

LEGAL SERVICES CORPORATION**45 CFR Part 1626****Restrictions on Legal Assistance to Aliens****AGENCY:** Legal Services Corporation.**ACTION:** Final rule.

SUMMARY: Revisions to 45 CFR Part 1626 of the Legal Services Corporation's ("LSC" or "Corporation") regulations are intended to conform the rule to changes required by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359 (1986), to LSC's appropriations act for fiscal year 1989, Pub. L. 100-459, 102 Stat. 2223 (1988).

EFFECTIVE DATE: May 30, 1989.

FOR FURTHER INFORMATION CONTACT: Timothy B. Shea, General Counsel, 400 Virginia Avenue SW., Washington, DC 20024-2751, (202) 863-1839.

SUPPLEMENTARY INFORMATION: Notice of proposed revisions to 45 CFR Part 1626 and request for comments was published in the Federal Register on October 19, 1988, 53 FR 40914. The revisions were proposed principally to conform the rule to changes required by IRCA and to LSC's appropriations act for fiscal year 1989. Approximately 100 comments from bar associations, LSC recipients, attorneys in private practice, and other interested parties were received and considered by the Corporation.

On November 18, 1988, the LSC Board of Director's Operations and Regulations Committee met to consider the proposed revisions and to hear public comment. After the Committee voted to recommend the proposed rule, with some amendments, to the Board, the LSC Board voted on January 27, 1989, to adopt as final, with one amendment, the Committee's recommendations. Notice of the Board action was furnished to the Appropriations Committees of the House and Senate by letter of February 8, 1989.

Background

Part 1626 was originally promulgated to implement the restrictions on the provision of legal assistance to certain aliens delineated in Pub. L. 97-377, the appropriations act for fiscal year 1983 funds, 48 FR 19750 (May 2, 1983). After comments were received and considered, the final regulation was promulgated on June 20, 1983, 48 FR 28089, and has been in effect since July 20, 1983.

Revisions To Conform to IRCA

A. Five-Year Restriction. In November 1986, IRCA was passed, amending the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, for the purpose of "effectively controll[ing] unauthorized immigration to the United States." H. Conf. Rep. 1000, 99th Cong., 2d Sess. 85 (1986). Section 201 of IRCA (Section 245A of INA) provides for the legalization of certain aliens who had been residing illegally in the United States prior to January 1, 1982. However, IRCA also provides in section 201(h) (Section 245A(h) of INA) that such aliens, commonly referred to as "amnesty" aliens, will be ineligible for a period of five years for "any program of financial assistance furnished under Federal law (whether through grant, loan, guarantee, or otherwise) on the basis of financial need, as such programs are identified by the Attorney General." On August 24, 1987, the Department of Justice's Immigration and Naturalization Service (INS) published a proposed rule listing LSC among those programs of financial assistance for which amnesty aliens would be ineligible. 52 FR 31784-31786 (Aug. 24, 1987). The rule, based on IRCA, disqualifies amnesty aliens who become permanent residents from being eligible for legal assistance for a period of five years from the date of grant of temporary resident alien status, unless the alien can qualify independently under another available exception.

Comments to LSC's proposed rule urged that LSC should not be considered a program of financial assistance furnished under Federal law, because LSC recipients do not provide financial assistance to eligible clients; instead, they provide free legal services.

The dispute centers on whether the phrase "program of financial assistance furnished under Federal law (whether through grant, loan, guarantee, or otherwise) on the basis of financial need" within the meaning of IRCA includes legal services. IRCA, by its terms, appears to answer the inquiry. LSC is not included in IRCA's list of federally funded programs that are excluded from the definition of programs of financial assistance. See section 201(h)(4) of IRCA (Section 245A(h)(4) of INA). In addition, section 301(d)(6) of IRCA (Section 210A(d)(6) of INA) specifically exempts LSC from being considered a program of financial assistance for the purposes of Replenishment Agricultural Workers (RAW), so that RAWs are made eligible

for legal services. Thus, IRCA clearly indicates that LSC is considered to be a program of financial assistance under the general restriction in section 201(h) of IRCA; otherwise, the exception language for LSC would be wholly unnecessary and reduced to mere surplusage.

