. STAT. ANN. § 443.101(7) (West 2020).

[92] The states are California, Connecticut, Hawaii, Illinois, Massachusetts, New York, and Virginia. CAL. WELF. & INST. CODE § 14007.5(b) (West 2020); CAL. CODE REGS. tit. 22, §§ 50301(b)(4), 50301.6 (2020); CONN. GEN. STAT. ANN. § 17b-257b(a) (West 2020); HAW. REV. STAT. ANN. § 346-59.4(2) (West 2020); ILL. ADMIN. CODE tit. 89, §§ 118.500(a)(2), 120.310(b), 240.750 (2020); MASS. GEN. LAWS ANN. ch. 118E, §§ 9, 16D(2), 47A (West 2020); 130 MASS. CODE REGS. §§ 504.003(B)-(C), 505.004, 505.005(A)(1)-(5), 518.003(B)-(C), 519.013(A) (LexisNexis 2020); N.Y. SOC. SERV. LAW §§ 366(g)(1), 369-gg(8) (McKinney 2020); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 360-3.2(j)(ii), 360-3.6(a)(2) (2020); 12 VA. ADMIN. CODE §§ 30-10-170, 30-40-10 (2020).

[93] 12 VA. ADMIN. CODE § 30-100-260(1)(b) (2020).

for its Kidney Disease Program.[94] At least ten states[95] and the U.S. territory of Guam[96] have retained PRUCOL eligibility for means-tested, disability-based, or elderly-based cash assistance programs. Only a few states appear to refer to PRUCOL with respect to nutrition assistance programs; Florida has retained the PRUCOL definition to determine eligibility for its School and Nutrition Services,[97] while New Jersey,[98] Maine,[99] and Arkansas[100] say explicitly that PRUCOL individuals are *not* eligible for their state SNAP programs. Still other states have retained the doctrine for miscellaneous state benefits. One such state is Washington,[101] which retained the doctrine to determine eligibility for in-state college tuition at public universities.

New York was the only state in which the legislature abolished the PRUCOL doctrine for state-funded Medicaid by passing Social Services Law § 122, but that legislative act was overturned by the New York Court of Appeals in 2001 on state constitutional grounds, restoring PRUCOL eligibility to New York's Medicaid program.[102] In *Aliessa v. Novello*, the Court of Appeals held that Social Services Law § 122 was incompatible with Article XVII of the New York State Constitution, which obliges the state to provide assistance to the "needy."[103] The *Aliessa* court found that it was constitutionally impermissible to condition Medicaid eligibility on any criteria other than need, such as "alienage" restrictions.[104] In effect, the *Aliessa* court said that the state must provide the same benefit to PRUCOL individuals as it does to U.S. citizen state residents.[105] The

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[94] MD. CODE REGS. 10.30.01.09(B) (2020).

[95] These states are Connecticut, Maryland, Massachusetts, New Mexico, New York, North Carolina, Rhode Island, Tennessee, and Washington. CONN. GEN. STAT. ANN. §§ 17b-112c(a), 17b-342(a) (West 2020); MD. CODE REGS. 07.03.03.07(1)(b) (2020); MASS. GEN. LAWS ANN. ch. 117A, § 4 (2020); 106 MASS. CODE REGS. § 703.440(A)(3) (2020); N.M. STAT. ANN. §§ 8.106.100, 8.102.410 (2020); N.Y. SOC. SERV. LAW §§ 122(1)(c), 158(1)(g) (McKinney 2020); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 349.3(b)(1)(iv), 370.2(c)(6)(vii), 403.7(c) (2020); 10A N.C. ADMIN. CODE 71P.0902(a)(2) (2020); 40 R.I. GEN. LAWS §§ 40-6-3, 40-6-3.1(a), 40-6-27.1(b) (West 2020); 218 R.I. ADMIN. CODE 20-00-3.16.2 (LexisNexis 2020); TENN. COMP. R. & REGS. 1240-01-03-.08(2)(b), 1240-01-03-.12(2)(b)(1)(ii), 1240-01-47-.06(1)(b) (2020); WASH. REV. CODE ANN. §§ 74.04.805(1)(b), 74.62.030(3)(a) (2020).

[96] 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(6) (1997).

[97] FLA. STAT. ANN. § 595.408(1)(b) (West 2020).

[98] N.J. ADMIN. CODE 10:87–3.9(a)(2) (2020).

[99] 10-144-301 ME. CODE R. § FS-111-2 (LexisNexis 2020).

[100] 16-20-03 ARK. CODE R. § 162 (LexisNexis 2020).

[101] WASH. REV. CODE ANN. 28B.15.012(4)(b)(vi) (West 2020); *see also* the corresponding state regulation, WASH. ADMIN. CODE § 250-18-020(2)(b)(i) (2020).

[102] Aliessa *ex rel.* Fayad v. Novello, 96 N.Y.2d 418, 429 (2001).

[103] *Id.* at 428-29.

[104] *Id.* at 436.

[105] *Id.*

PRUCOL doctrine was thus restored to state Medicaid eligibility.[106] Meanwhile, New York had actually continued to use PRUCOL eligibility for a state-specific cash assistance program called Safety Net Assistance ("SNA") in part of the same 1997 law that was enacted in response to PWRORA.[107]

Today, state-funded Medicaid and SNA in New York continue to retain their PRUCOL restrictions.[108] However, because no statewide consensus on the definition of PRUCOL has ever emerged, various state agencies define the term differently. The State Department of Health ("DOH"), which administers the state's Medicaid program, provides a lengthy list of immigration circumstances that it contends confer PRUCOL eligibility, in an approach reminiscent of the *Berger* consent decree's list of PRUCOL categories.[109] The state's welfare administrative body, the Office of Temporary Disability Assistance ("OTDA"), which administers the SNA program, also provides a list of immigration circumstances that it sees as conferring PRUCOL eligibility, but this list is substantially shorter than the DOH's.[110] This disparity in PRUCOL definitions produces an unbalanced status quo in which many non-citizens qualify for Medicaid but not SNA: one state agency views them as PRUCOL, while the other does not.

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[106] *See, e.g.*, Brunswick Hosp. Ctr., Inc. v. Daines, No. 019223/09, 2010 WL 623707, at *2 (N.Y. Sup. Ct. Feb. 22, 2010).

[107] *See* Tonashka v. Weinberg, 678 N.Y.S.2d 883, 883 (Sup. Ct. 1998).

[108] S*ee* N.Y. SOC. SERV. LAW §§ 122(1)(c), 158(1)(g), 366(g) (McKinney 2020); *see also* MKB v. Eggleston, 445 F. Supp. 2d 400, 405 (S.D.N.Y. 2006) ("PRUCOL aliens, although ineligible for many federal benefits, may nonetheless qualify in New York for state-funded Medicaid and Safety Net Assistance.") (internal citations omitted).

[109] The New York State Department of Health has issued multiple guidance documents and letters setting PRUCOL guidelines: ADM-7 and ADM-8, both issued in 2004, were more generous, but INF-2 and INF-4, respectively issued in 2007 and 2008, were stricter and are discussed in some detail in *Brunswick*, 2010 WL 623707, at *2. *See* N.Y. DEP'T OF HEALTH, INF-4, CLARIFICATION OF PRUCOL STATUS FOR PURPOSES OF MEDICAID ELIGIBILITY (2008), https://perma.cc/PDE4-MKR8; N.Y. DEP'T OF HEALTH, INF-2, CLARIFICATION OF PRUCOL STATUS FOR PURPOSES OF MEDICAID ELIGIBILITY 2-3 (2007), https://perma.cc/HQQ3-MPKQ; N.Y. DEP'T OF HEALTH, ADM-8, *ALIESSA/ADAMOLEKUN V. NOVELLO* IMPLEMENTATION OF RETROACTIVE RELIEF TO CLASS MEMBERS (2004), https://perma.cc/VKN6-T6LQ; N.Y. DEP'T OF HEALTH, ADM-7, CITIZENSHIP AND ALIEN STATUS REQUIREMENTS FOR THE MEDICAID PROGRAM 19-20 (2004), https://perma.cc/L8CH-F6DE.

[110] N.Y. OFFICE OF TEMP. & DISABILITY ASSISTANCE, LDSS-4579, NON-CITIZEN ELIGIBILITY DESK AID 1 (2019), https://perma.cc/JZ7F-UMGB; *cf.* N.Y. DEP'T OF HEALTH, CITIZENSHIP AND IMMIGRANT ELIGIBILITY FOR HEALTH COVERAGE IN NEW YORK STATE 9-10 (2008), https://perma.cc/CTD4-AVTX. How DOH's list and the ODTA's list differ is addressed *infra* in Part III, where relevant. *See also* EMPIRE JUSTICE CTR., PUBLIC CHARGE AND IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS 2-6 (2020), https://perma.cc/4JDF-HRTW.

II. EXISTING SCHOLARSHIP ON THE PRUCOL DOCTRINE

Only a handful of scholarly articles and discussions have focused substantially on the PRUCOL doctrine. These include Professor Sharon Carton's 1990 article *The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits*[111] and Robert Rubin's 1987 *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits.*[112] While not focusing entirely on the PRUCOL doctrine, a few other authors have provided substantial analysis of its statutory origins and judicial construction in the context of different topics.[113] A few other authors, in mentioning the doctrine, have briefly discussed the *Holley* decision without addressing its progeny.[114] Otherwise, most references to the doctrine are cursory mentions beyond the scope of the discussions in which it is cited,[115] or else the doctrine is literally a footnote.[116] The doctrine also has its share of brief references in immigration and health publications.[117]

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[111] *See* Sharon F. Carton, *The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits*, 14 NOVA L. REV. 1033 (1990).

[112] Rubin, *supra* note 32.

[113] Calvo, *supra* note 21, at 411-17; Irene Scharf, *Preemption by Fiat: The Department of Labor's Usurpation of Power over Noncitizen Workers' Rights to Unemployment Benefits*, 56 ALB. L. REV. 561, 562-67 (1993) (discussing PRUCOL in the context of non-citizens' unemployment insurance eligibility); Sara N. Kominers*, Caught in the Gap Between Status and No-Status: Lawful Presence Then and Now,* 17 RUTGERS RACE & L. REV. 57, 58 (2016).

[114] *See, e.g.*, Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577, 598-99 (1996); Nabilah Irshad, *Medical Repatriations: Death Sentencing United States Immigrants*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 797, 802-03 (2012).

[115] *See, e.g.*, Fatma Marouf, *Alienage Classifications and the Denial of Health Care to Dreamers*, 93 WASH. U. L. REV. 1271, 1319 (2016); Anna C. Tavis, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627, 1637 (2010).

[116] *See, e.g.*, Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1424 n.37 (2014); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 19 B.C. THIRD WORLD L.J. 275, 323 n.247 (1998).

[117] *See, e.g.*, Teresa L. Beck et al., *Medical Care for Undocumented Immigrants: National and International Issues*, 44 PRIMARY CARE, at e1, e9 (2017); Marilyn R. Ellwood & Leighton Ku, *Welfare and Immigration Reforms: Unintended Side Effects for Medicaid*, 17 HEALTH AFF. 137, 145-46 (1998); Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339, 352 (1995); Charles Wheeler & Robert Leventhal, *Aliens' Rights to Public Benefits*, 20 CLEARINGHOUSE REV. 913, 914, 916-17 (1986); MAYSOUN FREIJ ET AL., N.Y. IMMIGRATION COAL., "MUTUAL RESPONSIBILITY": A STUDY OF UNINSURED IMMIGRANTS' PERSPECTIVES ON HEALTH INSURANCE IN NEW YORK CITY 5 (2010); Marvi S. Lacar, *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Implications for Hispanic Migrant Farmworkers* 3 (Julian Samora Research Inst., Working Paper No. 53, 2001).

III. APPLYING PRUCOL: A PRACTITIONER'S GUIDE AND TAXONOMY

Advising clients on whether or not they are PRUCOL for purposes of accessing their eligibility for public benefits can be challenging when their immigration status is ambiguous because the doctrine was deliberately designed to be vague and malleable. In the practice of immigration law there are an endless variety of circumstances that either do not fit neatly into those mentioned in a *Berger*-type list or otherwise raise questions about whether they fall under the *Holley* definition. It is precisely such circumstances that have given rise to the available case law.

The PRUCOL categories described below are solely the authors' designations and in no way reflect a designation articulated anywhere in the law. The categories are invented here only to provide a convenient index system for practitioners and a navigable taxonomy of immigration circumstances and their corollary PRUCOL category.

One more thing to consider when reviewing the PRUCOL taxonomy guide for practitioners: even though the federal PRUCOL doctrine was largely abolished in 1996, several states have continued to use the doctrine to determine non-citizen eligibility for various state-funded benefits. When they did so, courts in these states continued to rely upon pre-1996 federal case law that interpreted PRUCOL, starting with *Holley* and *Berger*, but including later federal cases discussed below as well.[118] As such, pre-PRWORA federal PRUCOL case law remains good law today in those jurisdictions that employ a state-PRUCOL designation, and so they are included where applicable below.

A. Category One: Approved Applications

There are many forms of immigration relief that can be applied for but that, if approved, do not confer "qualified alien" benefit eligibility status.[119] These include approved applications for Temporary Protected Status (TPS), U and S non-immigrant visas, parole for less than one year, some valid work authorizations, and certain prosecutorial discretionary relief, such as deferred action. Generally, where individuals with such statuses have applied for and been granted some form of relief in immigration law, the courts are most likely to find that they are PRUCOL.

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[118] *See, e.g.*, Brunswick Hosp. Ctr., Inc. v. Daines, No. 019223/09, 2010 WL 623707 (N.Y. Sup. Ct. Feb. 22, 2010) (relying on Holley and Berger); Tonashka v. Weinberg, 678 N.Y.S.2d 883, 884-85 (Sup. Ct. 1998) (relying on the pre-PRWORA progeny of Holley and Berger).

[119] Velasquez v. Sec'y of Dep't of Health & Human Servs., 581 F. Supp. 16 (E.D.N.Y. 1984); *see also* Smart v. Shalala, 9 F.3d 921, 923 (11th Cir. 1993) (noting that PRUCOL status is not the equivalent of being lawfully admitted for permanent residence).

1. Approved Employment Authorization Documents

Perhaps the most common approved application that courts regard as conferring PRUCOL status is the approved work permit, or Employment Authorization Document ("EAD").[120]

Mr. Jose N. Vazquez, a national of Argentina, had a valid work permit, which he received because of a pending asylum application.[121] Mr. Vazquez applied for and was denied unemployment benefits based on his alleged lack of PRUCOL eligibility during the time he had the valid work permit, so he sued the Indiana Board of Employment.[122] The reviewing state court noted that while Mr. Vazquez lacked explicit permission to remain in the United States, unlike the *Holley* claimant, courts in five other states had relied on a valid work permit as grounds for finding someone PRUCOL.[123] Finding this consensus persuasive, the *Vazquez* court found Mr. Vazquez PRUCOL "until and unless this [work] authorization is terminated by the denial of Vazquez's petition for asylum and/or legal proceedings of deportation."[124]

In *Alfred v. Florida Department of Labor*, 26 Haitian nationals were found PRUCOL during the period in which they had valid work permits.[125] The court found them PRUCOL and eligible for unemployment benefits under FUTA because the government had given no indication that their deportation was planned or being pursued,[126] even though the state of Florida had argued that the Haitian nationals were not PRUCOL because they had not been given an affirmative written statement that the government did not intend to deport them. The *Alfred* court disagreed, identifying their work permits as enough proof that deportation was not currently the government's intention.[127]

The Superior Court of New Jersey has also endorsed the contention, in an unpublished opinion, that a valid work permit makes one PRUCOL.[128] The Superior Court explained that Zbigniew Cieslewicz, a national of Poland, would have been PRUCOL during the time he worked,

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[120] *E.g.*, Castillo v. Jackson, 566 N.E.2d 404, 407 (Ill. App. Ct. 1990).

[121] Vazquez v. Review Bd. of Ind. Emp't Sec. Div., 487 N.E.2d 171, 171-72 (Ind. Ct. App. 1985).

[122] *Id.* at 172.

[123] *Id.* at 174-75.

[124] *Id.* at 175.

[125] Alfred v. Fla. Dep't of Labor & Emp't Sec., 487 So. 2d 355, 356-58 (Fla. Dist. Ct. App. 1986).

[126] *Id.* at 357-58.

[127] *Id.* at 358.

