



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2000-1014

To: Terri Thomas, Esq.
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Date: August 8, 2000

Subject: **H-2A Worker Eligibility**

This responds to your recent inquiry about the continued eligibility of an H-2A worker for legal services representation when the worker has abandoned his or her original contract.

The H-2A program was established by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, to ensure an adequate source of labor for agricultural employers. Under the program, an H-2A visa allows a non-immigrant agricultural worker ("H-2A worker") to stay in the U.S. for the duration of the certified period of employment, up to a maximum of one year. The H-2A status expires if the worker's employment relationship ends. 8 C.F.R. § 214.2(h)(5)(viii). Thus, the H-2A worker is only admitted to the United States to perform work for a designated employer and must leave the United States when that employment terminates for any reason.

Under § 305 of IRCA and implementing LSC regulations, an H-2A worker may be provided legal assistance by an LSC grant recipient regarding certain types of matters arising out of the worker's specific employment contract. See also 45 C.F.R. § 1625.11. The availability of such representation is intended to prevent the exploitation of H-2A workers and to ensure that the wages and working conditions of U.S. workers are not undermined. The statute and regulations, however, are silent regarding the continued eligibility for legal representation of an H-2A worker who has abandoned the employment contract for which he/she was lawfully admitted to the U.S.¹

¹ The mere fact that once the contract is abandoned the H-2A worker is no longer legally in the country does not, itself, dictate a forfeit of eligibility to legal services. Under LSC regulations, as described in LSC Program Letter 2000-2, "for aliens who are eligible for legal services, as described in 45 C.F.R. § 1626.5, with the exception of H-2A workers, as described in 45 C.F.R. § 1626.11, representation is authorized so long as the eligible alien is present sufficient to maintain residence or lawful immigration status." Thus, although for categories of unrestricted aliens, eligibility for legal representation depends on the maintenance of their lawful status, H-2A workers are excepted from this requirement.

As there is no express provision prohibiting the representation of an H-2A alien who abandons his/her employment contract and unlawfully remains in the U.S., a recipient may exercise its discretion in offering legal assistance to such individuals. In making such determinations, a recipient might well wish to consider the reason for the abandonment of the contract. For example, if the abandonment is related to the cause of action the worker wished to pursue, the abandonment might be deemed to be a constructive termination. In such a case, a strong argument can be made that allowing an H-2A worker legal representation for a claim against the initial employer that arose under the original employment contract (despite the fact that the alien *may be required to depart* the United States prior to or during the course of representation) is consistent with the Congressional intent underlying the H-2A worker program. *See id.* at ii, iv. Thus, denying an H-2A worker representation in such a case might result in the denial of meaningful representation to that person in contravention of Congressional intent.

If the abandonment is not related to the claim which the H-2A worker wishes to pursue, a recipient would want to carefully consider all of the relevant circumstances and equities in determining whether the proposed representation would be consistent with the recipient's priorities and a reasonable use of its limited resources. Among the factors the recipient might wish to consider would be the reason for the abandonment (i.e., mere convenience of the worker, family emergency, etc.) and the nature of the employer's violation (i.e., whether the violation is so egregious that the claim should be pursued notwithstanding the worker's breach of the contract), if any.

Very truly yours,

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