Though not an agency, instrumentality, or department of the Federal Government, 42 U.S.C. 2996d, LSC can be described as a program of financial assistance furnished under Federal law. Federal law gives LSC its authority to "provide financial assistance to qualified programs," 42 U.S.C. 2996e(a)(1)(A), and LSC distributes Federal funds to programs to provide services to clients based on financial need. See 42 U.S.C. 2996a(3) and 2996f(a)(2).

The fact that LSC recipients provide services rather than cash benefits does not mean that such programs are not programs of financial assistance. Again this construction would render unnecessary the specific exception in section 301(d)(6) making legal services available to RAWs.

Comments urged that only the Attorney General has authority to define which federally funded entities are to be considered programs of financial assistance and that, absent publication of the final rule by INS, LSC has no authority to interpret IRCA as including LSC as such a program. IRCA provides that amnesty aliens are not eligible for any program of financial assistance "as such programs are identified by the Attorney General in consultation with other appropriate heads of the various departments and agencies of Government." See section 201(h)(1)(A)(i) of IRCA (section 245(h)(1)(A)(i) of INA). A final INS rule will constitute a determination by the Attorney General specifying which programs are subject to the rule. However, INS has not yet published its final rule, and LSC recipients need immediate direction as to whether they may represent amnesty aliens who are now eligible to be granted permanent resident alien status. In the event that the Attorney General reaches a conclusion inconsistent with this rule, the Board will revisit the matter.

Comments also suggested that the proposed rule establishing the five-year disqualification period contravenes the spirit of IRCA, because Congress, it was asserted, must have intended to provide free legal assistance to amnesty aliens once they achieve permanent resident

status. Comments cited IRCA's grant to amnesty aliens of the right to participate in several Federal programs and its general aim that the Attorney General "safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens." Pub. L. 99-603, 100 Stat. 3384 (1986) (sec. 115 of IRCA). Without legal services, the comments reasoned, amnesty aliens would be unable to enforce the rights Congress provided them in IRCA.

The disqualification rule, however, is mandated by the terms of IRCA. LSC cannot "elevate the rhetoric of purpose above the specifics of text," and, therefore, ignore the subtleties and complexities of crafting legislation. See *Common Cause v. Federal Election Com'n.*, 842 F.2d 436, 445 (D.C. Cir. 1988).

Finally, setting aside the characterization of LSC as a program of financial assistance, comments insisted that LSC is authorized under its appropriations act to provide legal assistance to amnesty aliens when they receive permanent resident status, regardless of the five-year restriction. Under this view, LSC's appropriations act would provide independent and superior authority for LSC recipients to represent any permanent resident alien, and this authority should not be affected or limited by the IRCA restriction.

The LSC appropriations act does not, by its terms, mandate provision of legal assistance to any class of aliens; it merely forbids legal assistance to certain aliens, principally temporary aliens. The five-year restriction is applicable whether or not amnesty aliens gain permanent status, in part, because IRCA specifically states that its restriction controls "notwithstanding any other provision of law." Section 245A(h)(1) of IRCA, 8 U.S.C. 1255a(h)(1) of INA. Moreover, the rule interprets the five-year restriction in IRCA as being applicable only to the new category of permanent resident amnesty aliens created by IRCA. As noted above, LSC recipients may continue to represent all other categories of permanent resident aliens, as they have in the past.

B. SAWS, RAWS, and H-2 Agricultural Workers. IRCA also created three new categories of aliens—Special Agricultural Workers (SAWS), Replenishment Agricultural Workers (RAWS), and H-2 Workers—who are eligible for services from LSC-funded programs. The final rule provides LSC recipients the authority to represent such aliens.

