



January 29, 2001

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RE: Representation of Former Client's Widow Seeking Retirement Pension Benefits, EX-2001-1005

Dear Mr. Stone:

I am writing in response to your inquiry about your proposed representation of your former client's lifetime companion in her efforts to obtain a widow's pension. You indicated that you previously helped a client obtain a retirement pension to which he was entitled, and now that he has died and left his companion destitute, the companion would like to pursue a widow's pension. The companion/proposed client (hereinafter "the proposed client") was a legal permanent resident of the United States, but she returned to Trinidad last year. She plans to return to New York this year, at which time you would like to represent her in trying to get a widow's pension. Your question is whether representation of the proposed client would violate 45 C.F.R. Part 1626, which restricts legal assistance to aliens.

Under §1626.5 of the LSC Regulations, recipients may represent aliens who fall in the following categories: (a) an alien lawfully admitted for permanent residence as an immigrant as defined by sec. 1101(a)(2) of the Immigration and Nationality Act (hereinafter "INA") (8 U.S.C. 1101(a)(2))¹; (b) an alien who is either married to a United States citizen or is a parent or an unmarried child under the age of 21 of such a citizen and who has filed an application for adjustment of status to permanent resident under the INA, and such application has not been rejected; (c) an alien who is lawfully present in the United States pursuant to an admission under the INA related to refugee admissions, or who has been granted asylum by the Attorney General under the INA; (d) an alien who is lawfully present in the United States as a result of being granted conditional entry pursuant to the INA because of persecution or fear of persecution on account of race, religion, or political opinion or because of being uprooted by catastrophic natural calamity; (e) an alien who is lawfully present in the United States as a result of the Attorney General's withholding of deportation pursuant to section 243(h) of the INA; or (f) an alien who meets the requirements of 45 C.F.R. §§ 1626.10 or 1626.11 (which exempt from this rule certain categories of Native Americans; agricultural workers; and aliens needing assistance in child abduction cases). Additionally, §1626.4 allows recipients to represent certain aliens who have been victims of battery or extreme cruelty, provided that non-LSC funds are used to represent such victims.

In addition to the requirements of Part 1626, LSC adopted the following policies with respect to the representation of aliens in Program Letter 2000-02, issued on January 24, 2000.²

¹ This section of the INA states that: "[t]he term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

² I am attaching a copy of Program Letter 2000-02 for your review.

For all 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 [in the United States] sufficient to maintain residence or lawful immigration status. Under this interpretation, LSC grantees who have begun representation of a permanent resident alien may continue that representation should the alien be temporarily outside of the United States. Grantees may also initiate representation of aliens, with the exception of H-2A workers, who are temporarily outside of the United States, provided that they have been present sufficient to maintain and have not abandoned their residence or immigration status.

Based on the information you provided, it appears that the potential client qualifies for representation under 1626.5(a), the exception for legal permanent residents. You indicated that the potential client was a legal permanent resident before leaving for Trinidad, and to your knowledge, no efforts have been made by the Immigration and Naturalization Service (hereinafter referred to as "INS") to prove that her status has changed.

Although the potential client has been absent from the United States for several months, her absence does not conclusively determine that she has abandoned her status as a legal permanent resident. When a legal permanent resident leaves the United States and has a colorable claim to returning resident status, it is the burden of the government to prove that the individual is not eligible for reentry.³ In such a case the INS must show by "clear, unequivocal, and convincing evidence" that the individual's status has changed.⁴ "[I]n order to qualify as a returning resident alien, an alien must have acquired lawful permanent resident status in accordance with our laws, must have retained that status from the time he acquired it, and must be returning to an 'unrelinquished lawful permanent residence' after a 'temporary visit abroad.'"⁵

The analysis of whether an individual's removal from the United States is a "temporary visit abroad" is fact-specific and is determined on a case by case basis. A trip is considered a temporary visit abroad if a) it is for a 'relatively short' period, fixed by some early event; or b) the trip will terminate upon the occurrence of an event that has a reasonable possibility of occurring within a relatively short time period.⁶ The Ninth Circuit Court of Appeals has held that if an alien's trip abroad is not 'relatively short,' it is a 'temporary visit abroad' only if the alien has a "continuous, uninterrupted intention to return to the United States during the entirety of his visit."⁷ The relevant intent is not the plan to return to the United States eventually, but the plan to return in a relatively short time period.⁸

In discerning an alien's intent with respect to his trip outside of the United States, courts consider the duration of the alien's absence from the United States; the alien's family ties, property holdings, and business affiliations within the United States; and the alien's family, property, and business ties in the foreign country.⁹

³ Singh v. Reno, 113 F.3d 1513, 1514 (9th Cir. 1997) (citing Landon v. Plasencia, 459 U.S. 21, 35, 103 S. Ct. 321, 330-31, 74 L.Ed.2d 21 (1982)). See also, Cuesta Martinez v. INS, 97 F. Supp. 2d 647, 651 (M.D. Pa. 2000); Matter of Huang, 19 I. & N. 749, 754 (1988); Matter of Davis, 16 I. & N. 514, 526 (1978).

⁴ *Id.* (citing Woodby v. INS, 385 U.S. 276, 277, 87 S.Ct. 483, 484, 17 L.Ed.2d 362 (1966)). See also, Huang, 19 I. & N. at 754.

⁵ Huang, 19 I. & N. at 753 (quoting Santos v. INS, 421 F.2d 1303, 1305 (9th Cir. 1970)).

⁶ Singh, 113 F.3d at 1514 (citing Chavez v. Ramirez, 792 F.2d 932, 936-37 (9th Cir. 1986)). See also, Huang, 19 I. & N. at 753 (citing Matter of Kane, 15 I. & N. 258 (1975)).

⁷ *Id.* (citing Chavez at 937).

⁸ *Id.*

⁹ *Id.* at 1514-15. See also, Matter of Muller, 16 I. & N. 637, 639 (1978).

Based on 45 C.F.R. Part 1626; the LSC policies adopted in Program Letter 2000-02; and the immigration case law cited herein, it appears that you may represent the proposed client if 1) you confirm that she was a legal permanent resident prior to her departure from the United States and 2) the INS does not initiate proceedings to show that her status has changed and prevail in those proceedings. As indicated in the policies adopted in Program Letter 2000-02, you may commence representation of the proposed client while she is absent from the country "provided that [she has] been present sufficient to maintain and [has] not abandoned [her] residence or immigration status." Additionally, once you begin representation, you "may continue that representation should the alien be temporarily outside of the United States." In the event that you commence representation of the proposed client and the INS initiates an action to prove that she has abandoned her legal permanent resident status, you might reevaluate your program's involvement in the case.

In following up on our telephone conversation of December 15, 2000, I investigated whether the proposed client might be represented by the Washington College of Law International Human Rights Law Clinic in her efforts to obtain a widow's pension. Unfortunately, this clinic only provides representation in international human rights claims and domestic political asylum cases. If, however, the proposed client is determined ineligible for services from your program (e.g. if she was not, in fact, a legal permanent resident, or if the INS proves that her status has changed upon her return), the client may be eligible for representation by another law school clinic.

I hope that this information satisfies your inquiry. If you have questions or if you need additional assistance, please feel free to contact me at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel