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B-202716 October 29, 1981

Number: B-202716

Date: 1981-10-29

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The Honorable James M. Collins House of Representatives

Dear Mr. Collins:

We refer to your letters asking whether certain Texas based Legal Services Corporation (LSC) grant recipient organizations have violated a restriction on the use of appropriated funds when staff attorneys of these organizations represented certain aliens in Immigration and Naturalization Service (Its) proceedings. Our review of this matter leads us to conclude that the representation of the aliens in question did not violate the appropriation restriction on the representation of illegal aliens.

You stated and INS docket entries verify that certain staff attorneys employed by LSC grant recipient organizations (including the Dallas Legal Services Foundation, Inc., the West Texas Legal Services, the Texas Rural Legal Aid, Inc., and the El Paso Legal Assistance) have represented aliens before the INS during the first half of fiscal year 1981. Also, you stated that Ms. Barbara Belejack, an attorney with the North Central Texas Legal Services Foundation, Inc., another LSC fund recipient, visited the INS suboffice in Grapevine, Texas, on March 24, 1981, and solicited clients from among a number of illegal aliens who were awaiting deportation. You question whether the representation of aliens before the INS would constitute a violation of the restriction on LSC appropriations concerning representation of aliens by LSC Grantee attorneys. Also, you Question the propriety of an LSC grantee attorney soliciting clients, especially since Texas State Bar Rule DR 2104 states that, "A lawyer shall not give unsolicited advice to a layman."

The appropriation restriction against the use of funds for the representation of aliens was first included in H.R. 4392 (96 Cong. 1st Sess.), which was enacted into law as Pub. L. No. 96-68, The Department of State, Justice and Commerce, the Judiciary and Related Agencies Appropriations Act, 1980. For the subsequent year, the same restriction was included in H.R. 7584 (96 Cong. 2d Sess.), The Department of State, Justice and Commerce, the Judiciary and Related Agencies Appropriation Bill 1981, and incorporated by reference in the law continuing appropriations for fiscal year 1981, Pub. L. No. 96-536, December 16, 1980, 94 Stat. 3166. The restriction reads as follows:

"* * * Provided further, That none of the funds appropriated in this title may be used to carry out any activities for or on behalf of any individual who is known to be an alien in the United States in violation of the Immigration and Nationality Act or any other law, convention, or treaty of the United States

relating to the immigration, exclusion, deportation, or expulsion of aliens:* * *"

The wording of this restriction prohibits the use of funds for the representation "* * * of any individual who is known to be an alien in the United States in violation of the Immigration * * * laws. However, the fact that an individual may be accused of violating immigration laws does not constitute an administrative or judicial determination that a violation has occurred. Until a definitive determination is made, an individual who is contesting the Government's deportation efforts cannot be considered to be "known to be an alien" within the meaning of the prohibition and thus is not an illegal alien for the purposes of this provision.

Under the provisions of 8 U.S.C. Sec. 1103, (the Attorney General has been charged with the administration and enforcement of immigration laws. He has delegated most of this authority to the Commissioner, INS and the Board of Immigration Appeals. These agencies make administrative determinations and rulings on questions involving violations of immigration laws. Final rulings on orders of deportation and exclusion are made by Federal courts pursuant to 8 U.S.C. Sec. 1105a. Hence, until judicial remedies have been exhausted, one may not know with certainty that an alien is in the United States in violation of immigration laws. This issue was addressed in the legislative history of the restriction when it was first considered by the Congress as a provision of H.R. 4392. In remarks concerning the measure and in a question to Senator Hollings, the floor manager of the bill, Senator Cranston, clarified the intent of Congress with respect to this provision as follows during floor debate on the Conference Report:

Mr. President, the prohibition contained in the conference report states that no funds appropriated to the Legal Services Corporation may be used for activities on behalf of any alien 'known' to be in the United States in violation of immigration laws. Under present immigration law, a determination that an individual is in this country in violation of an immigration statute is reached only after full due process have been completed.

"It certainly cannot be the intent of Congress to substitute the subjective judgment of an individual legal services attorney as to whether a potential client is 'legally' within the country for the full due process proceedings that the individual is entitled to receive under our immigration laws.

"I should like to ask the floor manager if it is his understanding as it is mine, that this provision which forbids legal assistance to individuals 'known' to be in the United States in violation of immigration laws means that the individual legal services attorney must be aware that a final judicial determination as to the client's residency status has been reached and that such a final determination has actually been reached.

"Mr. Hollings. That is my understanding as wells (Emphasis Supplied) 125 Cong. Rec. S 12286 (Daily ed. Sept. 10, 1979)

Likewise, in the Rouse during floor debate of the Conference Report on H.R. 4392, Representative Garcia explained the intent of Congress regarding this provision as follows:

"Furthermore, under the Immigration and Nationality Act, and current regulations

promulgated thereunder, a determination that an individual is in this country in violation of law is a complex matter which is left, by law, in the hands of administrative and Federal judges. Current Immigration law provides that the legality of a person's presence in the United States must be determined only after a thorough due process deportation or exclusionary proceeding, in which INS, and not Legal Services, investigates the legality of a person's presence in this country. In fact, the Immigration and Naturalization Service is legally precluded from requiring a person to depart from the United States until a final finding of Reportability or excludability is entered and statutory review procedures are exhausted or waived.

