

COMMENTS ON PROPOSED REVISIONS TO PART 1626 OF THE LSC REGULATIONS

RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS

SUBMITTED BY
THE CENTER FOR LAW & SOCIAL POLICY
ON BEHALF OF
THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

AUGUST 31, 2007

These comments are submitted to the Legal Services Corporation (LSC) by the Center for Law & Social Policy (CLASP) on behalf of the National Legal Aid and Defender Association (NLADA). They have been considered by NLADA's Civil Policy Group and the Client Policy Group. NLADA is a membership organization that represents civil legal aid programs, including those funded by LSC. CLASP serves as counsel to NLADA and its civil members.

On July 28, 2007, the LSC Board directed the LSC staff to issue a notice of proposed rulemaking (NPRM) regarding a proposed change in Part 1626 on Alien Eligibility. The proposed change addresses only one section of the rule, §1626.10(a), which deals with the eligibility for legal services of citizens of the Republic of the Marshall Islands (RMI), the Federated States of Micronesia (FSM) and the Republic of Palau. For convenience, in the balance of the comment we generally refer to all of these individuals as "Micronesians" but the change would also affect citizens of RMI and Palau in addition to those of FSM.

On August 2, 2007, LSC published the NPRM in the Federal Register, seeking comments from the public. Comments are due on September 4, 2007. NLADA is submitting this comment in support of the change proposed in the NPRM.

Background of Issue: The NPRM would revise §1626.10(a) to permit LSC recipients throughout the United States to serve Micronesians. Prior to 1996, the special eligibility section of Part 1626 permitted all LSC recipients to provide legal assistance to financially eligible Micronesians, who are allowed to live and work in the US without obtaining a visa under the Compact of Free Association (CFA) and implementing statute (CFA Act) that govern the relationship between the United States and the former trust territories that became independent countries in 1986. On behalf of the Project Advisory Group (PAG) which merged with NLADA in 1999, CLASP supported the provision of the pre-1996 version of Part 1626 that permitted all LSC recipients to serve Micronesians.

In 1996, the Office of Inspector General convinced the LSC Board that Part 1626 had incorrectly interpreted the CFA and CFA Act. The OIG took the position that the CFA and CFA Act provided that only the LSC program providing services in Micronesia should be permitted to serve Micronesians and that they should otherwise be treated as ineligible aliens. On behalf of PAG, CLASP opposed the OIG's position at that time. However, as part of the overall revision to Part 1626 that was adopted to implement the 1996 restrictions, the Board agreed to change Part 1626 to eliminate the language that permitted Micronesians to be served by any LSC-funded program, limiting eligibility to the specific program that was funded to serve Micronesia, including RMI and Palau. Under the new regulation, other programs were to consider Micronesians to be ineligible aliens unless they qualified for service under one of the specific other categories of aliens permitted to be served.

The issue resurfaced in 2001 when LSC convened a negotiated-rulemaking (reg-neg) working group to consider general revisions to Part 1626. Legal services programs in Hawaii and along the West Coast were seeing increasing numbers of Micronesians who were legally living and working in their service areas, but whom the programs could not serve because of the alien restriction and the language of Part 1626. Linda Perle, who served as the NLADA representative on the reg-neg working group, had received informal communications from State Department staff who indicated that they believed the OIG had incorrectly interpreted the CFA and CFA Act, which they indicated was intended to permit financially eligible Micronesians to be treated for legal services purposes as US citizens, so that they could be provided services by any LSC-funded recipient. While LSC staff was sympathetic, they were unable to obtain confirmation of the interpretation from the State Department or the Department of Interior, Office of Insular Affairs which is charged with interpreting the CFA and CFA Act. The reg-neg process did not reach resolution on a whole range of issues under Part 1626, and the issue of eligibility for Micronesians was not pursued. No changes were made to Part 1626 as a result of the reg-neg process, and LSC is now formally terminating that open rulemaking process. NLADA supports the formal termination of the open rulemaking process proposed by LSC. We do not at this time support any additional changes to Part 1626 beyond that currently proposed by the LSC staff.

We understand that during the last session of Congress the Senate passed a bill that would have definitively declared that financially-eligible Micronesians living legally in the US were eligible for legal services from all LSC recipients. Similar legislation was introduced in the House but was not acted on before Congress adjourned. Comparable legislative language has been introduced and is now pending in this Congress. On June 1, 2007, LSC received a letter from the Assistant Secretary for Insular Affairs at the Department of the Interior indicating that Federal policy under the CFA and CFA Act would allow Micronesians living legally in the US to receive services from all

LSC recipients. LSC subsequently met with Interior and State Department officials who reiterated and confirmed that position.

In response to LSC's request for input into its regulatory agenda for 2007, Charles Greenfield, Executive Director of Legal Aid Society of Hawaii, and Lee Richardson, Executive Director of Legal Aid of Arkansas, both requested LSC to reconsider its position on legal assistance for Micronesians living in the US. While NLADA's written comment on LSC's 2007 regulatory agenda did not address the issue of Micronesian eligibility, Don Saunders, speaking on behalf of NLADA, supported the position taken by Greenfield and Richardson in his oral testimony at the April 2007 Board meeting in Little Rock, Arkansas. Linda Perle, on behalf of NLADA, has consulted with Greenfield over the past year as he developed his proposal to the LSC Board.

Greenfield and Richardson indicated that more than 15,000 Micronesians, most of whom were financially eligible for LSC services, were living, working or going to school in Hawaii, and 30,000 to 40,000 Micronesians were living, working or going to school elsewhere in the US, with between 6,000 and 10,000 Marshallese living in Northeast Arkansas alone. These numbers represent a huge increase over the few thousand living in the US, principally in Hawaii and Guam, when the first CFA was signed, and over the fewer than 10,000 living in the US in 1996 when the alien restriction was expanded and the current version of Part 1626 adopted. Greenfield and Richardson indicated it was their experience that, in addition to the full range of legal problems that afflict the low-income community generally, Micronesians are more likely to be victims of unscrupulous employers who know that they have no recourse to legal services to protect their employment rights.

Recommended Revision to Part 1626: In response to Greenfield's and Richardson's request, and consistent with recommendations made by the LSC staff, the LSC Board met on July 28, 2007, and authorized LSC to issue an NPRM to change Part 1626 to permit service by all LSC recipients to financially-eligible Micronesians.

NLADA/CLASP supports the proposed change to permit financially eligible Micronesians to be provided with legal assistance by all LSC recipients, consistent with their priorities and otherwise permissible under the LSC Act and restrictions.

If you have any questions regarding this comment, please feel free to contact Linda Perle at CLASP. She can be reached by email at lperle@clasp.org or by phone at 202-906-8002.