[128] Cieslewicz v. Bd. of Review, No. 161,531, 2009 WL 804400, at *1 (N.J. Super. Ct. App. Div. Mar. 30, 2009).

and thus was eligible to receive unemployment benefits, if he had a valid work permit during his period of employment.[129]

A number of Colorado state court decisions have also found that individuals in possession of valid work permits procured during pending applications to adjust status were PRUCOL.[130] One Colorado state court found Mustapha Yatribi was PRUCOL for purposes of FUTA eligibility: Mr. Yatribi had a pending application for adjustment of status, but the court seemed to rely more on the valid work permit granted to him while his application was pending as the primary factor conferring PRUCOL eligibility.[131]

2. Grants of Prosecutorial Discretion

Prosecutorial discretion refers to an instance in which the immigration authority "refrain[s] from asserting the full scope of the agency's enforcement authority in a particular case."[132] The most conspicuous exercises of this discretion include stays or deferrals of deportation by U.S. Immigration and Customs Enforcement for individuals who otherwise have no status or defense from deportation. It also includes permission to enter the United States via the issuance of parole by U.S. Customs and Border Protection for individuals who otherwise have no means of lawful entry into the country.[133]

Post-deportation order grants of prosecutorial discretion, such as stays of deportation, suspension of deportation, and deferred action (which refers to the deferral of deportation) are widely recognized as conferring PRUCOL eligibility. Voluntary departure is a form of discretionary relief in which no order of deportation is issued, but the individual is required to leave "voluntarily" by a certain date.[134] The federal regulation listing PRUCOL categories[135] includes stays of deportation and voluntary

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[129] *Id.*

[130] *See, e.g.*, Indus. Comm'n v. Arteaga, 735 P.2d 473, 482 (Colo. 1987); Yatribi v. Indus. Comm'n of Colo., 700 P.2d 929, 931 (Colo. App. 1985); Zanjani v. Indus. Comm'n, 703 P.2d 652, 653-54 (Colo. App. 1985).

[131] *Yatribi*, 700 P.2d at 931 ("[P]etitioner was eligible for unemployment compensation benefits when he received work authorization from the INS.").

[132] WADHIA, *supra* note 18, at 7.

[133] *Id.* at 11.

[134] *See* 8 U.S.C. § 1229c (2018).

[135] While the federal PRUCOL regulation is no longer in use after welfare reform and PRWORA, we are referencing it here to provide some context.

departure, both general[136] and indefinite,[137] as well as suspension of deportation[138] and deferred action.[139] California's Medi-Cal program lists post-deportation order grants of prosecutorial discretion, including indefinite and extended voluntary departure, as conferring PRUCOL status.[140] The same goes for New Mexico's state Medicaid regulations,[141] Pennsylvania's public assistance PRUCOL definitions (now preempted by PRWORA),[142] and the territory of Guam's public assistance regulation.[143] New York's DOH likewise lists all of these grants of discretion among its list of PRUCOL statuses,[144] and both New York's OTDA and DOH agree that deferred action confers PRUCOL status.[145] Massachusetts's PRUCOL definition lists the same,[146] with the exception that instead of listing deferred action generally, it is the only regulation that explicitly includes Deferred Action for Childhood Arrivals ("DACA").[147] Rhode Island's public assistance program once listed general and extended voluntary departure and stays of deportation, before it was repealed in 2018,[148] while Colorado's[149] and Iowa's[150] definitions of PRUCOLfor purposes of unemployment insurence currently list only deferred action generally as a PRUCOL category.

Not surprisingly, the amended *Berger* consent decree listed stays of deportation, suspension of deportation, deferred action, and voluntary departure among its PRUCOL categories.[151] Other than *Holley*, in which the plaintiff certainly had deferred action (although it was not called that by

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[136] 20 C.F.R. § 416.1618(b)(7) (2020) (stay of deportation under 8 U.S.C. § 1105a); *id.* at § 416.1618(b)(10) (voluntary departure under 8 U.S.C. § 1252(b)).

[137] *Id.* § 416.1618(b)(3) (indefinite stay of deportation); *id.* at § 416.1618(b)(4) (indefinite voluntary departure).

[138] *Id.* § 416.1618(b)(14).

[139] *Id.* § 416.1618(b)(11).

[140] CAL. CODE REGS. tit. 22, § 50301.3(d), (e), (h), (l), (n), (q) (2020).

[141] N.M. CODE R. §§ 8.106.100.7(B)(16)(a), (b)(iv), (b)(x)-(xi), (b)(xiv), (b)(xvi), 8.200.410.11 (LexisNexis 2020).

[142] 55 PA. CODE § 150.1(b)(3)(iii)-(iv), (vii), (x)-(xi), (xiv), (xvi) (2020).

[143] 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(6)(vi)-(x) (1997). However, Guam's regulation adds voluntary departure grants of "not less than one year." *Id.* § 1822(g)(30)(A)(6)(viii).

[144] N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(c)-(d), (g)-(h), (k) (2020).

[145] *Id.* § 360-3.2(j)(1)(ii)(*i*); *see also* N.Y. OFFICE OF TEMP. & DISABILITY ASSISTANCE, *supra* note 110, at 1, 7.

[146] 130 MASS. CODE REGS. 504.003(C) (LexisNexis 2020).

[147] *Id.* at 504.003(A)(3)(c)(6), (C)(1)-(2), (4), (7).

[148] 39-2 R.I. CODE R. § 0104 (LexisNexis 2020) (repealed 2018).

[149] COLO. REV. STAT. ANN. § 8-73-107(7)(a)(III)(E) (West 2020).

[150] IOWA ADMIN. CODE r. 871-24.60(96)(3)(b)(6) (2020).

[151] Berger v. Heckler, 771 F.2d 1556, 1576 n.33 (2d Cir. 1985).

name),[152] no other case law opines directly on whether or not these prosecutorial discretion statuses in particular are PRUCOL. The question is so little posed probably because of the very common acceptance of their PRUCOL eligibility in state regulations and *Holley*. Prosecutorial discretion is the most traditional and widely accepted form of PRUCOL status.

While an individual with a grant of parole that exceeds one year became a "qualified alien" after PRWORA,[153] there is wide acceptance among jurisdictions that parole of any shorter duration continues to confer PRUCOL designation. The federal regulation that once provided the PRUCOL list for purposes of SSI—published as a result of the *Berger* consent decree—explicitly lists "temporary parole status" as establishing PRUCOL status.[154] Most states spell out explicitly in their state-FUTA PRUCOL eligibility statutes or regulations that the definition of PRUCOL includes those non-citizens "lawfully present in the United States as a result of the application of the provisions of § 212(d)(5) of the INA,"[155] which describes parole. New York State's Medicaid regulations state that persons paroled into the United States for less than one year are PRUCOL.[156] California's Medi-Cal program regulation, Rhode Island's former public assistance regulation, Tennessee's cash assistance regulation, Guam's public assistance regulation, and one Iowa social services statute also explicitly list parolees under INA § 212 as PRUCOL.[157] Similarly, many of the pre-PRWORA regulations also list conditional entrants, a form of parole, as PRUCOL,[158] even though conditional entrants became qualified aliens after PRWORA.[159]

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[152] The plaintiff in *Holley* was "covered by a letter from the Department of Justice stating that the Immigration and Naturalization Service 'does not contemplate enforcing . . . [her] . . . departure from the United States at this time,'" which was effectively a grant of deferred action. Holley v. Lavine, 553 F.2d 845, 849 (2d Cir. 1977).

[153] 8 U.S.C. § 1641(b)(4) (2018).

[154] 45 C.F.R. § 233.50(b)(4) (2020).

[155] *E.g.*, ARK. CODE ANN. § 11-10-511(a) (West 2020); CAL. UNEMP. INS. CODE § 1264(a)(1) (West 2020); DEL. CODE ANN. tit. 19, § 3314(10) (West 2020); IOWA CODE ANN. § 96.5(10) (West 2020); LA. STAT. ANN. § 23:1600(6)(c)(I) (2019); 10-144-103 ME. CODE R. § 2.2-5 (LexisNexis 2020); OR. REV. STAT. § 657.184 (2020).

[156] N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(a) (2020).

[157] CAL. CODE REGS. tit. 22, § 50301.3(b) (2020) ("INS Form I-94, with notation that the alien has been paroled into the United States pursuant to INA section 212(d)(5)"); 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(6)(iii) (1997); IOWA CODE ANN. § 96.5(10) (West 2020); IOWA ADMIN. CODE r. 871-24.60(96)(3)(b)(3) (2020); 39-2 R.I. CODE R. § 0104 (repealed 2018); TENN. COMP. R. & REGS. 1240-1-3-.12(2)(b)(1)(ii)(IV) (2020).

[158] 20 C.F.R. § 416.1618(b)(1)-(2) (2020); 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(i) (1997); N.M. CODE R. § 8.200.410.11 (2020); 39-2 R.I. CODE R. § 0104, 0104.05 (repealed 2018); TENN. COMP. R. & REGS. 1240-1-3-.12(2)(b)(ii)(II) (2020); WASH. REV. CODE ANN. 28B.15.012(4)(b) (West 2020).

[159] 8 U.S.C. § 1641(b)(6)-(7) (2018).

At least two state courts concur that conditional entrants and parolees are PRUCOL. One Florida court has designated those granted the same under sections 203(a)(7) and 212(d)(5) of the INA as PRUCOL.[160] In a Minnesota case, *Flores v. Department of Jobs and Training*, the Department of Jobs and Training conceded that Juana Flores was PRUCOL when she had been paroled into the United States but had not been given authorization to work.[161] The Supreme Court of Minnesota upheld the lower court's decision and noted that the Department of Jobs and Training went so far as to concede that Ms. Flores was PRUCOL, even after her parole had expired, because INS took no steps to deport her months after its expiration.[162]

3. "Temporary" Status

The Immigration Reform and Control Act (IRCA) was passed in 1986. The Act allowed certain non-citizens present in the United States since 1982 to apply for "temporary resident status."[163] Section 201(h)(1) of IRCA, however, explicitly precluded recipients of temporary resident status from being considered PRUCOL for purposes of Medicaid, food stamps, and any other means-tested state or federal benefits.[164] This was despite the federal regulation that lists temporary resident status as a PRUCOL category.[165] Reading this regulation together with the statute excluding means-tested benefits from PRUCOL eligibility implied that temporary permanent residents were nonetheless eligible for unemployment insurance, which is not means-tested. Only one state court has addressed whether temporary residents are PRUCOL for FUTA purposes.

The Supreme Court of Illinois considered this question in *Castillo v. Jackson* in 1992.[166] Two FUTA applicants, Victorino Castillo and Alberto Jimenez, argued that they were PRUCOL because unemployment insurance under FUTA was not Medicaid, food stamps, or otherwise means-tested, and thus an exception to IRCA's section 201(h)(1).[167] The *Castillo* court appeared to agree with the appellants and proceeded to determine whether or not they were PRUCOL.[168] Relying on *Holley*'s definition of

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[160] Alfred v. Fla. Dep't of Labor & Emp't Sec., 487 So. 2d 355, 357 (Fla. Dist. Ct. App. 1986).

[161] Flores v. Dep't of Jobs & Training, 393 N.W.2d 231, 232 (Minn. Ct. App. 1986).

[162] Flores v. Dep't of Jobs & Training, 411 N.W.2d 499, 501, 504 (Minn. 1987).

[163] Ortega de Robles v. Immigration & Naturalization Serv., 58 F.3d 1355, 1359 (9th Cir. 1995).

[164] 8 U.S.C. § 1255a(h)(1) (2018).

[165] 20 C.F.R. § 416.1618(b)(16) (2020).

[166] Castillo v. Jackson, 594 N.E.2d 323 (Ill. 1992).

[167] *Id.* at 329.

[168] *Id.* at 329-30.

"permanent," the Illinois Supreme Court said that temporary residence status was a "permanent" status despite its contrary-sounding name because the permanence of one's status is determined "by the nature and not simply the title of [one's] immigration status."[169] Despite its name, temporary residence can be conferred on someone with no intention of returning to their country of origin and has no defined end to its duration.[170] The Court noted that the appellants in the case had continuously resided in the United States for years, paid taxes, held long-term jobs, and had no principal dwelling place "anywhere but this country."[171] The Court thus held that they were in the United States "permanently" under *Holley*'s interpretation of that term.[172] Again looking to *Holley*, the Court also agreed that they were residing "under color of law" because their statuses placed them in "a class of aliens covered by an INS policy or statutory mandate not to deport."[173]

A Wisconsin state court, on the other hand, dodged the question of whether or not a beneficiary of temporary resident status under IRCA was PRUCOL.[174] Frederick N. Pickering was a national of Jamaica who was granted temporary resident status and work authorization under IRCA.[175] Before he was granted temporary residency, however, Mr. Pickering lost his job, applied for unemployment insurance, and received it. The Department of Industry, Labor and Human Relations later decided that he received it improperly.[176] FUTA required that an applicant be PRUCOL during the period of work in question, and as Mr. Pickering's alleged PRUCOL status began after his work ended, the Wisconsin court upheld the lower court's decision, finding PRUCOL status could not apply retroactively.[177] But the court did so without ever addressing whether or not IRCA relief made Mr. Pickering PRUCOL.[178]

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169 *Id.* at 332 (citing Castillo v. Jackson, 566 N.E.2d 404, 411 (Ill. App. Ct. 1990)).

170 *Id.* at 331.

171 *Id.*

172 *Castillo*, 594 N.E.2d at 332.

173 *Id.* at 333.

174 Pickering v. Labor & Indus. Review Comm'n, 456 N.W.2d 874 (Wis. Ct. App. 1990).

175 *Id.* at 875, 877 (noting that "courts ruling that PRUCOL status was conferred by INS action or policy have held that such status was attained when INS knew of and acquiesced to an alien's presence and not before" and citing to decisions from Colorado, Florida, and Indiana).

176 *Id.* at 875.

177 *Id.* at 877-78.

178 *Id.*

Generally, temporary residence status under IRCA does not appear on any state's list of PRUCOL categories.[179] Only Guam's public assistance regulation lists temporary resident status holders as PRUCOL, and then only if they are also conditional entrants, have also adjusted to lawful permanent resident ("LPR") status five years before applying for the benefit, or are an adult recipient of certain local benefit programs.[180]

TPS is another temporary form of lawful permission to remain in the United States, usually for six- or 18-month increments, with the possibility that this permission will be renewable at the end of that period.[181] The status is country-specific and is provided to nationals of states who are so afflicted with humanitarian disaster (*e.g.*, the civil war in Syria, or the 2010 earthquake in Haiti) that the state department designates these nationals as excused from deportation.[182] Persons with TPS are eligible to receive work permits.[183] The most significant barriers to persons with TPS receiving recognition as PRUCOL are the federal statute and regulation that explicitly preclude holders of TPS from PRUCOL eligibility.[184] Only one state, New York, has found a way around this federal rule.

In *Karamalla v. Devine*, the Supreme Court of Erie Country, New York, recently found that TPS holders should be entitled to the same benefit as PRUCOL individuals.[185] Yousif Karamalla, a national of Sudan with TPS, applied for and was denied Safety Net Assistance, the New York State cash benefit contingent on PRUCOL eligibility.[186] *Karamalla*, however, differs from the typical PRUCOL case because the court did not determine whether or not TPS status conferred PRUCOL eligibility. Instead, the court analyzed whether or not Mr. Karamalla's TPS entitled him to the same benefits as PRUCOL persons on equal protection and other state constitutional grounds. [187] The court found that he was entitled on these grounds but without making any pronouncements about whether or not TPS holders are themselves PRUCOL.[188]

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[179] *See e.g.*, CAL. CODE REGS. tit. 22, § 50301.3 (2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2 (2020).

[180] 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(6)(xii) (2020).

[181] 8 U.S.C § 1254a (2018).

[182] *See, e.g.*, Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19026-01 (Mar. 29, 2012); Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476-02 (Jan. 21, 2010); *see also Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://perma.cc/XX5R-KQK5 (last updated Mar. 30, 2020).

[183] 8 U.S.C. § 1254a(a)(1)(B) (2018).

[184] *Id.* § 1254a(f); 20 C.F.R. § 416.1619 (2020).

[185] Karamalla v. Devine, Index No. 00107-2015, at 9 (N.Y. Sup. Ct. Feb. 23, 2016), *aff'd*, 73 N.Y.S.3d 819 (App. Div. 2018).

[186] *Id.* at 2.

[187] *See id.* at 7-9.

[188] *Id.* at 7, 8.

Nevertheless, the court noted inconsistencies in any PRUCOL definition that would include applicants with parole, deferred action, or orders of supervision, but not TPS—a distinction made by the state agency that denied Mr. Karamalla public benefits.[189] The court held that it was arbitrary and capricious that people with pending deportations should receive public benefits "while Mr. Karamalla, a law abiding individual with no deportation order, should fall outside the [safety] net. Both may be waiting for conditions in their home country to improve but only the one ordered deported or supervised gets assistance? This is not reasoning deserving of deference."[190] While not speaking directly on the PRUCOL doctrine, the court made a helpful criticism about why a literal interpretation of the word "temporary" produces inconsistent results that seem inherently unfair. The court's decision also speaks to the counterintuitive nature of some PRUCOL designations discussed below.[191] Following the *Karamalla* decision, New York State's OTDA issued a policy statement indicating that it would now consider TPS holders PRUCOL.[192]

4. Approved Forms I-130

To become a permanent resident through a family relation, one must file both a "Petition for Alien Relative," Form I-130, and an Application to Register Permanent Residence, Form I-485. The I-130 is filed to establish a bona fide relationship between the prospective immigrant and the sponsoring relative. The I-485 application is solely to prove that the applicant meets the requirements of permanent residency. In many cases, the I-130 is filed first. The federal SSI PRUCOL regulation considers individuals with an approved I-130 to be PRUCOL.[193] Several state statutes and regulations, including New York's DOH regulation, California's Medi-Cal program, Massachusetts's medical assistance program, Pennsylvania's public assistance regulation (now preempted by PRWORA),

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[189] *Id.* at 8-9.

[190] *Karamalla*, Index No. 00107-2015, at 9.

[191] See discussion of Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985), *infra* Section III.B.3.