"Both the Justice Department and Immigration judges have recently commented on the positive role played by Legal Services attorneys in these complex proceedings representing indigent aliens. It is certainly not the intent of Congress to require Legal Services staff members to prejudge the outcome of official deportation or exclusion proceedings. Nor is it the intent of Congress to substitute the subjective judgment of an individual Legal Services staff member as to whether a potential client is legally within the country for the full due process administrative and judicial proceedings that an individual is entitled to receive under our laws and regulations. (Emphasis Supplied) 125 Cong. Rec. H 7084 (daily ed. August 2, 1979)

The legislative history quoted above makes clear that Congress intended the provision to apply only to those aliens, subject to deportation proceedings, who have either waived or exhausted their administrative and judicial remedies. The LSC adopted this construction of the provision shortly after it was enacted into law, and issued the following guidance to its grantee legal services provider organizations regarding the description of an alien known to be in violation of the immigration laws. LSC stated that such an alien is:

* * *one against whom a final order of deportation is outstanding. An outstanding order of deportation is final when it is not subject to appeal, either because (1) the relevant statutory appeal period (10 days) has run, (2) there are no lawful grounds upon which an appeal may be based' or (3) the available administrative and/or judicial appeals have been exhausted, and the order is not subject to review under the limited standards for reopening or reconsideration."

Upon review of the wording of the restriction and its legislative history, we are unable to find that LSC has misconstrued the restriction. On the contrary, we conclude that LSC's interpretation of the restriction is consistent with congressional intent regarding applicability of the provision to aliens. Representation under this provision is denied solely to those aliens who have admitted to being in this country in violation of immigration law or who have finally been so determined by the appropriate administrative judicial tribunal. While normally a deportation order will accompany such a determination, it is the final determination that will make an individual ineligible to be a client of federally funded legal services.

Representation of aliens before the INS by staff attorneys employed by the Texas based LSC grant recipient organizations referred to above does not, in our view, violate the restriction. The mere fact that INS administrative procedures remained available to the aliens in question confirms that the restriction was inapplicable to them.

In response to your question concerning the propriety of Ms. Barbara Belejack's alleged solicitation of clients while serving as an LSC grantee staff attorney, we requested LSC to investigate the matter and provide us with a report, which it has done. Ms. Belejack does not dispute the fact that she visited the INS detention center in Grapevine, Texas, on March 24, 1981. However, she denies that the purpose of the visit was to solicit clients. She states that on the previous weekend at the conclusion of a Mexican-American dance in Tyler, Texas, local sheriff's department officers stopped people leaving the dance and checked their identification. Some of these people were arrested and detained on "immigration holds" in the Tyler jail pending INS action. Friends and relatives concerned about the detainees contacted the East Texas Legal Services Office in Tyler for assistance. An employee of that office visited the jail and 'spoke to some of the detainees before INS took them to the Grapevine Center. Ms. Belejack states that the employee of the Tyler Legal Services Office requested her to visit the Grapevine Center, since it is located in territory served by her organization (the North Central Texas Legal Services Foundation, Inc.) to provide the detainees information about their rights and to determine if any of them wished to be represented in deportation proceedings.

Ms. Belejack states that upon arrival at the Center she identified herself to the officer in charge and gave him a list of the names of the people detained in Tyler. She requested that these people be informed that she was at the Center and was available to speak with them. Three of the people were brought to her. She explained their rights and basic deportation procedures, and indicated they could contact her if they wished further assistance.

On March 25, 1981, the day following her visit' M19. Belejack was contacted by the common-law wife of one of the detainees, who was an American citizen. This person requested that Ms. Belejack represent the detainee. Ms. Belejack determined that the detainee and his common-law wife both satisfied the alien eligibility requirements. However, before anything could be done, Ms. Belejack learned that the entire "Tyler" group had been removed from the Center on the afternoon of her visit.

Assuming the facts are as presented above, we are unable to conclude that Ms. Belejack's conduct constituted a violation of the appropriation restriction on the representation of illegal aliens. First, no representation was undertaken. However, even if representation had been undertaken, for the reasons discussed above, we do not believe it would have constituted a violation of the appropriation restriction. LSC has advised us that it has determined that Ms. Belejack's conduct in this case did not violate the rules governing the professional standards of conduct for attorneys prescribed by the American Bar Association or the State Bar of Texas. LSC explains that the rules restricting solicitation by attorneys create an exception for non-profit organizations such as LSC recipients that offer to represent individuals who are otherwise unable to obtain legal assistance at no cost. Since no question of Federal law is here involved, we believe it is inappropriate for this Office to render an opinion on whether Bar Association rules prescribing professional standards of conduct for attorneys have been violated in a given case. The Bar Associations promulgating such rules generally render their own opinions as to violations. If you wish to pursue this matter further, you may wish to contact them directly.

We trust this opinion is responsive to your request. If we can be of further assistance, please call on us.

Sincerely yours,

Milton J. Socolar for Comptroller General of the United States