IRCA provides for the adjustment or admittance of special agricultural workers and replenishment agricultural workers. Pursuant to sections 302 and 303 of IRCA, SAWS and RAWS are

considered to be permanent resident aliens for all purposes except immigration. See 8 U.S.C. 1160(a)(5) and 8 U.S.C. 1161(d)(4). As permanent resident aliens, these agricultural workers are eligible for legal assistance from LSC recipients once their status has been adjusted to that of a SAW or RAW, but not for purposes of attaining such status.

IRCA also created a new non-immigrant sub-category of H-2 workers. These workers are to be considered permanent resident aliens for purposes of receiving assistance from legal services programs with regard to housing, wages, transportation and other conditions of employment under their H-2 contract, but for no other purposes. A new § 1626.11 is included in the revisions to Part 1626 to implement the H-2 worker provisions of IRCA.

Revisions Implementing LSC's Appropriations Act

LSC has adopted a revision to the definition of "on behalf of" in § 1626.3(c) to prevent representation not authorized by LSC's appropriations act. The change will reinforce the prohibition on representation of an ineligible client under the pretense of representing an eligible client. The comments confirmed that there was little disagreement about what the statutory language and the regulation intended; rather, the disagreement focused on the concern that the revision as published in the proposed rule would have added more uncertainty to the rule. Accordingly, the definition was revised to satisfy these concerns by providing that:

To provide legal assistance "on behalf of" an ineligible alien is to render legal assistance to an eligible client which benefits an ineligible alien and does not affect a specific legal right or interest of the eligible client.

This definition focuses on the identity of the client rather than on whether a benefit flows to either an ineligible or eligible client. Legal assistance that benefits an ineligible alien will be allowed only when an eligible person is in fact the client whose legal interests or rights are advanced by the representation.

Miscellaneous Revisions

A. Section 1626.4. The language of § 1626.4(a) has been changed to conform to the language of the appropriations act, which requires an alien to be present in the United States in order to be eligible for legal assistance. Pub. L. 100-459, 102 Stat. 2225 (1988).

The listing of categories of ineligible aliens in § 1626.4(b) has been deleted as unnecessary. An alien who does not fit

into one of the categories defined in § 1626.4(a) is not eligible for legal services that are financed by funds appropriated under the relevant appropriations act.

B. Section 1626.5. Section 1626.5 has been changed to delete as unnecessary the listing of documents which do not provide evidence of eligible alien status. To be eligible for legal services, an alien must present one of the documents stated in § 1626.5(b).

The new paragraph (c) of § 1626.5 states that a Special Agricultural Worker who presents an INS Form I-688 is eligible for legal services.

Section 1626.5(f), which permits brief advice by telephone, has been revised to clarify that "brief advice" is limited to advice provided by telephone and does not include continuous representation of a client.

C. Section 1626.10(a). Paragraph (a) has been revised because the term "Micronesia" is a geographic rather than a political term. This change makes the language of § 1626.10(a) more precise and, in addition, restates congressional intent that residents of these political entities are eligible to be clients of a legal services program.

Technical Corrections

The authority section of Part 1626 has been revised to include LSC's current appropriations act. In addition, all references in Part 1626 to Pub. L. 93-355 have been changed to LSC's fiscal year 1989 appropriations act, Pub. L. 100-459, and "any succeeding act which contains the same restrictions." This revision is necessary to eliminate the necessity of amending the regulation annually.

Reprogramming

Pursuant to Pub. L. 100-459, 102 Stat. 2226 (1988), the Corporation is required to give 15 days notice to the appropriations committees of both Houses of Congress prior to publishing as final revisions to its regulations. Reprogramming letters were duly sent to the appropriate committees, and responses were received from both the House and Senate Subcommittees of the Departments of Commerce, Justice, and State, the Judiciary and related agencies. The Senate committee expressed disagreement with the LSC Board's interpretation of IRCA, and stated that it preferred to withhold consideration of approval until the Attorney General makes a final decision as to whether LSC is a program of financial assistance for the purposes of IRCA. The House committee, also concerned about the statutory authority of the Attorney General to issue a rule on the issue,

stated that it could not, at this time, approve the regulations.