[192] *See* N.Y. OFFICE OF TEMP. & DISABILITY ASSISTANCE, GIS 16 TA/DC053, BENEFICIARIES OF TEMPORARY PROTECTED STATUS (TPS) RECOGNIZED AS PERMANENTLY RESIDING UNDER COLOR OF LAW (PRUCOL) FOR SAFETY NET ASSISTANCE (SNA) (2016), https://perma.cc/9PKH-E9FJ.

[193] 20 C.F.R. § 416.1618(b)(5) (2020) (describing "[a]liens on whose behalf an immediate relative petition has been approved and their families covered by the petition" as PRUCOL).

and New Mexico's Medicaid program also designate people with approved I-130s as such.[194] Only two administrative courts have ever considered the question of whether or not such persons are PRUCOL.

New Jersey's Division of Economic Assistance has at least twice held that an approved I-130 confers PRUCOL eligibility.[195] In one pre-PRWORA case, A.S. appealed Passaic County's decision to remove her from Medicaid and AFDC.[196] Relying on *Holley* and a handful of similar state cases discussed *infra,* the Division found that she was PRUCOL because the then INS had taken no steps to deport her following the approval of her I-130.[197] The Division also noted that the only reason an immigrant visa (for LPR status) had not been issued to A.S. was because of the backlog of cases resulting from heavy demand.[198] While the opinion does not specify, these facts imply that A.S. had an approved I-130 but was not yet able to file the I-485 application for permanent residence. This raises the question of whether or not an individual with an approved I-130 would still be PRUCOL if they were nonetheless ineligible to apply for a visa for any reason, such as inadmissibility. This particular case thus leaves open the question of whether or not an approved I-130 is always sufficient to confer PRUCOL eligibility, or whether it must be an approved I-130 recipient *who is also eligible for an immigrant visa*.

In another case before New Jersey's Division of Economic Assistance, C.C., an Italian national who was denied AFDC and Medicaid, likewise held an approved Form I-130.[199] In that case, C.C.'s U.S. citizen-spouse had filed the I-130 to petition for her.[200] Following their separation on account of domestic violence,[201] C.C. filed an I-360 application to self-

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[194] CAL. CODE REGS. tit. 22, § 50301.3(f) (2020); 130 MASS. CODE REGS. 518.003(C)(3), (10) (LexisNexis 2020) (describing "noncitizens who have filed an application, petition, or request to obtain a lawfully present status that has been accepted as properly filed" as PRUCOL); N.M. CODE R. § 8.106.100.7(B)(16)(b)(v) (LexisNexis 2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2 (j)(1)(ii)(*e*) (2020); 55 PA. CODE § 150.1(b)(3)(v) (2020).

[195] *See* C.C. v. Hudson Cty. Div. of Welfare, No. HPW 12128-95, 1996 WL 669189 (N.J. Adm. March 27, 1996); A.S. v. Passaic Cty. Bd. of Soc. Servs., No. HPW 2528-95, 1995 WL 605372 (N.J. Adm. June 16, 1995).

[196] *A.S.*, 1995 WL 605372, at *1.

[197] *Id.* at *5.

[198] *Id.*

[199] *C.C.*, 1996 WL 669189, at *1.

[200] *Id.*

[201] The opinion does not say if the I-485 was rejected, denied or withdrawn, but implies that one of these occurred, both because C.C. must take an alternative route to adjustment of status and because the opinion never cites to a pending I-485 as reason to confer PRUCOL status. Also, in the general course of USCIS practice, if an interview cannot be completed, the adjustment application is eventually rejected or denied.

petition under the Violence Against Women Act (VAWA).[202] The opinion did not say if the I-360 had yet been approved but noted that the I-485 had not yet been filed because C.C.'s counsel was awaiting further evidence to include in the application.[203] The Division noted, however, that the initial I-130 was approved and that "adjustment of status can be achieved," making C.C.'s case "even stronger than that of the plaintiff in *Holley*," who had no approved application.[204]

5. Non-Immigrant Visas

Individuals with approved applications for non-immigrant visas, whose approved applications this taxonomy might assume places them into Category A, are generally not regarded as PRUCOL by many administrative agencies and courts. This is because non-immigrant visas are generally not considered "permanent," even as *Holley* uses the term. It should be noted that non-immigrant visa holders are designated as lawfully present immigrants for purposes of health insurance under the ACA; however, they are generally not considered PRUCOL for all other types of benefits.

Generally, state statutes and regulations do not list or include non-immigrant visas such as foreign or exchange student, or visitor visas in their lists or definitions of PRUCOL.[205] The federal PRUCOL list explicitly says "[n]one of the categories allows SSI eligibility for non-immigrants."[206]

Sometimes treated differently, however, are the "special" non-immigrant visas, specifically the U, T, and S visas for victims of qualifying crimes, victims of human trafficking, and witnesses against criminal defendants, respectively, and the K and V visas, for fiancées of USCs or LPRs and relatives of applicants for adjustment of status, respectively.[207] S, K, V, and T non-immigrant visa holders are considered PRUCOL under New York's DOH definition.[208] Another exception is Pennsylvania's public assistance PRUCOL list (now preempted by PROWRA), which included "permanent nonimmigrants as established by the Compact of

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[202] *C.C.*, 1996 WL 669189, at *2 ("[S]he filed for immigration benefits for herself and her three children under the Violence Against Women Act (VAWA)").

[203] *Id.*

[204] *Id.* at *4.

[205] *See, e.g.*, 20 C.F.R. § 416.1618(b) (2020).

[206] 20 C.F.R. § 416.1618(b) (2020).

[207] 8 U.S.C. § 1101(a)(15)(K)(i), (S)-(V). T-visa non-immigrant visa holders, who are victims of human trafficking, are considered qualified aliens under federal law. 8 U.S.C. § 1641(c)(4) (2018).

[208] *See* N.Y. DEP'T OF HEALTH, *supra* note 110, at 10-11.

Free Association Act of 1985,"[209] referring to special non-immigrant visas available to nationals of certain Pacific Island nations.[210] Even this is an extremely narrow category of non-immigrants. No court has yet examined the PRUCOL eligibility of a special non-immigrant, but most of the case law that has taken up the question of whether conventional non-immigrants are PRUCOL has concluded that they are not.

An Alabama state court, for example, found that one Dr. Joseph, a national of Jamaica, was not PRUCOL despite his current H1-B visa.[211] An H1-B visa is a non-immigrant work visa that expires on a specific date, and the court held that the visa did not satisfy *Holley*'s definition of "permanent" because it was "specifically for a nonimmigrant status with a definite ending."[212] In *Sharma v. Board of Review*, a New Jersey court likewise held that both an H1-B and a TN visa[213] did not render their holder PRUCOL.[214] In that unpublished decision, the New Jersey court said that Anil Sharma, a citizen of Canada, was ineligible for unemployment benefits because, *inter alia*, he was not a permanent legal resident and not PRUCOL.[215] The court gave little explanation for how it reached this conclusion but like other courts seemed focused on the idea that the non-immigrant visa was not "permanent" enough.[216]

A lower court case from Florida, *Madourie v. State Department of Health and Rehabilitative Services*, came to a similar conclusion.[217] At issue was not whether the denied applicant for AFDC benefits, Jamaican national Denise Madourie, was PRUCOL, but rather whether or not she was a resident of Florida.[218] Residency of Florida was another requirement of AFDC eligibility in the state at the time, separate from PRUCOL status, but the court found that the Jamaican national was not a resident because she held only a non-immigrant B2 visitor visa (colloquially known as a tourist visa).[219] The court pointed to the purpose of the non-immigrant visa, which is explicitly for those who do not intend to stay

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[209] 55 PA. CODE § 150.1(b)(3)(xvi) (2020).

[210] Kevin Morris, *Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance*, 41 U. Haw. L. Rev. 384, 402 (2019).

[211] Joseph v. State, 600 So. 2d 298, 301 (Ala. Civ. App. 1992).

[212] *Id.*

[213] 8 C.F.R. § 214.6(a) (2020). A TN visa is a special visa for temporary professionals who are Canadian or Mexican nationals.

[214] Sharma v. Bd. of Review, A-0607-11T2, 2013 WL 1222672, at *2 (N.J. Super. Ct. App. Div. 2013).

[215] *Id.*

[216] *Id.*

[217] Madourie v. Dep't of Health & Rehab. Servs., 667 So. 2d 237, 238 (Fla. Dist. Ct. App. 1995) (finding that plaintiff's B-2 visa "renders her statement of residency questionable").

[218] *Id.*

[219] *Id.*

permanently in the United States.[220] Despite numerous renewals of her B2 visa, the court held that the nature of the visa meant that Ms. Madourie did not intend to immigrate permanently into the country and therefore could not be considered a Florida resident.[221] The case, while not speaking directly on the PRUCOL doctrine, nonetheless reinforces the idea that non-immigrant visas fail to satisfy the permanency requirement of PRUCOL. Other state courts have reached similar conclusions about the non-permanency of non-immigrant visas, albeit outside the context of the PRUCOL doctrine.[222]

Only a couple of cases have differed in their conclusions. In 1993, a North Carolina state court found that those holding valid Seasonal Agricultural Worker ("SAW") non-immigrant visas were "lawfully present"[223] and, so it follows *a fortiori*, PRUCOL. David R. Hopkins was a tobacco farmer who employed, among others, persons with SAW non-immigrant visas.[224] Mr. Hopkins, who was required by North Carolina law to pay unemployment taxes on his employees, argued that he should not have to pay those taxes on SAW employees because they were themselves not eligible for unemployment insurance benefits.[225] The Court of Appeals of North Carolina found that the SAW employees were lawfully present and thus eligible for unemployment insurance benefits in the state.[226] However, one who is lawfully present is also PRUCOL,[227] and thus the decision provides authority for the proposition that SAW non-immigrant visa holders are PRUCOL.

In *M.R. v. Passaic County Board of Social Services*, a decision by New Jersey's Division of Economic Assistance, a national of Zambia who

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[220] *Id.* at 238-39.

[221] *Id.* at 239.

[222] *See* Pinilla v. Bd. of Review in Dep't of Labor & Indus., 382 A.2d 921, 923 (N.J. Super. Ct. App. Div. 1978) (finding that a non-immigrant B2 visitor visa holder was in the United States temporarily and unauthorized to work in the country, and thus not eligible for unemployment benefits during the time she worked); Jimoh v. Unemp't Comp. Bd. of Review, 902 A.2d 608, 611 (Pa. Commw. Ct. 2006) (declining to rule on the question of whether the F-1 visa holder Tajudeen A. Jimoh was PRUCOL for purposes of state unemployment insurance eligibility because the issue was not preserved on appeal).

[223] State *ex rel.* Emp't Sec. Comm'n of N.C. v. Hopkins, 432 S.E.2d 703, 705 (N.C. Ct. App. 1993).

[224] *Id.* at 703-04.

[225] *Id.* at 704.

[226] *Id.* at 705.

[227] *See* Castillo v. Jackson, 594 N.E.2d 323, 334 (Ill. 1992) ("If it is conceded that Castillo and Jimenez were 'lawfully present for the purposes of performing services' from the date of IRCA's passage, it makes no sense to say that Castillo and Jimenez were not also 'under color of law' as of such date. We find this to be the case because . . . the 'under color of law' prong of PRUCOL is a *less* restrictive requirement than the 'lawfully present' requirement . . . of FUTA.").

held a J-1 non-immigrant student visa[228] successfully argued that she was PRUCOL.[229] The Zambian national had applied for a waiver of the J-1 visa's two-year foreign residence requirement on the basis of hardship, arguing that her husband had a medical condition that could not be treated in Zambia and that deportation would result in his death.[230] After filing her waiver application, M.K. had applied for AFDC benefits but was denied by the County Board of Social Services on the basis that she was not PRUCOL.[231] Relying on a number of decisions, including *Holley*,[232] the Division concluded that "federal law rejects any attempt to deny a benefit where the INS has issued official documents" and that M.K. was PRUCOL because she "has applied for waiver to the residency requirement and that application is now pending."[233] It seems appropriate to categorize M.K.'s case with non-immigrant visas instead of pending applications because the application that was pending here was for an extension of a non-immigrant visa, implying that the non-immigrant visa itself conferred PRUCOL status. So far, no court appears to have considered other non-immigrant visas, such as F-1 visas, for example.[234]

B. Category Two: Pending Applications

The federal PRUCOL regulation definition lists pending applications for adjustment of status as another circumstance that confers PRUCOL eligibility.[235] California, New York, and New Mexico also list pending applications for adjustment of status. Massachusetts adds pending applications for asylum, Deferred Action for Childhood Arrivals (DACA), and any other "application, petition, or request to obtain a lawfully present

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[228] J-1 visas permit exchange students to enter the United States temporarily. 8 U.S.C. § 1101(a)(15)(J) (2018).

[229] M.K. v. Passaic Cty. Bd. of Soc. Servs., No. HPW 2276-95, 1995 WL 508073, at *1 (N.J. Adm. June 2, 1995).

[230] *Id.* at *2.

[231] *Id.*

[232] *Id.* at *3-4.

[233] *Id.* at *5.

[234] The authors' research for this article did not uncover any court decisions in which other non-immigrant visas were considered. *See e.g.*, Jimoh v. Unemp't Comp. Bd. of Review, 902 A.2d 608, 610-11 (Pa. Commw. Ct. 2006) (declining on procedural grounds to address J-1 visa holder's argument that his status made him PRUCOL for purposes of state unemployment benefit eligibility).

[235] 20 C.F.R. § 416.1618(b)(6) (2020) (where USCIS categorizes these applications as "properly filed").

status" to its list.[236] New York's DOH also includes pending applications for asylum, cancellation of removal, and suspension of deportation.[237]

Multiple federal and state court decisions have found that PRUCOL eligibility is conferred upon a person where they have an outstanding application for relief that has not yet received an answer from immigration authorities.

1. Pending Applications for Prosecutorial Discretion

One federal opinion discussing the PRUCOL doctrine in detail is *Farjam v. Commissioner, Social Security Administration*.[238] Decided by a court in the Eastern District of New York a year before PRWORA made PRUCOL individuals ineligible for SSI, at issue was whether or not a 75-year-old national of Iran, Akhtar Farjam, was PRUCOL for SSI purposes.[239] Ms. Farjam had submitted applications for "voluntary departure or deferred action" status, but she had not yet received a reply from the former INS (whose particular functions in this case are now carried out by the U.S. Citizenship and Immigration Services ["USCIS"] under DHS).[240] The court relied upon the knowledge-plus-permission standard set out in *Holley* and elaborated in *Berger*.[241] The court went on to clarify that the phrase "does not contemplate enforcing" does not mean official determination or authorization of the same, but rather includes non-citizens whose residence in the United States continues by virtue of "acquiescence."[242] Therefore, to be consistent with *Berger*, PRUCOL includes:

> scenarios in which INS does not respond to requests . . . yet in which official acquiescence to an individual's presence is nevertheless present. Such a situation would be present when INS is made aware on numerous occasions of the presence of an illegal alien yet does not take action to enforce the departure.[243]

The INS had been aware of Ms. Farjam's presence since she requested voluntary departure of deferred action status but took no steps to deport her, and therefore, despite the fact that no response had yet been received, the court held that Ms. Farjam was PRUCOL.[244]

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[236] 130 MASS. CODE REGS. 518.003(C)(8), (9), (10) (2020).

[237] *See* N.Y. DEP'T OF HEALTH, *supra* note 110, at 10.

[238] Farjam v. Comm'r, Soc. Sec. Admin., No. CV-94-4486 (CPS), 1995 WL 500477 (E.D.N.Y. Aug. 8, 1995).

[239] *Id.* at *1-2.

[240] *Id.* at *1.

[241] *Id.* at *3-4.

[242] *Id.* at *4 (quoting Berger v. Heckler, 771 F.2d 1556, 1576 (2d Cir. 1985)).

[243] *Farjam*, 1995 WL 500477, at *4 (citation omitted).

[244] *Id.* at *5.

Similar facts were before the Supreme Court of New York, Nassau County, in *Brunswick Hospital Center, Inc. v. Daines*.[245] Clare Thompson, an undocumented national of Jamaica, suffered a stroke and was admitted to Brunswick Hospital and then a nursing home.[246] Brunswick Hospital filed an application on Ms. Thompson's behalf with USCIS for voluntary departure in order to make her PRUCOL and thereby eligible for non-emergency Medicaid.[247] That application for voluntary departure went unanswered for seven years and remained unanswered at the time of the court's decision.[248] When Brunswick Hospital applied for Medicaid for Ms. Thompson, they were denied by Nassau County DSS and DOH, which argued that Ms. Thompson's outstanding application for voluntary departure did not make her PRUCOL.[249] The Brunswick Hospital Center sued the New York State DOH, and the court decided that Ms. Thompson was indeed PRUCOL.[250]

The court found that the authorities had knowledge of Ms. Thompson's presence because USCIS had "canceled" her passport and because that agency had received her application for voluntary departure.[251] The court further found acquiescence from USCIS's failure to try and deport Ms. Thompson for seven years since receiving her application, adding that there was no requirement that Ms. Thompson follow up with USCIS on the status of her request for voluntary departure in order for her to maintain her PRUCOL status.[252] The court ordered the state agency to restore her Medicaid coverage immediately.[253] Notably, the court cited *Holley* and other state decisions on PRUCOL status for the proposition that the "terms and requirements defining PRUCOL should be broadly interpreted."[254]

Finally, recall that in *M.K. v. Passaic County Board of Social Services*, New Jersey's Division of Economic Assistance found M.K., a noncitizen with a pending application for a waiver of the termination of her J-1 non-immigrant visa permit, was PRUCOL for purposes of AFDC eligibility because "federal law rejects any attempt to deny [a] benefit where the INS has issued official documents" and because M.K. had "applied

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[245] Brunswick Hosp. Ctr., Inc. v. Daines, No. 019223/09, 2010 WL 623707 (N.Y. Sup. Ct. Feb. 22, 2010).

