

7050-01-P-01-P

LEGAL SERVICES CORPORATION

45 CFR Part 1626

RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS

AGENCY: Legal Services Corporation

ACTION: Termination of Rulemaking and Notice of Proposed Rulemaking

SUMMARY: LSC is terminating a rulemaking it initiated in 2001 to consider broad revisions to its regulation on restrictions on legal assistance. Contemporaneously, LSC is initiating a new rulemaking to consider a proposal of limited scope to amend section 1626.10(a) of this regulation to permit LSC grant recipients to provide legal assistance to otherwise financially eligible citizens of the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau legally residing in the United States.

DATES: The open rulemaking is terminated as of [insert date of publication]. Comments on the NPRM are due on [insert date 30 days from date of publication].

ADDRESSES: Written comments on the NPRM may be submitted by mail, fax or email to Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K Street, N.W., Washington DC 20007; 202-295-1624 (ph); 202-337-6519 (fax); mcohan@lsc.gov.

FOR FURTHER INFORMATION CONTACT: Mattie Cohan, Senior Assistant General Counsel, 202-295-1624 (ph); mcohan@lsc.gov.

SUPPLEMENTARY INFORMATION:

Termination of Open Rulemaking

The LSC Board of Directors identified 45 CFR Part 1626 as an appropriate subject for rulemaking on January 27, 2001. On June 30, 2001, the LSC President and the Chair of the Operations and Regulations Committee made a determination to proceed with the initiation of a Negotiated Rulemaking to consider amendments to Part 1626. In accordance with the LSC Rulemaking Protocol, LSC published a notice in the Federal Register formally soliciting suggestions for appointment to the Negotiated Rulemaking Working Group from the regulated community, its clients, advocates, the organized bar and other interested parties (66 FR 46977, September 10, 2001). After receiving submissions of interest, a Working Group was appointed. Each organization which timely requested to participate was appointed to the Working Group. The Working Group met three times without coming to consensus on several issues. Subsequently, work on the 2001 rulemaking was deferred in 2003 by the previous Board of Directors pending the appointment and confirmation of the present Board. No further action on the rulemaking has been taken since that time.

During the past several years as LSC has considered its rulemaking agenda, neither Management nor recipients have suggested reinitiating work on this broad rulemaking. As such, LSC is of the opinion that consideration of broad revision of Part 1626 is no longer necessary or appropriate. Accordingly, with the publication of this notice LSC is terminating the open rulemaking.

New Notice of Proposed Rulemaking

LSC-funded legal services providers are permitted to provide legal assistance only to citizens of the United States and aliens upon whom eligibility has been expressly conferred by statute. LSC regulations at 45 CFR Part 1626 implement the various existing statutory

authorities and set forth the eligibility standards based on citizenship and eligible alien status. Since 1996 Part 1626 has limited the eligibility of citizens of the Republic of the Marshall Islands (“RMI”) and the Federated States of Micronesia (“FSM”) and the Republic of Palau to services provided in those respective nations (unless the applicant is otherwise eligible under Part 1626). In connection with LSC’s development of a 2007 Rulemaking Agenda, the Legal Aid Society of Hawai’i (LASH) and Legal Aid of Arkansas (LAA) have both requested that LSC engage in rulemaking to change the section 1626.10(a) to provide for the eligibility of citizens of RMI, FSM and Palau legally residing in the United States for legal assistance from LSC- funded programs.

LSC agrees that there is sufficient reason and authority for LSC to amend its regulation in this regard. To that end, the Operations and Regulations Committee of the LSC Board of Directors considered a Draft NPRM at its meeting of July 27, 2007, and the Board of Directors approved this NPRM for publication and comment at its meeting of July 28, 2007.

History of FAS Eligibility For Legal Assistance from LSC-funded Programs

At the time of the creation of LSC in 1974, the countries that are now the sovereign nations of the Republic of the Marshall Islands (“RMI”), the Federated States of Micronesia (“FSM”), and the Republic of Palau were possessions of the United States, known as the Trust Territories of the Pacific Islands (“the Trust Territories”). The LSC Act defined the Trust Territories as a “State” for the purposes of the Act. The Act thus conferred eligibility for LSC-funded legal services to Trust Territory residents to the same extent provided to residents of any other State of the United States. Section 1002(8) of the LSC Act, 42 U.S.C. §2996a(8).

In 1983, Congress placed the first statutory restrictions on representation of aliens on LSC recipients in LSC's appropriations bill for that year, P.L. 97-377. That law provided that none of the funds appropriated could be expended to provide legal assistance for or on behalf of any alien unless the alien was a resident of the U.S. and otherwise met certain statutorily specified criteria. On its face, this language would have appeared to imply that all non-U.S. citizens, including residents of RMI, FSM and Palau would be subject to these restrictions, notwithstanding their eligibility under the LSC Act. To deal with this problem, LSC included a "special eligibility section" (§1626.10) in the implementing regulations on representation of aliens, 45 CFR Part 1626, to exempt residents of the Trust Territory from the alien restrictions imposed by Congress.