After careful analysis, as set out above, the Corporation believes that its recipients need immediate direction as to whether they may represent amnesty aliens who are now eligible to be granted permanent resident alien status. An expression of committee disapproval, while respectfully considered, does not affect the authority of LSC to publish its revisions as final, as only notice, and not approval, is statutorily required. Pub. L. 100-459, 102 Stat. 2226 (1988); 130 CONG. REC. S8588-8589 (daily ed. June 28, 1984); and *Principles of Federal Appropriations Law 2-29* (GAO ed. 1982).

List of Subjects in 45 CFR Part 1626

Aliens, Legal services, Privacy, Reporting and recordkeeping requirements.

For the reasons set out above, 45 CFR Part 1626 is amended as follows:

PART 1626—RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS

1. The authority citation for Part 1626 is revised to read as follows:

Authority: Sec. 1008(e); Pub. L. 93-355, 88 Stat. 378 (42 U.S.C. 2996g(e)); Pub. L. 99-603, 100 Stat. 3417; Pub. L. 100-459, 102 Stat. 2168.

2. Section 1626.1 is revised to read as follows:

§ 1626.1 Purpose.

This part is designed to assist recipients in determining the eligibility and immigration status of persons who seek legal assistance, to provide guidelines for referral of ineligible persons, and to protect the confidentiality of information obtained from clients and prospective clients. This part does not apply to any case or matter in which assistance is not being provided with funds appropriated under Pub. L. 100-459 or any succeeding act which contains the same restrictions.

3. Section 1626.2 paragraph (b) is revised to read as follows:

§ 1626.2 Definitions.

(b) "Ineligible alien" means an alien who does not meet the requirements of § 1626.4(a) and who is consequently determined not to be eligible to receive legal assistance under Pub. L. 100-459 or any succeeding act which contains the same restrictions.

4. Section 1626.3 is revised to read as follows:

§ 1626.3 Prohibition of legal assistance "for or on behalf of" an ineligible alien.

(a) *General.* No funds made available to a recipient by the Corporation under the authority of Pub. L. 100-459 or any succeeding act which contains the same restrictions shall be used to provide legal services for or on behalf of any person unless that person is a citizen of the United States or an eligible alien.

(b) *Prohibited Legal Assistance "for" an Ineligible Alien.* (1) To provide legal assistance "for" an ineligible alien is equivalent to furnishing legal assistance to a client and it shall be deemed to be coextensive with accepting an ineligible alien as a client. Consequently, all recipients are prohibited from using Corporation funds to pay any costs connected with furnishing legal assistance to clients who are ineligible aliens.

(2) Normal intake procedures and referral of ineligible alien clients by the same procedures used to refer other classes of ineligible clients are excepted from this prohibition. If a referral is not possible, an ineligible alien client may not be represented with Corporation funds that contain the same restrictions on such representation. If such an ineligible alien client is referred, a recipient may not participate further in the case using Corporation funds.

(3) The provisions of section 1010(c) of the Legal Services Corporation Act, 42 U.S.C. 2996i(c), do not apply to the expenditure of funds to represent ineligible aliens. Such aliens may be represented if all costs of such representation, including staff time, are funded from non-Corporation sources.

(c) *Prohibited legal assistance "on behalf of" an ineligible alien.* To provide legal assistance "on behalf of" an ineligible alien is to render legal assistance to an eligible client which benefits an ineligible alien and does not affect a specific legal right or interest of the eligible client.

5. Section 1626.4 paragraphs (a) introductory text, (a)(1), and (b) are revised to read as follows:

§ 1626.4 Alien status and eligibility.

