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LEGAL SERVICES CORPORATION

45 CFR Part 1626

Restrictions on Legal Assistance to Aliens

62 FR 45755

DATE: Friday, August 29, 1997

ACTION: Final rule.

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SUMMARY: This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") rule on legal representation of aliens. The revisions to this rule are intended to implement a statutory provision included in the Corporation's FY 1997 appropriations act, which permits the use of a recipient's non-LSC funds for legal assistance to otherwise ineligible aliens who are the victims of domestic abuse.

DATES: The final rule is effective on September 29, 1997.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, (202) 336-8817.

SUPPLEMENTARY INFORMATION: Section 504(a)(11) of the LSC appropriations act for Fiscal Year ("FY") 1996, Pub. L. 104-134, 110 Stat. 1321 (1996), prohibits the Corporation from providing funding to any person or entity ("recipient") that provides legal assistance to ineligible aliens. Subsequent to the publication of an interim rule to implement this restriction, Congress passed the Corporation's 1997 appropriations act, Pub. L. 104-208, 110 Stat. 3009 (1996). That legislation amended the § 504(a)(11) restriction in the FY 1996 appropriations act to permit recipients to use non-LSC funds to serve indigent aliens who are victims of domestic abuse on matters directly related to the abuse (hereinafter referred to as the "Kennedy Amendment"). The Kennedy Amendment became effective on October 1, 1996, during the comment period for the interim rule. A number of comments urged incorporation of the Kennedy Amendment into the final regulations, even though the interim rule understandably made no mention of the Kennedy Amendment because the rule was published before enactment of the Amendment. While the few comments the Corporation received made suggestions on how to include the Amendment into the rule, the general public was not provided notice of the Amendment. Accordingly, on April 21, [*45756] 1997 (62 FR 19409), the Corporation

published a final rule that included the Kennedy Amendment provisions as interim provisions with a request for comments.

The Corporation received 2 comments on the Kennedy Amendment interim provisions, one from an LSC recipient and one from Ayuda, a public interest organization which handles cases relating to immigration, political asylum and family law matters for foreign-born individuals residing in the D.C. Metropolitan area. Both comments urged the Corporation to interpret the Kennedy Amendment as broadly as possible consistent with Congressional intent. The comments also applauded the provisions protecting the confidentiality of Kennedy Amendment clients. In addition, Ayuda pointed out some inconsistencies in one of the interim definitions with the terms of the Kennedy Amendment.

The Corporation's Operations and Regulations Committee of the LSC Board of Directors held public hearings in Los Angeles, California, on July 13, 1997, on the Kennedy Amendment provisions and revised the definition of "battered or subjected to extreme cruelty" in response to comments. The other interim provisions were approved by the Committee without change. The Committee recommended that the LSC Board adopt the provisions as revised by the Committee, and on July 14, 1997, the Board adopted the recommended provisions as final regulations.

A section-by-section discussion of the Kennedy Amendment provisions is provided below.

Section 1626.2 Definitions

The Kennedy Amendment uses the terms "spouse" and "parent" as the defining relationships in abusive relationships covered by the Amendment. The abuser must either be a spouse or parent, or a member of the spouse's or parent's family residing in the same household. Ayuda's comment advocated a category broader than "spouse" or "parent" but conceded that new legislation would be required to include, for example, a non-spouse partner, a blood relative other than a parent, or an individual with whom the victim has had a dating relationship. Ayuda did, however, urge the Corporation to use a broad definition of what constitutes "a member of the spouse's or parent's family residing in the same household."

"Spouse" and "parent" are terms of relationships that are generally regulated by State law. "Spouse" refers to either the husband or wife in a marital relationship and "parent" generally refers to a father or mother by blood or legal adoption. See Random House Webster's College Dictionary at 948 and 1249 (1997). This rule does not expand the generally recognized legal meanings of these terms; nor does it provide definitions for such common terms. The Board decided that it is unnecessary to define such common terms. Recipients should defer to local law defining "spouse" and "parent" or Federal law where it would apply in a particular case. For example, if the recipient assists the victim of abuse to self-petition for immigrant status under part 204 of the Immigration and Nationality Act ("INA"), the representation may require reference to the definition of "spouse" in Sec. 101(a)(35) of the INA.