In 1986 the trust governing the relationship between the U.S. and the Trust Territories was terminated. At that time the former Trust Territories were recognized as independent nations and a new relationship with RMI, FSM and Palau was created by the signing of two Compacts of Free Association, one with RMI and FSM and the other with Palau. The Compact with RMI and FSM contemplates the provision of certain services and programs of the U.S. to those nations. Specifically, section 224 of the Compact of Free Association with RMI and FSM provides that:

The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia may agree from time to time to the extension of additional United States grant assistance, services and programs as provided by the laws of the United States, to the Marshall Islands or the Federated States of Micronesia, respectively.

The Compact of Free Association Act of 1985 ("CFA Act") (P.L. 99-239, codified at 48 U.S.C. 1901 et seq.), which implemented the Compact, provides express authority for the provision of LSC-funded legal services. Specifically, section 105(h)(1)(A) of the CFA Act provides that:

. . . pursuant to section 224 of the Compact the programs and services of the [Legal Services Corporation] shall be made available to the Federated States of Micronesia and to the Marshall Islands.

The implementing act for the Compact with Palau makes section 105 of the CFA Act applicable to the Republic of Palau. 48 U.S.C. 1932(b).¹

After the signing of the respective Compacts and the corresponding implementing statutes, the FAS remained covered by the special eligibility section of Part 1626, notwithstanding their change in legal status vis-à-vis their relationship with the United States. In 1989 that section of the regulation was amended to make the section more precise in light of the termination of the trust. Under this version of the rule, the special eligibility section provided:

(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 [LSC] Act.

¹ RMI, FSM and Palau are collectively referred to as the "Freely Associated States" or "FAS." This designation will be used throughout the remainder of the supplementary information section.

54 Fed. Reg. 18812 (April 29, 1989). The preamble to the Final Rule adopting this language explained that this change was intended to “restate[] congressional intent that residents of these political entities be eligible to be clients of a legal services program.” Id. at 18110. The special eligibility section addressing the FAS remained as set forth above until 1996.

As a result of new statutory restrictions contained in the LSC FY 1996 appropriations legislation (P.L. 104-134), additional changes to Part 1626 were made in 1996. Although the statutory amendments did not address this issue, §1626.10(a) was again revised, this time in response to comments from the LSC Office of Inspector General (OIG). As explained in the preamble to the 1996 Final Rule:

The OIG suggested that both the prior rule and the interim rule dealt with the question of special eligibility incorrectly and urged that the final rule refer only to the legal services programs serving people who were citizens of those jurisdictions. The effect of this change would be to make financially eligible citizens of the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau only eligible for legal services from the recipients serving those areas. . . . They would not be eligible for services from any other recipients unless they also came within one of the categories of eligible aliens listed in section 1626.5

62 FR 19413 (April 21, 1997). The OIG’s comments were based upon its interpretation of the CFA Act that the language of the CFA Act provides authority for the provision of services within those nations, but does not expressly confer individual eligibility for services to the citizens of those nations without reference to where the service is to be provided. The Board considered the matter, agreed with the OIG analysis, and revised §1626.10(a) as follows.

This part [1626] is not applicable to recipients providing services in the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, or the Republic of the Marshall Islands.

62 FR 19413 (April 21, 1997); 45 CFR §1626.10(a). Thus, since 1996 otherwise financially eligible residents of the FAS seeking assistance from legal services providers in the United States may only receive such assistance if they meet the alien eligibility requirements of §1626.5.

Alternative Interpretation of the Compact Act

During the last session of Congress, legislation was passed in the Senate by unanimous consent on September 29, 2006, which would have definitively clarified the issue by clearly stating that LSC services were to be available to the citizens of the FAS. Specifically, section 5 of S.1830, provided:

SEC. 5. AVAILABILITY OF LEGAL SERVICES.

Section 105(f)(1)(C) of the Compact of Free Association Amendments Act of 2003 (48 U.S.C. 1921d(f)(1)(C)) is amended by inserting before the period at the end the following: “, which shall also continue to be available to the citizens of the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands who legally reside in the United States (including territories and possessions)”.

The report accompanying S.1830 explained that:

Section 5 clarifies that section 105(f)(1)(C) of the CFAAA is intended to continue eligibility for the programs and services of the Legal Services Corporation for FSM and RMI migrants who legally reside in the United States. Legal Services

Corporation eligibility was extended by the first Compact Act in 1986 (P.L. 99-239), but in 1996, without any further action by Congress, the Legal Services Corporation, by rule, terminated the eligibility of FSM and RMI migrants. Section 104(e) of the original Compact Act, and of the CFAAA, state that it is ‘not the intent of Congress to cause any adverse consequences for an affected area,’ which are defined as Hawaii, Guam, the CNMI, and American Samoa. The Legal Services Corporation is one of those programs which had assisted local communities, in both the ‘affected areas’ and in the mainland U.S., in responding to the impacts and needs of FSM and RMI citizens who were residing in U.S. communities. This section would restore eligibility as it existed from 1986 to 1996.