[246] *Id.* at *1.

[247] *Id.* at *2.

[248] *Id.* at *1-2. Ms. Thompson's application for voluntary departure was submitted in April 2002.

[249] *Id.* at *1.

[250] *Brunswick Hosp. Ctr*, 2010 WL 623707, at *6.

[251] *Id.* at *4.

[252] *Id.* at *4, *6.

[253] *Id.* at *7.

[254] *Id.* at *5.

for waiver to the residency requirement and that application [was] now pending."[255]

2. Pending Applications for Adjustment of Status to Lawful Permanent Residence

Five states currently list or formerly listed a pending application for permanent residency (i.e., an application to become a green card holder) as a PRUCOL category,[256] and a number of state courts have concurred with this interpretation.

In one of the first New York state cases to consider the PRUCOL doctrine, the First Department considered in 1979 whether a deceased Greek national was posthumously PRUCOL during the period of her life in which she had a pending application for permanent residence.[257] Ms. Papadopoulos had suffered a stroke for which she received care and, following her death, her daughter sued New York State's DSS on her behalf for Medicaid coverage that had been denied during her period of care.[258] The court relied on *Holley* and found that Ms. Papadapolous's pending green card application made her PRUCOL because the INS regulation forbade her deportation while her application was pending.[259]

In a scenario similar to the one in *Brunswick Hospital Center*, the South Nassau Communities Hospital brought suit in *St. Francis Hospital v. D'Elia* against Nassau County's DSS on behalf of one of its patients, Concepcion Dominquez, a national of Spain, after she was denied Medicaid coverage for her care.[260] Ms. Dominquez had a pending application for an "immigrant visa," and, quoting *Papadopoulos* and *Holley*, the court found that this made her PRUCOL.[261] Specifically, the court reasoned:

> Mrs. Dominquez' entry into this country on a valid non-immigrant visa, *her timely application for an immigrant visa*, the correspondence with her by the consular service of the Department of State at her residence in the United States after the expiration date of her non-immigrant visa, and the failure of the Immigration and Naturalization Service to deport her, all impel the conclusion

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[255] M.K. v. Passaic Cty. Bd. of Soc. Servs., No. HPW 2276-95, 1995 WL 508073, at *5 (N.J. Adm. June 2, 1995).

[256] These states are California, New York, Massachusetts, Pennsylvania (before PRWORA), and New Mexico.

[257] Papadopoulos v. Shang, 414 N.Y.S.2d 152, 153-54 (App. Div. 1979).

[258] *Id.*

[259] *Id.* at 154-55.

[260] St. Francis Hosp. v. D'Elia, 422 N.Y.S.2d 104, 108-09 (App. Div. 1979).

[261] *Id.* at 109-10.

> that at the time of her admission to the hospital Mrs. Dominquez was residing in this country under color of law.[262]

The facts do not clarify whether an application for an "immigrant visa" refers to a pending I-130 or I-485, or both, but that term properly refers here to an I-485.[263] New York's Second Department would draw the same conclusion in a similar case years later.[264]

The Court of Appeals of Oregon followed *Papadopoulos*, *St. Francis Hospital*, and *Holley* in *Rubio v. Employment Division*, when it found that Mexican national Ascencion Rubio was PRUCOL during the time in which he had a pending application to adjust his status through his U.S. citizen spouse.[265] While his application was pending, Mr. Rubio was also granted permission to exit and re-enter the United States, and this permission was extended repeatedly.[266] The court noted that Mr. Rubio "was married to a United States citizen, working for a United States business and had begun the necessary steps to achieve a legal permanent residence," and reasoned from this that INS knew of his residence "by its routine regular extensions of his voluntary departure," and therefore "had acquiesced in it."[267]

The first Illinois state court to consider the PRUCOL doctrine likewise found that a non-citizen Medicaid applicant was PRUCOL on the basis of a pending application for permanent residence.[268] Interestingly, however, that court questioned whether the receipt notice for an I-130 was sufficient proof that the applicant had a pending application for permanent residence.[269] The court found that it was not sufficient evidence of such, relying on the *Medicaid and Medicare Guide*,[270] an instructional guidebook produced by HHS, which was in use until 1996 and which required a form I-94 or an I-210 as proof of a pending application for permanent

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[262] *Id.* at 110 (emphasis added).

[263] *Id.* Form I-130 is a prima facie determination that one has a relationship qualifying them for an immigrant visa. 8 C.F.R. § 204.1(a)(1). U.S. CITIZENSHIP & IMMIGRATION SERVS., *I-130, Petition for Alien Relative*, https://perma.cc/8KMC-29K4 (last updated Aug. 4, 2020). The I-485 is the application for the immigrant visa itself. 8 C.F.R. § 245.2(a)(3)(ii); U.S. CITIZENSHIP & IMMIGRATION SERVS., *I-485, Application to Register Permanent Residence or Adjust Status*, https://perma.cc/6M3B-7S3P (last updated Aug. 12, 2020).

[264] *See* Mary Immaculate Hosp. Div. of Catholic Med. Ctr. of Brooklyn & Queens, Inc. v. Krauskopf, 475 N.Y.S.2d 132, 132-33 (App. Div. 1984).

[265] Rubio v. Emp't Div., 674 P.2d 1202, 1203 (Or. Ct. App. 1984).

[266] *Id.* at 1202.

[267] *Id.* at 1203.

[268] Bennetto v. Ill. Dep't of Pub. Aid, 550 N.E.2d 1041, 1044-45 (Ill. App. Ct. 1990).

[269] *Id.* at 1045.

[270] *Id.* at 1044-45.

residence.[271] Courts do not often raise the issue of what constitutes proof of a pending application.

The Colorado Supreme Court has held in a number of cases that pending "alien relative petitions" or other applications for legal permanent resident status confer PRUCOL eligibility.[272] In *Industrial Commission of State v. Arteaga,* the Court came to this conclusion regarding the plaintiffs' PRUCOL eligibility for FUTA benefits where the plaintiffs held valid work authorization and pending applications for adjustment of status.[273] Perhaps most notable is *Sandoval v. Colorado Division of Employment*: it is the only Colorado case in which the court said explicitly that a pending application for legal permanent residence is sufficient to confer PRUCOL status for purposes of FUTA eligibility, even when the applicant does not also have a valid work permit.[274] Martin Sandoval, who was brought to the United States as a child without inspection, was placed into deportation proceedings, whereupon he applied for non-LPR cancellation of removal and then later applied to adjust his status through a U.S. citizen spouse.[275] Following *Arteaga* and *Holley*, the court held that each of those applications in and of themselves were sufficient to confer PRUCOL eligibility upon Mr. Sandoval.[276]

In *Yatribi v. Industrial Commission of the State of Colorado*, an individual with a pending "alien relative" petition to adjust status was held to be PRUCOL.[277] The court found Mustapha Yatribi was PRUCOL for purposes of FUTA eligibility, not only because of his pending application to adjust status, but also because of a valid work permit granted while his

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[271] *Id.*

[272] *See, e.g.*, Indus. Comm'n of State v. Arteaga, 735 P.2d 473, 481-82 (Colo. 1987).

[273] *See id. Arteaga* was not disturbed by the Tenth Circuit's decision in *Esparza v. Valdez* one year later. Rather, the question of PRUCOL designation was rendered moot before the Circuit for unrelated reasons. Esparza v. Valdez, 862 F.2d 788, 792-93 (10th Cir. 1988).

[274] Sandoval v. Colo. Div. of Emp't, 757 P.2d 1105, 1108 (Colo. App. 1988) ("Although the Panel found that claimant . . .did not have a valid INS work authorization during his base period, claimant's lack of such an authorization is merely one factor to consider in determining whether he met the requirements of 'permanently residing in the United States under color of law.' . . . Because the other evidence so overwhelmingly establishes claimant's 'permanent resident under color of law' status, we hold that here the lack of a work authorization permit is not determinative.") (citations omitted).

[275] *Id.* at 1106 ("[C]laimant challenged [his attempted removal] pursuant to 8 U.S.C. § 1254 based on seven years continuous presence in the U.S., good moral character, and extreme hardship to the applicant or legally present family members.").

[276] *Id.* at 1108 ("Here, claimant had pending at all times during his base period at least one petition which would result in the adjustment of his status to lawful permanent resident.").

[277] Yatribi v. Indus. Comm'n of Colo., 700 P.2d 929, 930 (Colo. App. 1985).

application was pending.[278] The court held the same in a later case, *Zanjani v. Industrial Commission of Colorado*, finding that Bahman Zanjani was PRUCOL because he also had a pending adjustment of status application and a valid work permit.[279] The court noted that "[p]etitioner was also here under color of law because the INS made no effort to deport him during the application process,"[280] and "petitioner became eligible for unemployment benefits when the INS demonstrated its intention to allow petitioner to remain in the country until he obtained permanent resident alien status."[281]

In only one case, *In re Fodor*, has a court appeared to say that an individual with a pending application for adjustment of status is not PRUCOL. This minority view came from a federal bankruptcy court in Florida. Zsolt Fodor, a Hungarian national, had a pending application for permanent resident status but was denied the benefit of Florida's homestead exemption, which allows debtors to be exempt from the claims of creditors on the debtor's home.[282] The exemption is available to debtors with a residence in the state and with the actual intent to live in the state permanently, which Florida courts have interpreted to mean that the debtor has to be a citizen or a legal permanent resident.[283]

Mr. Fodor was a debtor who owed two other individuals $44,480.54 and argued that he should be protected from their claim for that sum against his home under the homestead exemption because he was PRUCOL and therefore, he reasoned, a permanent resident of the state.[284] The court disagreed, distinguishing Mr. Fodor's pending application for lawful permanent residence from individuals with pending asylum applications. The court averred that, unlike individuals with a pending asylum application, Mr. Fodor's "residential status" was "temporary" because he "merely held an Employment Authorization card." [285] The court seemed unaware that an asylum applicant could hold the same and concluded that because he was "temporary," Mr. Fodor could not establish the intent to

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[278] *Id.* at 931 ("[P]etitioner was eligible for unemployment compensation benefits when he received work authorization from the INS.").

[279] Zanjani v. Indus. Comm'n of Colo., 703 P.2d 652, 654 (Colo. App. 1985).

[280] *Id.*

[281] *Id.*

[282] *In re* Fodor, 339 B.R. 519, 520-21 (Bankr. M.D. Fla. 2006). "There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon . . . the following property owned by a natural person: (1) a homestead." FLA. CONST. art. X, § 4(a).

[283] *Id.* at 521-22.

[284] *Id.* at 520.

[285] *Id.* at 523.

make his home a "permanent homestead" as the homestead provision required.[286] Without explicitly saying Mr. Fodor was not PRUCOL, in distinguishing his case the way that it did, the court implied that his pending application did not satisfy the "permanent" element of the PRUCOL doctrine, at least not in the way someone with a pending asylum application would.[287]

3. Pending Applications for Asylum

After PRWORA in 1996, asylees and refugees, as well as grantees of "withholding of removal" (a form of refugee-like relief) became "qualified aliens" for purposes of federal benefit eligibility, making them eligible for most federal entitlements.[288] Prior to PRWORA, however, asylees, refugees, and grantees of withholding of removal were generally considered PRUCOL,[289] and many states' regulations listed them this way.[290] But now that persons granted asylum are "qualified aliens," the question that remains is whether or not PRUCOL eligibility is conferred upon non-citizens with a pending application for asylum.

While only Massachusetts regulations explicitly list asylum applicants as PRUCOL,[291] case law from five states agrees with that assessment. For example, the Supreme Court of Rockland County in New York found that a national of Bulgaria with a pending asylum application and a work permit was PRUCOL.[292] New Jersey's Division of Economic Assistance likewise found that non-citizens with pending asylum applica-

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[286] *Id.*

[287] *Id.*

[288] 8 U.S.C. § 1641(b)(2), (3), (5) (2018).

[289] *See* 20 C.F.R. § 416.1618(b)(8)-(10) (2020); Unemployment Compensation Program Letter No. 1-86, 51 Fed. Reg. 29713-01 (Aug. 20, 1986) (stating that parolees and refugees would be treated as PRUCOL); *see also* Getahun v. Office of Chief Admin. Hearing Officer, 124 F.3d 591, 596 (3d Cir. 1997) (holding that plaintiff was authorized to work because her grant of asylum, by statute, provided her with permanent residing status, notwithstanding that her employment authorization documents had yet to be received).

[290] *See, e.g.*, 26 GUAM ADMIN R. & REGS. § 1822(g)(30)(A)(6)(i)-(ii), (v)-(vi) (1997); ILL. ADMIN. CODE tit. 56, § 2905.15(a)(3) (2019); IOWA ADMIN. CODE r. 871-24.60(96)(3)(a)(1)-(2), (b)(6) (2020); N.M. CODE R. § 8.200.410.11(B)(2)(b)-(c), (f) (2020); 55 PA. CODE § 150.1(b)(3)(viii), (ix), (xv) (2020); 39-2 R.I. CODE R. § 0104 (repealed 2018); UTAH ADMIN. CODE rs. 994-405-1002, 994-405-1005 (2020); WASH REV. CODE ANN. § 28B.15.012(4)(b) (West 2020).

[291] 130 MASS. CODE REGS. 518.003(C)(8) (LexisNexis 2020).

[292] Tonashka v. Weinberg, 678 N.Y.S.2d 883, 886 (Sup. Ct. 1998). The court followed *Holley* and the reasoning of the Supreme Court of New York Appellate Divisions in the first and second departments with respect to pending green card applications discussed above. *Id.* at 885-96.

tions and valid work authorizations were PRUCOL, noting that either factor conferred PRUCOL status on them.[293] And a majority of the Supreme Court of Colorado found a group of Polish nationals with pending asylum applications and valid work authorizations were PRUCOL for purposes of FUTA eligibility,[294] although the court appeared to rely heavily on the applicants' valid work authorization and eligibility for prosecutorial discretion (to wit, voluntary departure) in rendering its decision.[295]

In *Department of Health and Rehabilitative Services. v. Solis*, the Supreme Court of Florida also considered whether an applicant with a pending asylum case was PRUCOL, this time for purposes of AFDC and Medicaid, and found that they were.[296] Luisa Solis and her five children were Nicaraguan nationals who feared persecution in that country, and thus applied for political asylum.[297] Uniquely, the court cited the testimony of an INS employee who testified that an individual with a pending asylum application is not deported unless they are "an absolute threat to public safety" and that their case could be pending for as long as 30 years.[298] Florida's Supreme Court regarded this as proof that the INS had knowledge of Louisa Solis's presence in the United States but was acquiescing to her presence, and concluded that she was therefore PRUCOL, looking to *Holley*.[299] The Court followed *Holley*'s definition of "permanent" and regarded Ms. Solis's presence as "permanent" because there was no defined end point to her time in the country.[300]

A lower Florida state court in *Lisboa v. Dade County Property Appraiser* re-affirmed *Solis* in 1998 when, citing to *Solis*, it concluded that another asylum seeker was PRUCOL, this time for purposes of Florida's homestead tax exemption.[301] The Court said that Mr. Lisboa, like Ms. Solis, "ha[d] a 'permanent' status," and "[t]he fact that his status can be 'dissolved eventually at the instance either of the United States or of the individual' does not detract from its permanency."[302] This, too, echoes *Holley*'s interpretation of "permanent."

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[293] S.D. v. Passaic Cty. Welfare Agency, No. HPW 2524-95, 1995 WL 508076, at *3 (N.J. Admin. Jun. 5, 1995).

[294] Div. of Emp't & Training v. Turynski, 735 P.2d 469, 472 (Colo. 1987).

[295] *See id.* at 472.

[296] Dep't of Health & Rehab. Servs. v. Solis, 580 So. 2d 146 (Fla. 1991).

[297] *Id.* at 147.

[298] *Id.* at 149.

[299] *Id.*

[300] *Id.* at 149-50.

[301] Lisboa v. Dade Cty. Prop. Appraiser, 705 So. 2d 704, 707-08 (Fla. Dist. Ct. App. 1998).

[302] *Id.* at 707 (quoting 8 U.S.C. § 1101(a)(31) (2018)); *see also* DeQuervain v. Desguin, 927 So. 2d 232, 235-36 (Fla. Dist. Ct. App. 2006) (reaffirming that asylum applicants satisfy the homestead tax's permanent-residency requirement).

Perhaps what is most notable about *Solis* is that it is the only decision in which a court appears to say that asylee derivatives listed on a pending asylum application are as PRUCOL as the applicant herself. Ms. Solis had five children, who presumably were listed on her application. The court appeared to infer that the government knew about her children as much as it knew about her when it concluded, "[W]e agree with the district court that Solis *and her family* fit within the PRUCOL language."[303] Generally, when an asylum applicant wins their claim, their non-citizen children or spouse living in the United States and listed on their application are automatically granted status as derivative asylees.[304] In this respect, the derivative asylee has a pending application for status as much as the principal asylum applicant. The *Solis* court appeared to recognize this and regarded the whole family as PRUCOL for this reason.

