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CLIENT ADVICE MEMORANDUM

DATE: December 17, 2014

TO: Jim West, Washington Student Achievement Council

FROM: Justin Kjolseth, Assistant Attorney General

SUBJECT: **Withholding of Removal and Residency Tuition**

I. ISSUE

For students who are not citizens of the United States, under what conditions does Withholding of Removal (WOR) status under 8 C.F.R. § 1208.16 satisfy the "permanently residing in the United States under color of law" exception from the definition of nonresident student contained in WAC 250-18-020(2)(c)?

II. DISCUSSION

WAC 250-18-020 contains the classifications that colleges use to determine whether a student is a resident or nonresident for purposes of in-state tuition. Under this regulation, in relevant part:

> A student shall be classified as a "nonresident" for tuition and fee purposes if he or she . . .
>
> (c) Is not a citizen of the United States of America, unless such person [is] . . . permanently residing in the United States under color of law and further meets and complies with all applicable requirements of WAC 250-18-030 and 250-18-035.

WAC 250-18-020(2). The term "permanently residing under color of law" (PRUCOL) means that an individual is or was in the country illegally, but is legally distinguishable from an alien subject to deportation because the Immigration and Naturalization Service (INS) has no plans to deport that person. *See Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 422 n.2, 754 N.E.2d 1085 (N.Y. 2001).[1] Under Social Security Administration regulations, an "[a]lien[] whose deportation has been withheld pursuant to section 243(h) of the Immigration and Nationality Act" qualifies as permanently residing under color of law, and may receive Supplemental

[1] The Immigration and Naturalization Service no longer exists. The equivalent entity is now U.S. Citizenship and Immigration Services (USCIS).

Security Income benefits, provided that he or she has "an order from an immigration judge showing that deportation has been withheld."[2]

In July 2013, the Attorney General's Office issued a memorandum stating that "individuals in 'Withholding of Removal' status may be eligible for residency provided there are no restrictions on the document that could obstruct the person's ability to form the intent necessary to become a resident." *See* Residency Handbook (2014), App. B-13 at 2. However, in processing residency applications, questions have arisen about particular aspects of immigration court orders that grant WOR, and whether they constitute restrictions that could obstruct the person's ability to form the intent necessary to become a resident. This memorandum aims to distinguish between circumstances that either qualify or disqualify a student under the PRUCOL exception.

WOR status is not an absolute bar to deportation and should not be thought of as one. For example, an individual who has been granted WOR may still be removed to a safe third country if one is available. *See* 8 C.F.R. § 1240.11(g). However, it is important to know that "[a]s a practical matter, it is extremely rare for the government to remove an individual granted withholding to a third country."[3] Such actions are generally limited to individuals who are career criminals, or otherwise repeatedly receive negative attention from government agencies. Generally, where an order has granted withholding of removal as to <u>at least</u> one country, it is sufficient to qualify under the PRUCOL exception as described in the July 2013 memorandum.

There are limited circumstances where a grant of WOR status may not be sufficient to qualify for the PRUCOL exception. The first is where a subsequent deportation action is initiated *after* the WOR is granted. This could be removal to a safe third country or removal where there is a "fundamental change in circumstances" in a country to which WOR was originally granted. 8 C.F.R. § 1208.16(b)(1)(A). A subsequent removal action demonstrates that the individual is no longer PRUCOL, because USCIS clearly has plans to deport them. Like removal to a third country, a subsequent removal action is exceedingly unlikely unless the alien has a significant criminal history or similar circumstances. Therefore, if the college is aware that an applicant has any history of criminal or administrative violations, it would be appropriate to request further information in order to determine whether a subsequent action has been initiated.

The second circumstance that would disqualify an individual from the PRUCOL exception is where an individual has been ordered to be removed to more than one potential country, and WOR is not granted as to all of those countries. In that case, the individual would be unable to form the capacity to be a resident, as they will still be removed to another country. In that case, the individual does not have the capacity to form the intent necessary to qualify as a resident for

[2] 20 C.F.R. § 416.1618(b)(15). This regulation is for purposes of Social Security Administration enforcement and is not binding on WSAC or public institutions of higher education. However, it provides an illustrative example of when an individual would be considered PRUCOL in the eyes of a federal agency.

[3] Public Counsel Law Center, *Asylum Manual for Public Counsel's Volunteer Attorneys* at 43 (January 2012), available at http://www.publiccounsel.org/tools/publications/files/AsylumManual.pdf.

purposes of in-state tuition. This situation is unlikely to arise because after the order is entered, the individual would most likely be removed to the country where WOR was not granted. If there is a pending appeal, the individual may still be in the country, but he or she is not eligible for the PRUCOL exception.

The final circumstance which could disqualify an individual from the PRUCOL exception is when there are conditions placed on the WOR that could lead to deportation. *See* Residency Handbook (2014), App. B-13 at 3. This circumstance could present itself in more than one way. For example, there could be a condition that allows the individual to be deported at any time, or under other circumstances outside of their control. Alternatively, there might be a condition which states that the individual's status is subject to review at some point in the future. Both of these conditions would disqualify the individual from PRUCOL because it would not be clear whether USCIS has plans to deport them; he or she would not be able to form the intent that is required to be considered a resident for purposes of in-state tuition. Colleges should carefully review documentation submitted by students to ensure that no such conditions exist, and seek advice from the Student Achievement Council if the documentation appears ambiguous.

III. CONCLUSION

Although WOR is not an absolute bar to deportation, the status generally qualifies a student for the PRUCOL exception to the definition of nonresident student. However, colleges should closely review documents supplied by students to determine whether there are prohibitive conditions placed on their WOR status, or whether it is likely that a subsequent removal action has been initiated. If those circumstances are not present, and the student otherwise meets the residency requirements of WAC 250-18, then he or she qualifies as a resident for purposes of in-state tuition.