The Board decided to direct recipients to refer to State protection order statutes for guidance on the meaning of a "member of the spouse's or parent's family." Ayuda pointed out that most states have protection order statutes that define "family members." Because protection order statutes would normally have the same purpose as the Kennedy Amendment to provide legal protection against domestic violence, it is appropriate for recipients to defer to such laws where available or to other applicable local law.

Section 1626.2(f) Battered or Subjected to Extreme Cruelty

The Kennedy Amendment requires the Corporation to base its definition of "battered or subjected to extreme cruelty" on the regulatory definition of the term promulgated by the Immigration and Naturalization Service ("INS") pursuant to subtitle G of the Violence Against Women Act of 1994 ("VAWA"), see Pub. L. 103-322, 108 Stat. 1953 (1994). Subtitle G refers to the section of VAWA that provides protections for battered immigrant women and children. *Id.* For example, Subtitle G provides authority for abused women and children to self-petition for lawful permanent resident status and to apply for suspension of deportation proceedings. Rather than include the language of the INS definition, the LSC interim rule simply cited to the INS definition at 8 CFR part 204. See 8 CFR 204.2(c)(1)(vi) and 204.2(e)(1)(vi) (The definition is found twice in part 204, once in the regulations governing self-petitions by spouses and again in the regulations governing self-petitions by a child).

Ayuda contended that, by simply citing to the definition in part 204, the Corporation was including language that goes beyond defining the type of abuse and is inconsistent with or not required by the Kennedy Amendment. The Board agreed in part with Ayuda's specific recommendations regarding this definition.

In addition to defining the meaning of abuse, the INS definition in part 204 includes requirements that an abused person must meet in order to qualify to self-petition for immigration status under part 204. These qualifying requirements are unrelated to defining the type of abuse contemplated by the term "battered or subjected to extreme cruelty." In addition, for the purposes of the LSC definition in part 1626, certain of these qualifying requirements are not consistent with the Kennedy Amendment. For example, one requirement in the INS definition is that the abuse be committed by a U.S. citizen or lawful permanent resident spouse or parent. The Kennedy Amendment does not require that the spouse or parent be a U.S. citizen or lawful permanent resident. In addition, the category of perpetrators is limited to a spouse or parent in the INS definition, whereas the Kennedy Amendment also includes "a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent."

Ayuda urged the Corporation to adopt a definition that, unlike the INS definition, does not require that the abuse must have taken place during the victim's marriage to the abuser. The Board noted that the terms of the Kennedy Amendment only apply to spousal abuse that occurs during marriage. However, the Board decided it was unnecessary to deal with the issue in a definition, as the matter is made clear in § 1626.4, the provision setting out the terms of the Kennedy Amendment.

The Board adopted a definition that includes only that language from the INS definition that defines the type of abuse and that is consistent with the terms of the Kennedy Amendment. In addition, the final definition not only includes clear acts of violence, such as rape or forceful detention, it also clarifies that certain actions may be considered to be abusive because they are part of an overall pattern of violence.

Section 1626.2(g) Legal Assistance Directly Related to the Prevention of, or Obtaining Relief From, the Battery or Cruelty

The interim rule's definition of "legal assistance directly related to the prevention of, or obtaining relief from the battery or cruelty" established a standard that would include any legal assistance that would assist an abuse victim to escape from the abuse, ameliorate the current effects of the [*45757] abuse, or protect against future abuse. Ayuda urged that this standard be broadened to (1) ensure that "protecting against future abuse" include representation that would assist the victim to establish self-sufficiency, (2) recognize the lingering effects of domestic violence, and (3) allow assistance in immigration matters not covered by VAWA.