One question that may arise when considering the PRUCOL designation of a pending asylum claim is whether the asylum applicant's PRUCOL eligibility persists if their application is denied by USCIS but then referred to the immigration court in the context of a deportation proceeding. In *Gillar v. Employment Division*, the Supreme Court of Oregon answered that question in the affirmative.[305] Bohuslav J. Gillar, a national of then-Czechoslovakia, was initially denied asylum by INS and opted to renew his request before an immigration court.[306] Today, a denial by USCIS would result in the applicant's case being referred to the immigration court for deportation proceedings, where the application for asylum would be reviewed de novo.[307] At issue was whether or not Mr. Gillar was PRUCOL for purposes of the state unemployment insurance.[308] The court relied on *Holley* and a number of other cases to reason that, because the law said that Mr. Gillar could not be deported until a determination on his case was made, he was residing under color of law until that time.[309] The *Gillar* court further said that he was permanently residing in the United States because, while he was awaiting the determination, his time in the country had "no defined end or defined purpose."[310] The court's last point echoes the reasoning of the *Solis* court.

One federal appellate court came to a different conclusion about pending asylum applications. In 1985, it was the Ninth Circuit's turn to

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[303] Dep't of Health & Rehab. Servs. v. Solis, 580 So. 2d 146 at 150 (Fla. 1991) (emphasis added).

[304] *See e.g.*, Mobombo v. Holder, 403 Fed. App'x 873, 874 (4th Cir. 2010).

[305] Gillar v. Emp't Div., 717 P.2d 131, 137 (Or. 1986).

[306] *Id.*

[307] *Id.*

[308] *Id.* at 134.

[309] *Id.* at 137.

[310] *Id.* at 138.

consider whether a pending asylum application conferred PRUCOL status: in *Sudomir v. McMahon*, three asylum seekers applied for AFDC benefits but were denied because they were asylum applicants.[311] The asylum seekers brought a class action against the state of California and sought a preliminary injunction to prevent California from denying AFDC to asylum seekers.[312] The district court denied the injunction, and the asylum seekers appealed to the Ninth Circuit.[313] The question before the Ninth Circuit was whether or not asylum seekers were permanently residing under the color of law.[314]

While the plaintiffs invoked *Holley*'s knowledge and permission standard and the Second Circuit's interpretation of the word "permanently,"[315] the court did not rely on that decision or the one in *Berger*.[316] Instead, the court went against precedent and said that "[i]t stretches this language considerably to have [the word 'permanently'] embrace" asylum applicants,[317] and it sided with the state government's more limited definition of what PRUCOL and "permanently" meant.[318] The court agreed that the applicants were in the country under the color of law but said their statuses were not permanent, but inchoate.[319] In the court's view, "permanently" connoted a situation in which the person's status could theoretically continue indefinitely, as was the case in *Holley*, not where the applicant's status merely "[gave] rise to the *possibility*" of indefinite residence, which it saw as temporary.[320] The court also described temporary grants of work authorization as similarly inchoate.[321] Finding this a permissible construction of the statute, the court found for the state of California, upholding the denial of AFDC benefits.[322]

Interestingly, the *Sudomir* court did note that, even by its narrower definition of PRUCOL, persons with indefinite stays of deportation or extensions of voluntary departure were PRUCOL because they had been

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311 Sudomir v. McMahon, 767 F.2d 1456, 1458 (9th Cir. 1985). Elizabeth Sudomir sought asylum from Poland, while Ebrahim Nejati and Mahin Vojdani sought asylum from Iran. *Id.*

312 *Id.*

313 *Id.*

314 *Id.* at 1459.

315 *Id.* at 1460-61.

316 *Sudomir* does not follow *Berger* but merely states in a footnote that the *Berger* consent decree did not include pending asylum applications, ignoring the actual reasoning the *Berger* court applied in its opinion, to wit, that there is a need to interpret the PRUCOL doctrine broadly. *See Sudomir*, 767 F.2d at 1460 n.6.

317 *Id.* at 1459.

318 *Id.* at 1461-62.

319 *Id.* at 1461.

320 *Id.* at 1462.

321 *Id.* at 1464.

322 *Id*.

"subject to official review" and were "entitled to reside in the United States for an indefinite period."[323] The court also noted that temporary parolees were PRUCOL because the statute explicitly made them so, but did not reflect at all on the ostensible contradiction between its own "permanent" vs. "inchoate" definition and the statute's explicit grant of PRUCOL status to *temporary* parolees.[324] Instead, the court explained the inconsistency by noting that temporary parolees were given permission to enter the country and remain, while asylum applicants entered or remained in the United States "illegally,"[325] an inaccurate assessment.[326] The court explained this as consistent with Congress's intent to "end the ad hoc use of parole authority, which had been implemented by custom rather than clearly defined by law."[327] Furthermore, the court pointed to the INS practice of forcing some persons who present claims for asylum at the border to wait outside the United States for a determination on their application, and said that defining asylum applicants as PRUCOL "would seriously undermine this new scheme,"[328] referring presumably to both the practice of having some asylum applicants wait outside the country and disdain for "ad hoc" forms of relief.

The dissent by Judge William C. Canby did follow *Holley*'s definition of "permanently." Judge Canby, too, looked to the statutory definition of "permanently"[329]:

> [A] relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with the law.[330]

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[323] *Id.* at 1459-60. Note that the court also dismissed the asylum seekers' argument that the PRUCOL requirement violated the federal Equal Protection Clause, finding rational basis review was appropriate and upholding the district court's finding that there was a rational reason for the distinction. *Id.* at 1466.

[324] *Id.* at 1462.

[325] *Id.* at 1459, 1462.

[326] The assessment that asylum applicants were in the country "illegally" is inaccurate since they are permitted to enter after a preliminary determination is made that they have a reasonable fear of persecution. 8 U.S.C. § 1158(a)(1) (describing one's entry into the United States for the purpose of seeking asylum as a lawful process).

[327] *Sudomir*, 767 F.2d at 1463 (quoting S. REP. NO. 96-256, at 5 (1970)) (alterations omitted).

[328] *Id.* at 1462-63.

[329] *Id.* at 1467 (Canby, J., dissenting).

[330] 8 U.S.C. § 1101(a)(31) (2018).

Judge Canby noted that "temporary," as it is defined in the statute, is used to describe non-immigrant visa holders, such as students and tourists, persons for whom "there is never any intention of abandoning the country of origin as home,"[331] a distinction from "permanently" that would certainly mean that asylum applicants are PRUCOL inasmuch as they have every intention of abandoning their country of origin. They are not temporary, Judge Canby argued, simply because "their continued presence is solely dependent upon the possibility of having their applications for asylum acted upon favorably," as the majority insisted.[332] On the contrary, Judge Canby found this description of asylum seekers more analogous to temporary parolees and conditional entrants, who might also have their continuous presence revoked at any time but are nonetheless PRUCOL,[333] and to persons with indefinite stays of deportation or grants of voluntary departure, who also remain in the country only until the immigration authorities revoke their permission and who are also PRUCOL.[334] Finally, Judge Canby argued that the Refugee Act cannot be interpreted as relegating asylum seekers to non-PRUCOL status, especially because Judge Canby could not "ascribe to Congress, in passing the Refugee Act for clearly humanitarian purposes," an intent to deny asylum seekers "the means to feed, clothe and house their families" while remaining in the United States or "an intent to require victims of persecution to run that kind of gauntlet."[335]

Sudomir may be the most controversial case in PRUCOL history. The jurisdictions discussed above have not followed it and some courts have explicitly rejected it.[336] Still other courts have tried to narrow its precedent by applying it only to facts like those before the *Sudomir* court. The Supreme Court of Colorado has said that *Sudomir* does not apply to an asylum applicant seeking unemployment benefits under FUTA, or its state counterpart, nor to asylum applicants with work authorization, nor to applicants for asylum who are "covered by a policy of extended voluntary departure," that is, likely to receive some form of prosecutorial discretion even in the absence of their asylum application.[337]

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[331] *Sudomir*, 767 F.2d at 1467 (Canby, J., dissenting).

[332] *Id.* at 1468 (quoting *id.* at 1462).

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *See, e.g.*, Castillo v. Jackson, 566 N.E.2d 404, 411 (Ill. Ct. App. 1990) ("[T]he narrow view of the *Sudomir* court should be rejected."); Gillar v. Emp't Div., 717 P.2d 131, 140 (Or. 1986) ("We too reject the *Sudomir* proposition that asylum applicants can never be 'permanently residing' in this country and are therefore automatically ineligible for a variety of benefits.").

[337] Div. of Emp't & Training v. Turynski, 735 P.2d 469, 472 (Colo. 1987).

Sudomir may be an outlier—but it has followers. The first California state court to consider the PRUCOL doctrine[338] was the Second District Court of Appeal of California, in *Zurmati v. McMahon.* At issue was whether or not Golgotai Zurmati, a national of Afghanistan, was PRUCOL for purposes of AFDC benefits where she had a pending asylum application.[339] The state court found that she was not PRUCOL despite her having valid work authorization and the standard asylum receipt notice that said she was permitted to remain in the United States at least until her case was decided.[340] The court followed *Sudomir* and held that Ms. Zurmati's status was not "permanent."[341] The court limited the PRUCOL doctrine to those who were residing in the United States as the result of a "affirmative admission or grant of status."[342]

Zurmati was followed by its sister court, the First District Court of Appeal, in *Khasminskaya v. Lum*.[343] Tsilia Khasminskaya, a Ukrainian national, was also an asylum applicant who applied for and was denied state-funded general cash assistance.[344] Nevertheless, following *Sudomir* and *Zurmati*, the *Lum* court held that Ms. Khaminskaya was not lawfully present (and thus, not PRUCOL) because "her residence was not yet established as lawful on a permanent basis."[345]

Outside of the Ninth Circuit, *Sudomir* was followed on at least two other occasions, possibly three. The most significant of these was *Joudah v. Ohio Department of Human Services*, in which an Ohio court of appeals upheld a lower court's heavy reliance upon *Sudomir* to find that an asylum applicant with valid work authorization was not PRUCOL.[346] The appellate court held that the lower court did not abuse its discretion in following *Sudomir* and determining that Mahdi Joudah, a national of Kuwait, did not satisfy the "permanent" element of PRUCOL.[347]

Sudomir was again followed in a brief decision issued by the New Jersey Employment Compensation Board, which, in its failure to mention

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[338] Zurmati v. McMahon, 225 Cal. Rptr. 374, 376 (Ct. App. 2d 1986) ("There are no reported decisions of the California courts on the issue presented.").

[339] *Id.* at 375-76.

[340] *Id.* at 379-80.

[341] *Id.* at 380-82.

[342] *Id.* However, the court also distinguished the facts before it from those in *Holley* and attempted to make the holding in that case logically consistent with its own by saying that the *Holley* petitioner was given explicit permission to remain until her children were adults. *Id.* at 381-82.

[343] Khasminskaya v. Lum, 54 Cal. Rptr. 2d 915 (Ct. App. 1st 1996).

[344] *Id.* at 916.

[345] *Id.* at 919-20.

[346] Joudah v. Ohio Dep't of Human Servs., 641 N.E.2d 288, 290-91 (Ohio Ct. App. 1994). The lower court was the Court of Common Pleas of Summit County. *Id.* at 289.

[347] *Id.* at 290-91. *But see* Vespremi v. Giles, 427 N.E.2d 30, 31-32 (Ohio Ct. App. 1980).

Holley or any other contrary decisions available at the time, clearly cherry-picked case law to avoid compliance with *stare decisis*.[348] That tribunal, too, found that an asylum applicant was not PRUCOL, this time for purposes of qualifying for unemployment benefits.[349]

Finally, a decision from New York State's Fourth Department, *Bibezic v. Schauseil*, held that an asylum applicant was not PRUCOL.[350] While this decision was then mentioned by the Supreme Court of Rockland County in *Tonashka v. Weinberg*,[351] the *Bibezic* opinion itself is not published and is otherwise unavailable, so it remains unknown whether or not the Fourth Department followed *Sudomir* or simply came to the same conclusion on its own reasoning.

All told, courts in four states (California, Ohio, New Jersey, and New York) have followed the *Sudomir* decision, while courts in six jurisdictions (Oregon, Florida, Colorado, Massachusetts, New York, and New Jersey) have rejected *Sudomir*. Notably, New Jersey and New York remain in turmoil on the issue, with lower or administrative court decisions coming down on both sides and New York's DOH and OTDA departments coming to different conclusions as well—the former lists asylum applicants as PRUCOL, while the latter does not. Nonetheless, it remains the case that more jurisdictions have rejected *Sudomir* than have followed it.

4. Pending Applications for Other Immigration Relief

Only Massachusetts and New York PRUCOL regulations state that applications for relief generally confer PRUCOL status.[352] Unlike asylum applications, however, there is virtually no case law on pending applications for other forms of relief other than prosecutorial discretion, adjustment of status, and asylum. No court has spoken squarely, for example, on whether or not PRUCOL status is conferred upon an applicant for TPS, a Special Immigrant Juvenile visa, or a U or T non-immigrant visa.

Only one court has opined, albeit indirectly, on the PRUCOL nature of an application for relief other than prosecutorial discretion, adjustment

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[348] *In re* J.C., No. UCC 90026-91, 1991 WL 441657, at *1 (N.J. Adm. Sept. 23, 1991).

[349] *Id.* at *2.

[350] Tonashka v. Weinberg, 678 N.Y.S.2d 883, 885 (Sup. Ct. 1998) (discussing Bibezic v. Schauseil, 236 A.D.2d 899 (N.Y. App. Div. 1997)).

[351] *Id.* ("[I]n *Matter of Bibezic,* the Fourth Department recently upheld denial of benefits to a person with an asylum application pending, relying on the fact that the Desk Aid of the Department of Social Services' Public Assistance Source Book, which contains a list of persons considered to be PRUCOL, did not include a person awaiting a determination on an asylum application.").

[352] *See* 130 MASS. CODE REGS. 518.003(C) (LexisNexis 2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii) (2020).

of status, or asylum. In *Brambila v. Board of Review, New Jersey Department of Labor and Industry*, a superior court of New Jersey found that Carolina and Mario Brambilla were not PRUCOL for purposes of FUTA eligibility, even after having filed applications for temporary resident status under the Immigration Reform and Control Act (IRCA) and during the period of time in which they were in possession of special agricultural worker status and work permits based on their pending IRCA application.[353] However, the Supreme Court of New Jersey reversed that decision.[354] The Court's reversal was effectively on other grounds, finding that the Brambilas were entitled to FUTA because they were "lawfully present," an entirely different eligibility category beyond the scope of this article, and so it did not reach the PRUCOL question.[355] Despite never reaching the PRUCOL question, anyone who is lawfully present is also PRUCOL, as at least one court has noted.[356] *Brambila* thus ultimately provides persuasive authority for the proposition that applications for other forms of relief, such as temporary residence under IRCA, also confer PRUCOL eligibility.

C. Category Three: Explicit Knowledge and Permission Without an Application or Grant

Category three comes up less frequently in the case law than any other, owing to the rare circumstance in which the government issues explicit written declarations of permission to remain in the United States without also granting the individual some form of categorical relief. Because these are not official statuses, they cannot be applied for or granted. Examples from this category demonstrate that a non-citizen need not have a grant of, or a pending application for, immigration relief, such as TPS or deferred action, to be considered PRUCOL. Rather, mere written permission, absent any official category of relief, is sufficient to demonstrate that they are here permanently with the immigration authorities' knowledge and permission.

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[353] Brambila v. Bd. of Review, N.J. Dep't of Labor & Indus., 574 A.2d 992, 994-95 (N.J. Super. Ct. App. Div. 1990), *rev'd*, 591 A.2d 605 (N.J. 1991); Brambila, 591 A.2d at 608 ("Because INS had not yet granted the claimants temporary-resident status, the Board denied benefits").

[354] Brambila, 591 A.2d at 613.

[355] *Id.* at 609 ("We need not address the third category (PRUCOL) . . . . We focus instead on the 'lawfully-present' exception.").

[356] *See* Castillo v. Jackson, 594 N.E.2d 323, 334 (Ill. 1992) ("If it is conceded that Castillo and Jimenez were 'lawfully present for the purposes of performing services' from the date of IRCA's passage, it makes no sense to say that Castillo and Jimenez were not also 'under color of law' as of such date. We find this to be the case because . . . the 'under color of law' prong of PRUCOL is a *less* restrictive requirement than the 'lawfully present' requirement . . . of FUTA.").