(a) Subject to all other eligibility requirements of the Act, an alien who is present in the United States and who is within one of the following categories shall be eligible for legal services:

(1) An alien lawfully admitted for permanent residence as an immigrant as defined by section 1101(a)(20) of the Immigration and Nationality Act (INA) (8 U.S.C. 1101 (a)(20)) except that an alien who has adjusted his status to that of temporary resident alien under the provisions of section 245A of INA (section 201 of IRCA, 100 Stat. 3304, 8

U.S.C. 1255a) shall not be eligible for legal assistance pursuant to the provisions of section 245A(h) of INA (8 U.S.C. 1255a(h)) for a period of five years, which commences on the date the alien is granted temporary resident alien status as determined by INS, whether or not such alien acquires the status of permanent resident alien during the five-year period, unless the alien can qualify independently under another exception to the general restrictions as stated in § 1626.4(a)(2), (3), or (4).

(b) An alien who is not within one of the eligibility categories defined in § 1626.4(a) shall not be eligible for legal services.

6. Section 1626.5 paragraphs (a)(5), (b)(1), (c) and (f) are revised, paragraph (b)(5) is added, and paragraph (a)(6) is removed to read as follows:

§ 1626.5 Verification of citizenship and eligible alien status.

(a) * * *

(5) Baptismal certificate showing place of birth within the United States and date of baptism within two months after birth.

(b) * * *

(1) An alien in the category specified in § 1626.4(a)(1) shall present an Alien Registration Receipt Card (INS Forms I-151 or I-551), a Temporary Evidence of Lawful Admission for Permanent Residence form (INS Form I-181B), or a valid passport and immigration visa.

(5) A recipient may also accept any other authoritative document issued by INS that provides evidence of alien status for the categories of aliens listed in paragraph (b) of this section.

(c) A Temporary Resident Card (INS Form I-688) shall be considered evidence of eligible alien status in the case of a Special Agricultural Worker. See § 1626.10(c). This form shall not be considered evidence of eligible alien status in the case of an alien who has obtained an adjustment in status under the General Amnesty provisions of Immigration Reform and Control Act (IRCA), 8 U.S.C. 1255a, unless the alien can qualify independently under another exception to the general restriction as stated in § 1626.4(a)(2), (3), or (4).

(f) No written verification is required when the only service provided for an eligible alien or citizen is brief advice and consultation by telephone. The term "brief advice" is limited to advice provided by telephone and does not include a continuous representation of a client.

7. Section 1626.6 paragraphs (a) introductory text, (a)(3), and (b)(1) are revised to read as follows:

§ 1626.6 Disposition of cases involving ongoing representation of ineligible aliens.

(a) A recipient may not use funds available to it under the authority of Pub. L. 100-459 or any succeeding act which contains the same restrictions to provide legal assistance to ineligible aliens; other alternatives must be used to dispose of pending cases in which the client is an ineligible alien. Generally three alternatives are available:

(3) Continuance of representation supported by funds available to the recipient either from non-Corporation sources or from unexpended carryover balances of pre-1983 Corporation funds. As such other funds will normally be limited, referral or discontinuance of representation should be chosen wherever not inconsistent with an attorney's professional responsibilities.

(b)(1) Where referral or discontinuance of representation is not possible and no other funds are available, the recipient may permit a staff attorney to complete the case (or bring it to a stage where referral or discontinuance is possible) on an uncompensated basis. In such instances, the attorney may use the necessary minimum of recipient overhead support, but direct expenditures of funds appropriated by Pub. L. 100-459 or any succeeding act which contains the same restrictions will not be permitted.

8. Section 1626.7 paragraphs (a) introductory text and (b) are revised to read as follows:

§ 1626.7 Change in circumstances.