The Board did not broaden the interim rule's standard. A broader standard would be inconsistent with the language and intent of the Kennedy Amendment, because the Kennedy Amendment requires a direct nexus to the abusive situation. Besides, the standard already includes much of the type of representation of concern to Ayuda. Apparently, the interim rule's preamble discussion of the scope of representation was misinterpreted as being exclusive. It was not meant to be exclusive; rather, it was intended to provide a few examples. Although the preamble mentioned that representation under VAWA would be allowed, this was not intended to mean that other representation in immigration matters is prohibited. Thus, representation under the INA that would allow an abuse victim to stabilize immigration status, facilitate naturalization, or acquire work authorization would be permitted if the recipient can show the necessary connection to abuse. Likewise, as long as the representation can be justified as necessary to "assist victims escape from an abusive situation, ameliorate the current effects of the abuse or protect against future abuse," allowable representation would include everyday domestic and poverty law matters such as obtaining civil protection orders, divorce, paternity, child custody, child and spousal support, housing, public benefits, employment, abuse and neglect, juvenile proceedings, and contempt actions. For example, a recipient could provide legal assistance to seek a civil protection order against the abuser and to terminate the marriage and the parental rights of the abuser, but could not provide adoption assistance if the client remarries and the new spouse, who is also an ineligible alien, wishes to adopt the children. Similarly, the definition would permit the recipient to use non-LSC funds to provide assistance to secure housing, medical or income assistance for the abused spouse and children, so they would no longer have to be dependent on the abuser. However, absent some evidence that subsequent events were the direct result of the abuse, it would not, for example, permit them to challenge an eviction action by a landlord for non-payment of rent, sue the agency administering the medical assistance program for failure to pay for specific care, or to challenge a cutoff of public assistance for failure to meet work requirements.

Section 1626.4 Applicability

Paragraph (a) of this section sets out the terms of the Kennedy Amendment. As a threshold matter, the Kennedy Amendment is not stated as an exception; rather, it clarifies that the restriction on alien representation in 504(a)(11)

shall not be construed to prohibit representation of persons who fall within the terms of the Kennedy Amendment. Accordingly, the rule states that the prohibition in the rule does not apply to applicants for service who meet the criteria set out in the Kennedy Amendment. Thus, victims of abuse under the Kennedy Amendment may be represented by recipients with non-LSC funds, provided that the legal assistance is directly related to the abuse. Under this analysis, the immigration status of Kennedy Amendment clients is essentially irrelevant, because they may be served with non-LSC funds regardless of citizenship or alien status.

One comment stated that the Kennedy Amendment does not require that the abuse take place in the United States. The Board did not agree. The Kennedy Amendment clearly applies to "an alien who has been battered or subjected to extreme cruelty *in the United States* " or "whose child has been battered or subjected to extreme cruelty *in the United States*." [Emphasis added]. No changes were made to the rule in response to this comment, as the terms of § 1626.4 already make it clear that the abuse must occur in the United States.

Paragraph (b) addresses special confidentiality concerns regarding the special needs of aliens with respect to confidentiality of information relating to immigration status. There is a need to protect from disclosure information provided to a recipient by (1) applicants for service who are rejected or referred to another legal services provider because they do not fall within one of the permitted categories of aliens who may be served or (2) clients who are represented using non-LSC funds under the Kennedy Amendment. In both of these situations, the information on alien status contained in intake records could potentially lead to loss of employment or educational opportunities, deportation, imprisonment or other serious consequences if disclosed. Fear that such information might be revealed to the INS or other law enforcement agencies, whether or not well-founded, could discourage those aliens uncertain of their eligibility for services from seeking legal assistance for critical legal needs. The Corporation decided that part 1626 should explicitly state that recipients are not required to maintain records regarding the immigration status of clients served under the Kennedy Amendment.

Recipients are also not required to maintain immigration records for applicants who are rejected or referred to other sources of legal assistance. Section 1626.3 clarifies that normal intake and referral services are not legal assistance for the purposes of this part. In addition, the documentation requirements in §§ 1626.6 and 1626.7 specifically do not apply to persons who receive only intake or referral services.

List of Subjects in 45 CFR Part 1626

Grant programs-law, Legal services.

For the reasons set forth in the preamble, LSC adopts the interim regulation at *62 FR 19409* (April 21, 1997) a final, with the following changes:

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. Section 1626.2 is amended by revising paragraph (f) to read as follows:

§ 1626.2 -- Definitions.

* * * * *

(f) *Battered or subjected to extreme cruelty* includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.

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Dated: August 25, 1997.

62 FR 45755, *

Victor M. Fortuno,

General Counsel.

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