1. Orders of Supervision

Perhaps the most common version of explicit permission is the order of supervision. An order of supervision cannot be applied for but is merely a form of conditional prosecutorial discretion.[357] The federal definition of PRUCOL[358]—and almost every state definition available—identifies orders of supervisions as conferring PRUCOL eligibility.[359] *Berger*, in addition to resulting in a consent decree that gave the first PRUCOL category list, also established that non-citizens with orders of supervision are PRUCOL.[360] While an order of supervision is typically provided to anyone who first receives a grant of deferred action or a stay of deportation, it can be said to fall into the category of explicit knowledge and permission without an application or grant insofar as it is not a grant that one can apply for. Rather, the order is literally a written record that the government conditionally promises to delay deportation at least until the date provided in the order.[361]

2. Other Explicit Permission to Remain

The first PRUCOL case, *Holley*, gave not just the definition of PRUCOL but also the very first example of what this third category of PRUCOL designation looks like. *Holley* did not say that Gayle McQuoid Holley was ever granted a specific category of immigration relief, such as deferred action—although, that is likely how we would classify her relief today.[362] Instead, the opinion explained that she was in possession of a letter from INS that explained in explicit terms that she was not in deportation proceedings for humanitarian reasons, and that this would remain the case until such day as those reasons changed.[363] While today we would characterize such written permission as a grant of deferred action, the option of applying for deferred action as one would apply for other forms of

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[357] 8 C.F.R. § 241.13(h) (2020).

[358] 20 C.F.R. § 416.1618(b)(12) (2020).

[359] *See, e.g.*, CAL. CODE REGS. tit. 22, § 50301.3(c) (2020); 26 GUAM ADMIN. R. & REGS. § 1822(g)(30)(A)(6)(v) (1997); 130 MASS. CODE REGS. 518.003(C)(5) (2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(b) (2020); 55 PA. CODE § 150.1(b)(3)(xii) (2020). Both of New York's definitions agree on the same. N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(b) (2020); *see* N.Y. DEP'T OF HEALTH, *supra* note 110, at 9; N.Y. OFFICE OF TEMP. & DISABILITY ASSISTANCE, *supra* note 110, at 7.

[360] Berger v. Heckler, 771 F.2d 1556, 1559-60 (2d Cir. 1985).

[361] 8 C.F.R. § 241.13(b), (h) (2020).

[362] Holley v. Lavine, 553 F.2d 845, 849 (2d Cir. 1977).

[363] *Id.* at 849-50. The opinion notes that the letter from INS actually specified that "[s]hould the dependency of the children change, [Holley's] case would be reviewed for possible action consistent with circumstances then existing," showing that she was tacitly granted deferred action at least in large part because she was caring for six U.S. citizen children.

categorical immigration relief was relatively new and little-known in the 1970s.[364] Instead, Ms. Holley's PRUCOL designation was based solely on the bureaucratic equivalent of a doctor's note.

From the Ninth Circuit came another case with similar facts to *Holley*. *Flores v. Bowen* raised the interesting question of whether or not Julio Flores, a national of Mexico, was PRUCOL based on his possession of what was known as a *Silva* letter.[365] In the 1977 case *Silva v. Levi*, an Illinois district court issued an injunction and ordered INS to issue a letter to approximately 250,000 non-citizens who had applied for permanent residence,[366] explicitly granting them permission to remain and work in the United States.[367] These became known as *Silva* letters, and in 1977 Julio Flores acquired one after having applied for permanent residence in 1976 and being denied. Mr. Flores then became disabled and applied for SSI benefits.[368] By this time the Social Security Administration (SSA) regulations had designated *Silva* letter-holders PRUCOL, and Mr. Flores was granted SSI.[369] But in 1982, the *Silva* court dissolved the injunction, and SSA followed suit by declaring that *Silva* letter-holders were no longer PRUCOL—without changing its regulations.[370] Mr. Flores's SSI benefits were cut off, and he sued the SSA.[371] In its decision, the Ninth Circuit noted that the end of the injunction was not followed by any revocation of the *Silva* letters. The higher court stated that the Illinois district court had held that the letters remained valid and their holders remained PRUCOL until such time as their letters were affirmatively revoked.[372] The Ninth Circuit also noted that SSA had not actually changed its regulation, only its internal policy, and that this too was a reason Mr. Flores remained PRUCOL.[373] Interestingly, Rhode Island's PRUCOL definition

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[364] The first known case of a non-citizen filing an application for deferred action occurred in 1972, when John Lennon, through counsel, requested on humanitarian grounds that he be granted deferred action and allowed to remain in the United States while he and his wife Yoko Ono concluded a custody battle over her daughter from a previous marriage. *See* WADHIA, *supra* note 18, at 4, 16-18.

[365] Flores v. Bowen, 790 F.2d 740, 741 (9th Cir. 1986).

[366] *See* Silva v. Levi, No. 76-C4268 (N.D. Ill. Mar. 10, 1977), *modified on other grounds sub nom*; Silva v. Bell, 605 F.2d 978 (7th Cir. 1979). *Silva* enjoined the INS from deporting certain nationals with appropriate priority dates for the issuance of an immigrant visa because the INS had previously allocated certain visas erroneously. *See* Bagues-Valles v. Immigration & Naturalization Serv., 779 F.2d 483, 484 (9th Cir. 1985).

[367] *Flores*, 790 F.2d at 741 (citing *Silva*, No. 76-C4268).

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Flores*, 790 F.2d at 741-42.

[373] *Id.* at 742.

is the only one that listed *Silva* letters on its list of those circumstances which confer PRUCOL status.[374]

Also from Rhode Island is another case involving explicit permission to remain, *Lapre v. Department of Employment Security*, in which the Supreme Court of Rhode Island addressed the question of whether or not something called "deferred inspection" conferred PRUCOL eligibility.[375] Upon returning from her native Germany, Helga Lapre, a permanent resident of the United States, learned after she reentered the United States that the length of her stay in Germany was long enough that she was considered to have abandoned her permanent residence and was now out of status.[376] Ms. Lapre was eligible to reapply for permanent resident status, so she was issued "deferred inspection" status at the border upon her entry.[377] Deferred inspection is not actually a status at all, but merely a temporary pass issued by Customs and Border Protection ("CBP") when "an immediate decision concerning the immigration status of an arriving traveler cannot be made at the port of entry due to a lack of documentation."[378] It is unclear from the court's opinion whether or not this pass was given to Ms. Lapre in writing or issued to her verbally, but the current CBP policy is to provide a deferred inspection grantee with "an Order to Appear-Deferred Inspection, Form I-546, explaining what information and/or documentation is required to resolve the discrepancy."[379]

Ms. Lapre then continued to stay in the United States for about eight months with her deferred inspection before she applied again for permanent residence.[380] The question was whether or not Ms. Lapre was PRUCOL for purposes of FUTA eligibility during the period of time she had deferred inspection.[381] The court relied on *Holley* and its progeny to determine that Ms. Lapre was indeed PRUCOL because she was in the United States with INS's knowledge and acquiescence.[382] The court inferred knowledge and acquiescence because INS told Ms. Lapre she was eligible to adjust her status and took no steps to deport her, also noting that the INS Operating Instruction at the time instructed that anyone prima

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374 39-2 R.I. CODE R. § 0104.05 (LexisNexis 2020) (repealed 2018).

375 Lapre v. Dep't of Emp't Sec., 513 A.2d 10 (R.I. 1986).

376 *Id.* at 11.

377 *Id.*

378 *Deferred Inspection Sites*, U.S. CUSTOMS & BORDER PROTECTION, https://perma.cc/Q6K7-U5BG (last visited May 21, 2020).

379 *Id.*

380 *Lapre*, 513 A.2d at 11.

381 *Id.*

382 *Id.* at 12-13.

facie entitled to adjustment of status should not have deportation proceedings initiated against them.[383] Ms. Lapre's deferred inspection permission was not unlike the letter in *Holley*, in that explicit permission from both the "deferred inspection" and from the INS Operating Instruction was given to her to remain without granting her any status and without her having any pending application for status.

Another way to consider cases like *Holley* and *Lapre*: PRUCOL status is conferred upon a person anytime the government has a policy against deportation for people in that person's specific situation. However, that has been the case historically only when that policy is in writing or when it is inferred from the government's habit of action or inaction.

D. Category Four: Implicit Knowledge and Permission Inferred from Circumstances

In this category of PRUCOL eligibility, no application has necessarily been filed or granted, and there is no explicit policy to cite or written permission in the non-citizen's possession. Instead, a court or agency infers that a person is in the United States permanently with the government's knowledge and permission merely from the circumstances surrounding the person's case. Knowledge and permission or acquiescence are deemed implicit.

The original federal definition of PRUCOL and most state definitions include a catch-all PRUCOL category that seems to contemplate this or a similar scenario.[384] New Mexico's catch-all category, for example, includes "any other aliens living in the United States with the knowledge and permission of the immigration and naturalization service and whose departure the agency does not contemplate enforcing."[385] These catch-all categories appear to contemplate circumstances where individuals have neither an approved status, nor a pending application for the same, nor any explicit permission to remain permanently. Thus, they appear to anticipate circumstances in which permission to remain must be inferred from circumstance.

Several courts have inferred from the circumstances surrounding an individual's case that they are PRUCOL despite lacking granted or pending applications or explicit permission of any kind.

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[383] *Id.*

[384] 20 C.F.R. § 416.1618(b)(17); *see, e.g.*, CAL. CODE REGS. tit. 22, § 50301(b)(3) (2020); 130 MASS. CODE REGS. 518.003(C)(11) (2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(l) (2020); 55 PA. CODE § 150.1(b)(3)(xvi) (2020).

[385] N.M. CODE R. § 8.106.100.7(B)(16)(b)(xvi) (LexisNexis 2020).

1. Deportation Proceedings

One category of non-citizens whose PRUCOL designation remains a relatively open question are those who have been placed into deportation ("removal") proceedings but have not yet been deported. While two different courts have looked at these circumstances, neither have given clear guidance.

A very short concurring opinion in *Alfred v. Florida Department of State Labor* seems to state that someone in deportation proceedings is PRUCOL, at least until they are afforded their individual or merits hearing.[386] In *Alfred*, the majority opinion identified 26 Haitian nationals as PRUCOL because they either had valid work permits or were parolees or conditional entrants.[387] A very short concurring opinion noted: "It is admitted that [the PRUCOL Haitian nationals] cannot be excluded or deported without a prior hearing."[388] The concurring judge reasoned then, that "[s]ince they have not yet been granted the required hearing, it inevitably follows that they are residing in the United States 'under color of the law,' which grants them that right."[389] Under this interpretation, until an individual is placed into deportation proceedings and is scheduled for or participates in a hearing, they remain PRUCOL.

Two decisions from the Supreme Court of Utah have also attempted to clarify the significance of deportation proceedings for a person's PRUCOL eligibility. In *Antillon v. Department of Employment Security*, Baltazar Antillon, a national of Mexico, had received a grant of voluntary departure and a docket number with a date by which he was supposed to leave the United States.[390] Mr. Antillon never left, overstayed his departure date, and instead filed an application for suspension of deportation.[391] In response, INS served him a Notice to Appear ("NTA") before an immigration judge with the date of the hearing "to be determined," but the government never scheduled a hearing.[392] Based on this, the court reasoned that Mr. Antillon was PRUCOL because the docket number and NTA showed INS knew he was in the United States. The agency's failure to schedule or hold a pre-trial hearing, called a "master calendar" hearing, proved their acquiescence to his presence.[393] The highest court of Utah

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386 Alfred v. Fla. Dep't of Labor & Emp't Sec., 487 So. 2d 355, 359 (Fla. Dist. Ct. App. 1986) (Schwartz, C.J., specially concurring).

387 *Id.* at 356-57 (majority opinion).

388 *Id.* at 359 (Schwartz, C.J., specially concurring).

389 *Id.* (alterations omitted).

390 Antillon v. Dep't of Emp't Sec., 688 P.2d 455, 457 (Utah 1984).

391 *Id.*

392 *Id.*

393 *Id.* at 458-59.

thus appeared to say that being in deportation proceedings but not scheduled for a hearing makes one PRUCOL. Interestingly, the court did frame Mr. Antillon's PRUCOL status as one based on his pending application for suspension of deportation. The court could have relied on the application as a source of Mr. Antillon's PRUCOL eligibility but did not.

However, the Supreme Court of Utah may have retreated somewhat from the *Antillon* pronouncement in a later decision. In *Alvarado v. Board of Review of Industrial Commission of Utah*, Hismael Alvarado, also a Mexican national, applied for unemployment benefits under FUTA.[394] Following Mr. Alvarado's application for a docket control permit or, in the alternative, a suspension of deportation, INS issued an NTA and scheduled what seemed from the opinion like a master calendar hearing, though no date had yet been set for a trial (called an "individual hearing") to adjudicate Mr. Alvarado's application.[395] Mr. Alvarado argued that he was PRUCOL until such time as the individual hearing took place.[396] The Supreme Court of Utah disagreed, finding that on these facts INS "continued to make all proper and concerted efforts to enforce the law and deport Alvarado" because "an initial hearing was held" on his case.[397] Both courts focused on the deportation proceedings as the source of PRUCOL eligibility. One material difference between Mr. Alvarado's and Mr. Antillon's circumstances was that the former was scheduled for a master calendar hearing but latter was not, rendering the latter PRUCOL but not the former. During Mr. Alvarado's final immigration hearing, the judge determined that he was, in fact, deportable, which was not a conclusion drawn in Mr. Antillon's case.[398] The court also differentiated the two men's cases by reasoning that Mr. Antillon had voluntarily initiated contact that led to proceedings, in which INS took no further action and deemed that he was PRUCOL.[399] Mr. Alvarado, on the other hand, was arrested during a sweep operation and did not—either himself or by an attorney—present himself to immigration.[400] Read together, these cases imply that whether or not an individual in deportation proceedings is PRUCOL depends on how they ended up in proceedings and what stage of the proceedings they reach.

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394 Alvarado v. Bd. of Review of Indus. Comm'n of Utah, 737 P.2d 180, 181 (Utah 1987).
395 *Id.*
396 *Id.*
397 *Id.* at 182.
398 *Id.*
399 *Id.*
400 Alvarado, 737 P.2d at 182.

2. Immigration Internment

No case law has commented on whether or not immigration "detention" confers PRUCOL eligibility, but an unusual case from the U.S. Federal Court of Claims, *Shibayama v. United States*, provides an interesting argument for why immigration detention could confer PRUCOL eligibility. In 1988, Congress passed the Civil Liberties Act ("CLA") to "acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II."[401] The CLA created a trust fund and directed the Attorney General to pay each "eligible individual" reparations of $20,000 for their unjust internment during World War II.[402] Isamu Shibayama, Kenichi Shibayama, and Takeshi Shibayama were three brothers who were nationals of Peru but of Japanese ancestry and who were abducted with their parents and sisters by American military forces on March 1, 1944.[403] For reasons that are unclear in the opinion, they were forcibly brought to the United States from Peru and held at an internment camp in Crystal City, Texas.[404] During their internment, they were not legal permanent residents or citizens of the United States.[405]

The Shibayama brothers applied for their $20,000 under the CLA, arguing that they were entitled to it because, even though they were not legal permanent residents or U.S. citizens during their internment, they were nonetheless PRUCOL.[406] Relying on *Holley* and *Berger* to make their point, the Shibayama brothers argued that they were in the country with the government's knowledge and permission by virtue of being forcibly held in a government-operated internment camp inside the United States.[407] The Federal Court of Claims did not comment on whether the Shibayama brothers were PRUCOL during their internment, and instead denied their claim because PRUCOL status is not equivalent to permanent resident status, and the CLA limited entitlement to persons who were permanent residents and citizens during internment.[408]

Whether or not the Shibayama brothers were PRUCOL remains an open question. In fact, eight years prior to *Shibayama*, attorney Manjusha

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401 Shibayama v. United States, 55 Fed. Cl. 720, 721 (2002).
402 *Id.* at 722.
403 *Id.* at 723.
404 *Id.*
405 *Id.* at 743.
406 *Id.*
407 *Id.* at 744.
408 *Id.* at 744-45.

P. Kulkarni made the same argument as the Shibayama brothers, describing it as "the most feasible alternative"[409] to an equal protection argument for future Japanese-Peruvian plaintiffs seeking redress for their internment.[410]

The analogy between the internment of Japanese nationals and the many thousands of non-citizens who are interned in immigration prisons and concentration camps today is a natural one. Like the Shibayama brothers in 1944, immigration "detainees" of today are held in the U.S. government's custody against their will. Government custody shows the government's knowledge of these non-citizens' presence and permission to remain in the United States, at least until their deportation is effectuated, or as Kulkarni argued for Japanese-Peruvian internees: "INS knew and permitted Japanese Peruvians to reside in the United States without formal documentation, and did not contemplate enforcing their deportation."[411] In this way, Kulkarni and the Shibayama brothers supply an argument for why immigration "detainees" may be PRUCOL.

3. Immigration Authority Inaction Alone

Some courts have found that PRUCOL status can be conferred simply by the immigration authority's failure to place someone in deportation proceedings despite knowing that the individual is in the United States.[412] For example, suppose an application for relief is denied or an individual's relief expires, but the individual is never placed into deportation proceedings. They have no explicit permission to remain and no application for relief. However, some courts have said that if the government has some knowledge that the person is here but responds to their presence with inaction, this allows us to infer PRUCOL eligibility.

In *S.W. v. Paterson City Welfare Division at Passaic Welfare Agency*, the New Jersey Human Services and Economic Assistance Board held that S.W. was PRUCOL when he applied for cash assistance.[413] He applied for permanent residence status and was subsequently denied, but was not subject to deportation for years.[414] Relying on *Holley*, but also *Antillon* and *Cruz*, as discussed below,[415] the tribunal reasoned that "even

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[409] Manjusha P. Kulkarni, *Application of the Civil Liberties Act to Japanese Peruvians: Seeking Redress for Deportation and Internment Conducted by the United States Government During World War II*, 5 B.U. PUB. INT. L. J. 309, 338 (1996).