Similar legislation was introduced in the House, but was not acted on during the course of the 109th Congress. Accordingly, there was no final legislation enacted into law on this subject in the last Congress. More recently, on January 12, 2007, S.283, the Compact of Free Association Amendments Act was introduced in the Senate. On February 15, 2007, the bill was reported out of the Senate Committee on Energy and Natural Resources, accompanied by a written report. The operative language of the bill and report dealing with the availability of legal assistance from LSC recipients to citizens of the FAS, regardless of where they are obtaining those services, is the same as in last year’s Senate bill (quoted above). A similar bill, H.R. 2705, has also been introduced in the House. As of the publication of this notice, both of the bills are still pending.

In addition, LSC received a letter dated June 1, 2007, from David Cohen, Deputy Assistant Secretary for Insular Affairs at the Department of Interior. In his letter, Deputy Assistant Secretary Cohen stated:

I can assure you that it is consistent with Federal policy under the Compacts and the [implementing] public laws ... to allow FAS citizens lawfully resident in the United States to receive LSC services. . . . We are not aware of any intention to permit the extension of LSC benefits to FAS citizens in the FAS but to prevent the extension of those benefits to FAS citizens during their lawful residence in the United States.

Subsequently, representatives of LSC met with the Deputy Assistant Secretary, several members of his staff and an attorney from the Department of State. They reiterated their understanding of the Compact and the CFA Act. In particular, they explained that the United States and the FAS countries negotiated the Compacts as essentially an aid package and that the Departments of Interior and State, as well as the FAS nations themselves, consider the extension of benefits to the FAS to include the extension of benefits to FAS citizens, regardless of where those citizens are lawfully residing (in the FAS or the United States). As an example, they noted that the CFA Act extends the Pell Grant (educational grants) program to the FAS and that the grants are provided to FAS citizens regardless of whether they are attending institutions of higher education in the FAS or in the United States. Similarly, FAS citizens are eligible for Job Corps services being provided in the United States.

In light of the above, it would appear that LSC's interpretation of the CFA Act, while permissible, was not the only permissible reading and perhaps, in hindsight, not the best available reading. Moreover, LSC appears to be within its legal authority under the law to

amend §1626.10 to permit FAS citizens to receive legal assistance anywhere LSC services are provided without requiring independent eligibility under Part 1626.

Need for Amendment of the Regulation - FAS Citizens in the United States

When LSC was created in 1974, there were probably no more than a few thousand Micronesians living in Guam and Hawai'i, and a scattering in the continental United States. Even when the first Compact was negotiated in 1986, there were probably still less than ten thousand Micronesians living within U.S. territory, still mostly in Guam and Honolulu. However, when the Compact was renegotiated and extended in 2002 it was then known that the migration pattern was showing greatly increased numbers in the continental United States. According to the Embassy of FSM there are, in addition to the traditionally high populations of Micronesians in Guam and Hawai'i, at least 30,000 to 40,000 FSM citizens living or going to school in the continental U.S. Further, LAA has noted in its request to LSC for rulemaking on this issue that there are also 6,000 to 10,000 Marshallese living in Northeast Arkansas alone.

Thus, while there was relatively little demand for legal services among FAS citizens in the United States in 1996, the increased migration of FAS citizens to the United States has significantly increased the potential demand for legal services among members of that community. The inability of financially eligible FAS citizens in the U.S. to access legal services from LSC programs assistance is a growing problem for the U.S. FAS community. LASH, for example, has noted that that FAS citizens working in Hawai'i are more likely to be victims of unscrupulous employers because they believe that such citizens have little recourse to legal services to protect their employment rights.

Proposed Amendment of Section 1626.10(a)

LSC is proposing to amend section 1626.10(a) to redesignate the existing language in paragraph (a) as paragraph (a)(1) and to add a new paragraph (a)(2) to read as follows: “All citizens of the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands residing in the United States are eligible to receive legal assistance provided that they are otherwise eligible under the Act.” This language makes explicit that FAS citizens are eligible under Part 1626 for legal assistance and is consistent with the other eligibility provision in section 1626.10 addressing the eligibility of Canadian-born American Indians at least 50% Indians by blood, members of the Texas Band of Kickapoo and foreign nationals seeking assistance pursuant to the Hague Convention. 45 CFR §§1626.10(b); 1626.10(c); and 1626.10(d). The “otherwise eligible” language is meant to refer to financial eligibility (for the provision of LSC-funded legal assistance”) and to the permissibility of the legal assistance provided under applicable law and regulation.

For reasons set forth above, and under the authority of 42 U.S.C. 2996g(e), LSC proposes to amend 45 CFR Part 1626 as follows:

PART 1626—Restrictions on Legal Assistance to Aliens

1. The authority citation for part 1626 continues to read as follows:

Authority: Pub. L. 104-208, 110 Stat 1321; Pub L. 104-134, 110 Stat. 3009.

2. Amend Sec. 1626.10 by revising paragraph (a) to read as follows:

§1626.10 Special eligibility questions

(a)(1) This part is not applicable to recipients providing services in the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, or the Republic of the Marshall Islands.

(2) All citizens of the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands residing in the United States are eligible to receive legal assistance provided that are they otherwise eligible under the Act.

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Victor M. Fortuno

Vice President and General Counsel