(a) A recipient shall not use funds made available to it under the authority of Pub. L. 100-459 or any succeeding act which contains the same restrictions to provide legal assistance for or on behalf of an alien if:

(b) A recipient shall discontinue representation supported by Corporation funds under the circumstances described in § 1626.7(a), provided discontinuance is not inconsistent with the attorney's professional responsibilities. In discontinuing representation, a recipient shall follow the procedures set out in § 1626.6. In the event of discovery of false information relating to eligibility as set forth in § 1626.7(a)(3), steps to discontinue representation shall be taken immediately.

9. Section 1626.10 paragraph (a) is revised and paragraph (c) is added to read as follows:

§ 1626.10 Special eligibility questions.

(a) *Micronesia*. The alien restriction stated in the appropriations acts is not applicable to the legal services program in the following Pacific Island entities:

- (1) Commonwealth of the Northern Marianas;
- (2) Republic of Palau;
- (3) Federated States of Micronesia;
- (4) Republic of the Marshall Islands.

All citizens of these entities are eligible to receive legal assistance, provided they are otherwise eligible under the Act.

(c) *Special agricultural workers*. An alien who qualified as a special agricultural worker and whose status is adjusted to that of temporary resident alien under the provisions of IRCA is considered a permanent resident alien for all purposes except immigration under the provisions of section 302 of Pub. L. 99-603, 100 Stat. 3422, 8 U.S.C. 1160(g). Since the status of these aliens is that of permanent resident alien under section 1101(a)(20) of Title 8, these workers are eligible for legal assistance. These workers are ineligible for legal assistance in order to obtain the adjustment of status of temporary resident under IRCA, but are eligible for legal assistance after the application for adjustment of status to that of temporary resident has been filed, as long as such application has not been rejected and the applicant is eligible for services under § 1626.4(a)(2).

10. Section 1616.11 is added to read as follows:

§ 1626.11 H-2 Agricultural workers.

(a) Nonimmigrant agricultural workers admitted under the provisions of 8 U.S.C. 1101(a)(15)(H)(ii), commonly called H-2 workers, are considered to be aliens described in 8 U.S.C. 1101(a)(20) and, as such, are eligible for legal assistance regarding the matters specified in section 305 of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3434, 8 U.S.C. 1101 note.

(b) The following matters which arise under the provisions of the worker's specific employment contract may be the subject of legal assistance by an LSC-funded program:

- (1) Wages;
- (2) Housing;
- (3) Transportation; and
- (4) Other employment rights as provided in the worker's specific contract under which the nonimmigrant worker was admitted.

11. Section 1626.12 is added to read as follows:

§ 1626.12 Replenishment agricultural workers.

Aliens who acquire the status of aliens lawfully admitted for temporary residence as replenishment agricultural workers under section 210A(c) of the Immigration and Nationality Act, such status not having changed, are considered to be aliens described in 8 U.S.C. 1101(a)(20) and, as such, are eligible for legal assistance.

Timothy B. Shea,
General Counsel.
April 21, 1989.

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1825 and 1852

Interim Changes to the NASA FAR Supplement on Domestic Preference

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: This notice establishes interim amendments to the NASA Federal Acquisition Regulation Supplement, Chapter 18 of the Federal Acquisition Regulations System and invites written comments on these interim amendments. The rule implements section 209 of Pub. L. 100-685, the FY 89 NASA Authorization Act which contains a special-domestic preference ("Buy American") provision.

EFFECTIVE DATE: April 30, 1989.

ADDRESS: Comments should be addressed to W.A. Greene, Chief, Regulations Development Branch, Office of Procurement, Procurement Policy Division, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: W.A. Greene, Telephone: (202) 453-6923.

SUPPLEMENTARY INFORMATION:

Background

NASA is issuing interim changes to the NASA FAR Supplement to implement section 209 of Pub. L. 100-685, the FY 89 NASA Authorization Act. For the second time in two years, Congress has placed a domestic preference ("Buy American") provision in the NASA Authorization Act. The