[410] *Id.* at 332-33.

[411] *Id.* at 338.

[412] *See* Castillo v. Jackson, 594 N.E.2d 323, 333 (Ill. 1992).

[413] S.W. v. Paterson City Mun. Welfare Div. at Passaic Cty. Welfare Agency, No. HPW 07398-04, 2005 WL 183093, at *3 (N.J. Adm. Jan. 13, 2005).

[414] *Id.*

[415] *Id.* at *2.

without letters and documentation from INS, there is persuasive case law that holds that an alien is PRUCOL, where the INS knew of his presence but took no action to deport him."[416] It concluded that S.W. was PRUCOL since "the INS knew of S.W.'s status because they received and reviewed, but did not accept, his application for permanent residency and did not commence deportation proceeding [sic]."[417]

L.R. v. Passaic County Board of Social Services, issued by Human Services and Economic Assistance of New Jersey, held that L.R., a Cuban national with Cuban entrant status, was PRUCOL from 1980 to 1996 simply by virtue of receiving a stamped I-94 upon entry into the United States in 1980, and was thus eligible for the assistance she received during that time.[418] The tribunal relied on *Antillon*, summing up its holding thusly: PRUCOL status is conferred "where the INS knew of [the person's] presence but took no action to deport [them]."[419] The court implies that L.R.'s I-94 proved the government knew she was here and acquiesced to her presence for the 27 years it failed to deport her.[420]

S.W. and *L.R.* open the door to the possibility that even rejected or denied applications, as long as they are not followed by a referral to an immigration court, still confer PRUCOL status on the applicant.

Possibly the most radical of the cases involving implicit knowledge or inferred permission came out of the Massachusetts Supreme Judicial Court. In 1985, the Court faced the question of whether Luisa Cruz was PRUCOL for purposes of federal Medicaid eligibility.[421] Ms. Cruz had entered the United States with her mother when she was a child.[422] She and her mother entered on non-immigrant visitor visas, which Ms. Cruz then overstayed, though her mother eventually became a legal permanent resident after marrying a U.S. citizen.[423] At some point Ms. Cruz filed an application for adjustment of status herself, but then became terminally ill and entered a semi-comatose state, and her family "did not pursue the adjustment of status proceedings."[424] The Court noted in a footnote that it was unclear whether the application was "completed but never filed" or whether it was "filed and then proceedings were suspended."[425]

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[416] *Id.* at *3.

[417] *Id.*

[418] L.R. v. Passaic Cty. Bd. of Soc. Servs., No. HPW 07124-07, 2007 WL 2852197, at *1, *3-4 (N.J. Adm. Aug. 30, 2007).

[419] *Id.* at *4.

[420] *Id.*

[421] Cruz v. Comm'r of Pub. Welfare, 478 N.E.2d 1262, 1263-64 (Mass. 1985).

[422] *Id.* at 1263. The Court's opinion does not say how old she was at the time of entry.

[423] *Id.*

[424] *Id.*

[425] *Id.* at 1263 n.2.

What does seem clear from the opinion is that the Court did not care if the application was never filed, or filed and suspended. Instead, the Court found that, if the facts before it were confirmed, Ms. Cruz was PRUCOL.[426] The Court relied on *Velasquez* and *Antillon* to note that in those cases, the circumstances were enough to find knowledge and acquiescence, pursuant to *Holley*.[427] The Massachusetts court found that for Ms. Cruz as well, the agency's inaction "warrants the inference that the INS has acquiesced in the plaintiff's continued presence in the country."[428]

What makes *Cruz* such an unconventional decision is the basis upon which the Court found knowledge and acquiesce. The Court observed that Ms. Cruz had lived in the United States for more than 12 years, that her parents were an LPR and a citizen, and that the record suggested that INS was aware of her presence and that it could have proceeded to deport her but had decided not to do so.[429] The Court said nothing about the adjustment of status application and indeed was unclear on whether or not the application had even been submitted. Presumably, the Court inferred that the INS had knowledge of Ms. Cruz's presence from either her entry visa or her mother's immigration application history, or both, but it did not specify. Either way, the Court found that these facts "may fall squarely within the rationale of *Holley*," despite the fact that Ms. Cruz lacked any official written permission to remain as the *Holley* plaintiff had.[430] The *Cruz* court thus indicated that someone might be PRUCOL under *Holley*'s rationale whenever circumstances indicate that (1) the government has at some point received word that they are residing in the country and (2) the government has taken no steps to deport them. This may be the broadest ever interpretation of *Holley*. Such a PRUCOL designation would widen the doctrine to include a very large number of otherwise undocumented residents of the United States, including anyone who had ever overstayed a non-immigrant visa but was never placed into deportationproceedings. The only consideration narrowing the Court's holding slightly is that it seemed to matter that Ms. Cruz appeared to be eligible for suspension of deportation due to her serious illness.[431]

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[426] *Id.* at 1266-67.

[427] *Id.* at 1265-66 (noting that in *Velasquez* "the judge reasoned that evidence of the agency's history of inaction was sufficient to establish . . . that the INS had acquiesced in her presence within the country," and in *Antillon*, the plaintiff was PRUCOL "when the INS was aware of his presence and knew where to find him, but it had taken no action to deport him").

[428] *Id.* at 1266.

[429] *Id.*

[430] *Id.*

[431] *Id.* Professor Irene Scharf provides the most detailed discussion of the *Cruz* decision to date in her 1993 article. Scharf, *supra* note 113, at 569-70.

The Western District Court of Washington may have similarly extended the boundaries of PRUCOL in *Mayorquin v. Secretary of HHS*. Guillermo Mayorquin was a citizen of Mexico who entered the United States without inspection and then suffered diabetes and kidney failure such that he required dialysis.[432] He applied for SSI benefits based on these impairments but was ultimately denied by HHS on the basis that he was not PRUCOL.[433] The Western District observed that Mr. Mayorquin's situation was not reflected anywhere in the list of PRUCOL examples provided in the federal PRUCOL definition, but that Mr. Mayorquin was nonetheless PRUCOL under the catch-all provision of that regulation.[434]

The court was vague on the facts but observed that Mr. Mayorquin's presence in the United States and his fragile medical condition had "been presented to the I.N.S. repeatedly by advocates for [the] plaintiff, entreating the I.N.S. to make a decision."[435] Although the opinion did not say whether this meant that any application had been filed or was pending before INS,[436] there was some indication that this may have been an application for indefinite voluntary departure.[437] The opinion added that no action had been taken to enforce Mr. Mayorquin's departure and that INS could "furnish no indication of when, if ever, it will even consider plaintiff's case."[438] The only specifics the opinion gave were that "a letter from the district director of INS demonstrates that the agency had made no determination as to plaintiff, and provided no timetable for when it would do so, if ever."[439] Notably, the holding of the case turned on the absence of a decision by the agency:

> [Mr. Mayorquin] is not required to show that I.N.S. has determined he is entitled to stay. He need only show that the agency is presently permitting him to reside in the United States indefinitely, and does not contemplate enforcing his departure. This record establishes that the I.N.S. refuses to contemplate plaintiff at all; and thus by default is permitting him to remain in the United States indefinitely.[440]

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[432] Mayorquin v. Sec'y of HHS, No. C88-1032C, 1989 WL 225598, at *1 (W.D. Wash. Sept. 21, 1989).

[433] *Id.* at *2.

[434] *Id.*; *see* 20 C.F.R. § 416.1618(b)(17) (2020).

[435] *Mayorquin*, 1989 WL 225598, at *3.

[436] *Id.*

[437] *Id.* at *1 ("It is therefore highly likely that, once INS begins an investigation into his status, he will be granted an indefinite voluntary departure.").

[438] *Id.* at *3.

[439] *Id.* (citation omitted).

[440] *Id.* (citation omitted).

The Western District was not as concerned with what the letter showed in terms of action, but what the lack of enforcement showed "by default."[441] The court seemed to imply that it is permissible to look at what the government is not doing (enforcement) rather than what they have affirmatively done (letter of permission) in considering PRUCOL eligibility. Despite the government's knowledge that Mr. Mayorquin was present, they took no steps to deport him—by their inaction, the government showed they were permitting him to stay.[442]

As a final example, recall that in *Flores v. Department of Jobs and Training*, discussed *supra*, the Supreme Court of Minnesota approved applications conferring PRUCOL eligibility. In that case, Minnesota's Department of Jobs and Training conceded that Ms. Flores was PRUCOL even after her parole had expired because INS took no steps to deport her months after its expiration.[443] Here, too, the court upheld an administrative decision that seemed to say that PRUCOL status is conferred, even after a status expires, for as long as the government fails to deport, or try to deport.

4. Cuban Nationality Per Se

This category of cases ceased to be legally relevant at the end of the Obama presidency, when it was announced that the United States would resume deportations of deportable Cuban nationals to Cuba.[444] This has remained the case under the Trump regime.[445] Prior to this announcement, owing to the unique political relationship between the United States and Cuba (or lack thereof), nationals of Cuba were long treated differently under American immigration law.[446] Also making Cuban nationals unique was Cuba's refusal to accept deported Cuban nationals from the United

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[441] *Id.*

[442] This rationale might be similar to the Eastern District's in *Farjam* but for the fact that in *Mayorquin* there was no pending application for relief, or at least the court's reasoning would not have changed even without one. Farjam v. Comm'r, Soc. Sec. Admin., No. CV-94-4486 (CPS), 1995 WL 500477, at *1 (E.D.N.Y. Aug. 8, 1995).

[443] Flores v. Dep't of Jobs & Training, 411 N.W.2d 499, 502 (Minn. 1987).

[444] U.S. DEP'T OF HOMELAND SEC., FACT SHEET: CHANGES TO PAROLE AND EXPEDITED REMOVAL POLICIES AFFECTING CUBAN NATIONALS (2017), https://perma.cc/B6NG-2Z9V.

[445] Adriana Gomez Licon & Gisela Salomon, *Trump Administration Ramps Up Deportations to Cuba*, ASSOCIATED PRESS (Oct. 11, 2019), https://apnews.com/5a885a04f8bc4ad99144bf7e01be39a6. Please note: The authors are choosing to use the term "Trump regime" rather than "Trump administration" because they contend it more accurately reflects this president's unprecedented and authoritarian treatment of law and policy, and out of concern that using "administration" normalizes the same.

[446] *See, e.g.*, Gonzalez v. McNary, 980 F.2d 1418, 1419-20 (11th Cir. 1993) (discussing special rights and privileges under the Cuban Refugee Adjustment Act).

States.[447] In practice, for many years, that meant that the federal government did not deport Cubans.[448] While it may no longer be helpful for Cuban nationals today, the following caselaw may be helpful by way of analogy for nationals of other countries that may in the future develop similar diplomatic relationships with the United States.

In *S.N. v. Hudson County Division of Social Services*, a decision from New Jersey's Division of Economic Assistance, S.N. was a Cuban national who entered the U.S. on a B-2 visitor non-immigrant visa and was issued an I-94 upon entry.[449] S.N. overstayed her B-2 visa, accrued unlawful presence, then applied in 1997 for permanent residence status. Subsequently, she applied for and received a work permit that same year.[450] Her application for permanent residence was approved in 1999 under the Cuban adjustment law, but at issue was her state benefit eligibility prior to her LPR status.[451] The Division found that S.N.'s circumstances conferred PRUCOL status on her as early as August 22, 1996, when the state benefit she was applying for became available to PRUCOL individuals.[452] The Division noted that, both in 1996, before she had applied for permanent residence or been granted a work permit, and after she had been out of status for several years, S.N. was PRUCOL.[453] She had resided permanently since her entry and gave the government every indication that she did not intend to return to Cuba because she "routinely told the INS where she was."[454] The INS was aware that she was in the United States during this time but, inferable from their failure to deport S.N., did not intend to deport her.[455] Thus, despite being out of status without any pending application for status in 1996, the Division inferred from S.N.'s circumstances of continued known presence and lack of deportation proceedings that she was PRUCOL.

A similar case, *Union County Division of Social Services v. A.P.*, also from New Jersey's Division of Economic Assistance, considered the PRUCOL eligibility of a Cuban entrant whose one year of parole and I-

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[447] *See* Clark v. Martinez, 543 U.S. 371, 386 (2005) (noting that the government "concedes that it is no longer even involved in repatriation negotiations with Cuba").

[448] *See* Gonzales v. Screws, No. 12-22006-Civ-SEITZ, 2013 WL 943102, at *2 n.7 (S.D. Fla. Feb. 4, 2013) ("[E]xcept for exceedingly rare cases, Cuban nationals are not deported or removed from the United States.").

[449] S.N. v. Hudson Cty. Div. of Soc. Servs., HPW 3525-99, 1999 WL 1189083, at *1 (N.J. Adm. Nov. 1, 1999).

[450] *Id.*

[451] *Id.* at *2.

[452] *Id.* at *3.

[453] *Id.*

[454] *Id.*

[455] *Id.*

94 had long since expired but who had not yet applied for permanent residence or a work permit.[456] However, the government had taken no steps to remove A.P.[457] Relying on *Holley* and *Solis*, the Division nonetheless found that "the decision to withhold the removal process" was enough to confer PRUCOL status.[458]

Inasmuch as these cases stood for the proposition that Cuban nationals whom the government fails to deport enjoy PRUCOL eligibility, and to the extent that it was policy that Cuban nationals were not deported, there was an argument for identifying all Cuban nationals as per se PRUCOL. While the recent policy change renders this argument moot, the history of Cubans as a group that enjoyed per se PRUCOL eligibility lends support to the idea that entire groups of non-citizens may be rendered PRUCOL vis-à-vis official or quasi-official government policies.

5. Immigration Authority Practice Toward Entire Categories of Non-Citizens

It is useful to mention *Farjam*—in which the Southern District of New York said that an unanswered pending application for Deferred Action conferred PRUCOL eligibility—again, because the *Farjam* court also had something to say about categorical PRUCOL eligibility.

The court noted that the SSA's Administrative Law Judge had held in a finding undisputed by the SSA's Appeals Council that "INS has a long standing policy against enforcing the departure of the infirm, frail and elderly," which the plaintiff was.[459] The *Farjam* court thus seemed to endorse the idea that entire categories of non-citizens such as the frail or elderly can be considered PRUCOL when there is a practice of deferring the deportation of that group. Indeed, the government has had a policy for many years that such cases are non-priority with respect to deciding which individuals to subject to deportation,[460] although this policy by no means guarantees safety from deportation in every instance.[461]

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[456] *Union Cty. Div. of Soc. Servs. v. A.P.*, HPW 9226-00, 2001 WL 307493, at *1 (N.J. Adm. Mar. 12, 2001).

[457] *Id.*

[458] *Id.* at *3.

[459] Farjam v. Comm'r, Soc. Sec. Admin., No. CV-94-4486 (CPS), 1995 WL 500477, at *5 (E.D.N.Y. Aug. 8, 1995).

[460] *See, e.g.*, Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 6 (Nov. 20, 2014), https://perma.cc/45YT-LXNP; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4-5 (June 17, 2011), https://perma.cc/TL2K-KQDK.

[461] *See* Christine N. Cimini, *Hands off Our Fingerprints: State, Local and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 107 (2014).

The Southern District clarified in *Farjam* that the phrase "does not contemplate enforcing" does not mean official determination or authorization of the same; rather, it includes non-citizens whose residence in the U.S. continues by virtue of acquiescence.[462] Therefore, to be consistent with *Berger*, PRUCOL includes:

> [S]cenarios in which INS does not respond to requests . . . yet in which official acquiescence to an individual's presence is nevertheless present. Such a situation would be present when INS is made aware on numerous occasions of the presence of an illegal alien yet does not take action to enforce the departure.[463]

Interestingly, parties before the Eastern District of New York in the case that would become *Lewis v. Grinker* made arguments that entire groups of individuals, such as all children and all pregnant women, were categorically PRUCOL because it was not then the government's practice of deporting them.[464] Although the reviewing court never reached or ruled on these arguments for procedural reasons,[465] we note this case here because this argument can be useful to advocates who seek to expand PRUCOL eligibility in their states.

6. Prima Facie Eligibility for Immigration Relief

Several statutory and regulatory definitions of PRUCOL, currently and before 1996, include in their definition individuals who have continuously resided in the United States since June 30, 1948, or since January 1, 1972.[466] Generally, any non-citizen continually residing in the United States since January 1, 1972, (and, prior to 1986, since June 30, 1948)[467] is eligible to apply for adjustment of status.[468] What makes this PRUCOL category unique is that the people it applies to are PRUCOL by virtue of

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[462] *Farjam*, 1995 WL 500477, at *4.

[463] *Id.* (citation omitted).

[464] *See* Lewis v. Grinker*,* 965 F.2d 1206, 1214 (2d Cir. 1992).

[465] *Id.* at 1221.

[466] *See, e.g.*, 20 C.F.R. § 416.1618(b)(13) (2020); ARIZ. ADMIN. CODE § 6-14-111(18) (2020); IOWA ADMIN. CODE r. 871-24.60(96)(3)(b)(5) (2020); 10-144-103 ME. CODE R. § 2.2-5 (LexisNexis 2020); 130 MASS. CODE REGS. 518.003(C)(6) (2020); N.M. CODE R. § 8.106.100.7(B)(16)(b)(xiii) (LexisNexis 2020); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(j) (2020); 55 PA. CODE § 150.1(b)(3)(xiii) (2020).

[467] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 203, 100 Stat. 3359, 3405 ("Section 249 (8 U.S.C. 1259) is amended by striking out 'JUNE 30, 1948' in the heading and inserting in lieu thereof 'JANUARY 1, 1972.'").

[468] *See* 8 U.S.C. § 1259(a) (1996) ("A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, *as of the date of the approval of his application* . . . [if] he establishes that he entered the United States prior to January 1, 1972.") (emphasis added).

their prima facie *eligibility* for some form of immigration relief, and not because they have applications granted or pending for the same.

The authors could find only one instance of a tribunal accepting the idea that PRUCOL eligibility is conferred upon those who are prima facie eligible for some form of immigration relief before they apply for that relief: *In re Barazas*, an administrative hearing discussed in *Castillo v. Jackson*, accepted this argument.[469] In that hearing, a claimant for unemployment benefits argued that before he applied for relief under IRCA, he was PRUCOL after IRCA's effective date.[470] The administrative judge agreed with the claimant, finding "that Congress had conferred a special status on amnesty-eligible aliens and agreed that Barazas was PRUCOL from IRCA's effective date even though Barazas was not individually known to INS until his amnesty claim was filed."[471]

IV. WHAT IS PRUCOL ELIGIBILITY WHEN IMMIGRATION RELIEF, SUCH AS DEFERRED ACTION FOR CHILDHOOD ARRIVALS OR TPS, IS GRANTED BUT LATER RESCINDED?

An era of grave uncertainty in the administration of immigration laws began in 2016, with the election of Donald Trump as president. On September 5, 2017, Acting Secretary of Homeland Security Elaine C. Duke issued a memorandum terminating Deferred Action for Childhood Arrivals ("DACA"),[472] which began under the Obama administration as a means to provide work authorization and a reprieve from deportation.[473] The Trump regime alleged that such protection was unlawful: the DHS now held the view that the DACA program confers a benefit that required congressional action.[474] Thus, the government declared that it was inappropriate for DHS to continue to protect DACA recipients through deferred action.[475] The practical implication of this change in policy was that new DACA applications would not be accepted after September 7, 2017. Those who were already granted DACA would also not be able to renew

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469 *See* Castillo v. Jackson, 594 N.E.2d 323, 333-34 (Ill. 1992).

470 *Id.* at 334.

471 *Id.*

472 Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://perma.cc/7YGC-LGFG.

473 Immigrant youth who entered the country before their 16th birthday, had proof of continuous residence, and pursued an education in the United States were granted DACA. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://perma.cc/8YUM-RE7V.

474 *See* Memorandum from Elaine C. Duke, *supra* note 472.

475 *Id.*

their employment authorization documents and would lose this special designation that provided some protection against deportation.[476] Until the Supreme Court of the United States restored the DACA program and rejected the Trump regime's attempt to end the program,[477] USCIS was not accepting new DACA applications. Only those with DACA applications filed prior to October 5, 2017, were able to renew their work authorizations.[478]

The termination of the DACA program created ambiguity in states like New York, where DACA recipients were considered PRUCOL and thus eligible to receive state-funded Medicaid.[479] The question arose as to whether they would continue to be PRUCOL if the program ended and recipients no longer had their special designation. Through lobbying efforts called the Coverage 4 All campaign,[480] the legal theory and strategy for which was created by co-author of this article, Sarika Saxena, advocates were able to successfully ensure that DACA recipients will remain eligible for Medicaid, despite the immigration program's unknown future.[481]

Under New York's regulations setting forth the eligibility requirements for Medical Assistance,[482] the first PRUCOL requirement—that the federal immigration agency know of the individual's presence—is met for DACA applicants. Since the DACA application has been granted, it is proof of the agency's knowledge. Whether the agency is acquiescing and not contemplating enforcement, however, requires further analysis.

Courts have found that the policy and practices of the federal immigration agency can be used to determine this element, as in *Papadopoulos*.[483] The *Papadopoulos* court reasoned that Ms. Papadopoulos satisfied the PRUCOL requirements because of INS's operating instructions that

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[476] *Id.*

[477] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020). Please note that this decision only temporarily restores DACA because it holds that the government improperly terminated the program, laying out a path for them to terminate DACA in the near future by following the proper motions. Unless there is a change in the presidency, it is likely that we will lose DACA for good in the near future.

[478] *See* Memorandum from Elaine C. Duke, *supra* note 472.

[479] N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii)(i) (2020).

[480] *See* #COVERAGE4ALL, https://perma.cc/228X-337F (last visited May 21, 2020).

[481] Press Release, Office of the N.Y. Governor, Governor Cuomo Ensures Medicaid Coverage for DACA Recipients Regardless of Federal Action (Jan. 23, 2018), https://perma.cc/VC6W-2YMB. *See also What You Should Know About Applying for or Renewing Your Medicaid Coverage Through N.Y. State of Health if Deferred Action for Childhood Arrivals (DACA) Is Rescinded*, N.Y. STATE OF HEALTH (Jan. 23, 2018), https://perma.cc/VQY3-T7JW.

[482] N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii) (2020).

[483] *See* Papadopoulos v. Shang, 414 N.Y.S.2d 152, 154-55 (App. Div. 1979).

it "would not take any steps to effect deportation of [Ms. Papadopoulos]."[484] Currently, USCIS's policy to refer cases for the initiation of deportation proceedings does not categorically include DACA recipients.[485] In fact, USCIS protocol and procedures explicitly state that DACA recipients will not be referred for deportation proceedings.[486] Advocates can argue that DHS's decision to rescind the executive orders creating DACA and no longer issuing applications establishes that the agency is acquiescing to the person's presence. At the very least, it can be argued that a person's PRUCOL eligibility extends until it can be demonstrated that the federal immigration agency *would* contemplate enforcing the person's departure.[487]

Furthermore, the reason given for rescinding the program was based on a procedural issue and not because DHS believed that DACA recipients were no longer worthy of prosecutorial discretion. Certainly, DHS's memorandum rescinding the current program has no bearing on an individual's likelihood to be removed and whether the immigration agency is said to be acquiescing to the person's presence. Deportation proceedings are initiated based on an individualized, case-by-case analysis. Until an indication is given that DACA grantees could be removed from the country, typically done through the issuance of an NTA before an immigration judge, *Papadapoulos* might be relied upon as authority for the position that the agency is acquiescing to the individual's presence and that they maintain PRUCOL eligibility.

It is important to acknowledge the general nature of immigration enforcement as well. Rescinding or even terminating a form of immigration relief does not in and of itself initiate any adverse actions against the person, nor does it necessarily indicate the agency's intent to do so. USCIS, the immigration agency that adjudicates DACA applications, initiates deportation proceedings refering an applicant to the immigrant court only in particular scenarios. DHS has established policies and procedures for circumstances in which to refer a case and serve the applicant with an NTA, which were last updated on June 28, 2018.[488]

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[484] *Id.* at 154.

[485] U.S. CITIZENSHIP & IMMIGRATION SERVS., *Notice to Appear Policy Memorandum*, https://perma.cc/DM6R-LMFE (last updated Feb. 28, 2019).

[486] *See Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T OF HOMELAND SEC. (Sept. 5, 2017), https://perma.cc/AUK5-A97A.

[487] *See* discussion *supra* Section III.D.

[488] *See* Memorandum from U.S. Citizenship & Immigration Servs., Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA (June 28, 2018), https://perma.cc/3UET-SPDP.

Therefore, in New York, there is at least support for the argument that, until the federal immigration authority affirmatively puts a person into deportation proceedings and the person is made aware of such action being taken against them, the person remains PRUCOL and eligible for Medicaid. Until an individual Medicaid recipient has been issued an NTA, as described above, the person is still PRUCOL. Governor Cuomo's executive team, along with the New York State Department of Health, agrees.[489]

Starting on September 18, 2017, the Trump regime began attacking the Temporary Protected Status designations of El Salvadoran, Haitian, Nicaraguan, Sudanese, Nepalese, and Honduran nationals. Despite the government's attempts to end TPS designations for these countries, the programs have thankfully remained in place as the result of litigation.[490] However, the question of whether non-citizens who may lose their TPS designation in the future would be considered PRUCOL after losing that designation is still unresolved. If the circumstances for DACA recipients are similar to those with TPS, there is no reason that arguments like the ones made in *Papadapolous* would not apply to TPS recipients as they do to DACA recipients. Given the nature of immigration enforcement, it is highly probable that the circumstances for ending TPS for certain nationals will mirror that of DACA. In other words, those who have their statuses terminated may receive NTAs thereafter.

V. PUBLIC CHARGE CONCERNS

Non-citizens seeking admission to the United States are deemed inadmissible if the adjudicating DHS or State Department officer has reason to believe they are likely to become a public charge, i.e. unable to support themselves financially.[491] Those seeking admission include those applying to become legal permanent residents but also some legal permanent residents returning from abroad.[492] The public charge ground of inadmissibility does not apply to those seeking admission subsequent to receiving

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[489] *See* sources cited *supra* note 481.

[490] *See, e.g.*, Bhattarai v. Nielsen, No. 19-cv-731-EMC (N.D. Cal. filed Feb. 10, 2019); Casa De Maryland, Inc. v. Trump, No. 18-cv-845-GJH (D. Md. filed Mar. 23, 2018); Saget v. Trump, No. 18-cv-1599-WFK (E.D.N.Y. filed Mar. 15, 2018); Ramos v. Nielson, No. 18-cv-1554-EMC (N.D. Cal. filed Mar. 12, 2018); Centro Presente v. Dep't of Homeland Sec'y, No. 18-cv-10340-DJC (D. Mass. filed Feb. 22, 2018).

[491] 8 U.S.C. § 1182(a)(4) (2018).

[492] The public charge ground of inadmissibility also applies to those lawful permanent residents who have traveled abroad and are returning to the United States after an absence of 180 days, or who are returning to the United States after having been convicted of certain crimes. 8 U.S.C. § 1227(a)(5) (2018).

humanitarian forms of relief, such as asylum, VAWA, U or T visas, Special Immigrant Juvenile or other Special Immigrant visas, or through other humanitarian programs such as CAA, NACARA, or HRIFA.[493] The adjudicating officer is allowed to consider many factors in determining the likelihood that the applicant will become a public charge,[494] but it is the experience of the authors that, generally, the past receipt of specific government benefits significantly increases the likelihood that the adjudicating officer will find that the applicant meet the definition of someone who will become a public charge.[495]

Critical for the advocate who is advising on the receipt of government assistance by those non-citizens who may seek admission in the future is knowing which programs will trigger the public charge grounds of inadmissibility and which will not. Up until recently and pursuant to guidance issued on May 26, 1999, such applicants were generally inadmissible on public charge grounds if they had received public assistance in the form of cash assistance, such as SSI, TANF, or state-funded cash assistance programs, or long-term in-patient institutional care at government expense.[496] However, on August 14, 2019, DHS issued new regulations that added federally funded Medicaid (excluding emergency Medicaid and Medicaid-funded programs for children under 21 years of age and pregnant people), SNAP, and Section 8 and public housing to this list of benefits that triggers the public charge ground of inadmissibility.[497] This regulation is currently in effect as this article goes to publication, except in the Second Circuit where it is currently blocked by federal court injunction;[498] however, advocates and several local governments across the country have filed lawsuits to challenge the regulations as unconstitutional and impermissible and this litigation is ongoing.[499]

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[493] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41, 336 (Aug. 14, 2019) (to be codified at 8 C.F.R. §§ 103, 212, 213, 214, 245 and 248).

[494] *Id.* at 41,298-300.

[495] *Id. See also* U.S. CITIZENSHIP & IMMIGRATION SERVS., *Public Charge Fact Sheet*, https://perma.cc/6ZKK-LCYD (last updated July 31, 2020).

[496] *See id.* at 41,306.

[497] *Id.* at 41,295.

[498] Make the Road New York v. Pompeo, --- F. Supp. 3d ---- at *23 (2020 WL 4350731); U.S. Court of Appeals for the Second Circuit Order No. 20-2537 (August 12, 2020) *States of New York, Connecticut, and Vermont v. U.S. Department of Homeland Security, et al.* (staying the July 29, 2020 injunction issued in Make the Road New York v. Pompeo in all jurisdictions outside of the Second Circuit).

[499] Make the Rd. N.Y. v. Cuccinelli, No. 19 Civ. 7993 (GBD), 2019 WL 5589072 (S.D.N.Y. Oct. 11, 2019), *aff'd*, 2019 WL 6498283 (2d Cir. Dec. 2, 2019), *rev'd sub nom.* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020); New York v. Dep't of Homeland Sec., 408 F. Supp. 3d 334 (S.D.N.Y. 2019). *See also Public Charge Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (July 31, 2020), https://perma.cc/LQ9Z-5FQL.

Practitioners should understand how the public charge bar of inadmissibility affects PRUCOL recipients under both new and former regulations. By definition, no individual designated PRUCOL will be eligible for those benefits exclusively available to qualified aliens, such as SSI, TANF, SNAP, Section 8, and federally funded Medicaid,[500] so receipt of these benefits will generally not be of concern to PRUCOL individuals.[501] Also not of concern will be the PRUCOL individual's receipt of state-funded Medicaid, since this is excluded from consideration under both the old and the new public charge regulations.[502] However, state-funded cash assistance is of the most concern, as it is the main benefit available to many PRUCOL individuals and will trigger public-charge concerns under both old and new regulations.[503]

Also important to understanding when receipt of state-funded cash assistance benefits will affect a public charge determination is identifying whether or not the recipient had been "lawfully present" when receiving the benefit.[504] Receipt of state-funded cash assistance will only impact the public charge determination if the assistance was received when the recipient was out of status. For example, if a New York resident with TPS receives SNA (the New York cash assistance program) while their TPS status is active, this will not trigger the public charge bar because the holder of TPS is considered to be lawfully present. However, if a New York resident with DACA, or an approved I-130, or a pending application (to adjust status, for example) receives SNA, this will trigger the public charge ground of inadmissibility because none of these conditions are considered a "lawfully present" status by DHS. For this reason, practitioners in jurisdictions with more expansive definitions of PRUCOL and which afford a more generous provision of cash assistance to PRUCOL individuals should proceed with the most caution.

Finally, one special group to consider in this analysis are certain lawful permanent residents. Lawful permanent residents who receive their residence through family members or employers may be deportable if they use one of those benefits subject to the public charge consideration

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[500] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,295 (Aug. 14, 2019) (to be codified at 8 C.F.R. §§ 103, 212, 213, 214, 245 and 248).

[501] However, this will be of concern for public charge purposes to those qualified aliens who are not yet lawful permanent residents but may seek permanent residence in the future through a family member, such as someone granted parole or withholding of deportation, who will seek admission in the future. The receipt of certain benefits for legal permanent residents within the first five years of their residence may also trigger a ground of deportability. *See* 8 U.S.C. § 1613(a) (2018).

[502] *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. §§ 103, 212, 213, 214, 245 and 248).

[503] *Id.*

[504] *See* Inadmissibility on Public Charge Grounds, *supra* note 501.

within their first five years of resident status.[505] Such individuals, while "qualified aliens," are nonetheless ineligible for federally funded public benefits.[506] However, they are likely entitled to the same state benefits as other legal permanent residents residing in the same state[507] and would thus be eligible for state-funded Medicaid and cash assistance programs, which may then trigger this deportability ground. Advising these clients will require a nuanced understanding of their immigration history in order to make them aware of the risks and liabilities they may incur from receiving certain benefits.

CONCLUSION

This article has discussed the history of PRUCOL and the decades of judicial construction and administrative applications that have framed its moving boundaries. Immigration regulations and the exercise of discretion by immigration authorities are fluid and far from static institutions. PRUCOL was created and evolved with this reality in mind. Congress intended—and the courts have reaffirmed—that the phrase is to be interpreted broadly and flexibly to fit this reality. This can and should be used to expand the term's capacity to provide access to otherwise undocumented residents with public assistance.

Inasmuch as the practice of law involves the identification and use of a rule's ambiguity in furtherance of your client's interests, the PRUCOL doctrine offers plenty of opportunity to make the law work for your client. In jurisdictions where PRUCOL is still good law, there is room to push the boundaries of who is included within its pliable definition. Practitioners, and in particular those institutions with the capacity for impact litigation, should look to the arguments advanced in cases like *Cruz*, *Shibayama*, and *In re Barazas* for inspiration and authority to bring new immigration circumstances under the PRUCOL umbrella.

The hope is that this discussion can provide practitioners not just with the tools and taxonomy to identify conventional PRUCOL arguments (e.g., for clients with deferred action or pending asylum applications), but also to encourage and support advocacy for the recognition of less traditional PRUCOL categories (e.g., for undocumented children or clients in deportation proceedings). Ultimately, expanding our knowledge and understanding of the PRUCOL doctrine may help thousands access

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505 8 U.S.C. § 1613(a) (2018).

506 *Id.*

507 *See e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971)(holding that "a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause [of the Fourteenth Amendment].")

life-saving public assistance and insurance in jurisdictions across several states.