

COMMENT

**The LSC Requirement That Aliens be “Present in the U.S.”
To be Eligible for Legal Assistance:**

**Legislative History and Statutory Construction
As They Relate to H-2A Temporary Agricultural Workers**

Submitted to:

The Erlenborn Commission
Legal Services Corporation

Pursuant to request published at
Fed. Reg. Feb. 18, 1999 (Vol. 64, No. 32)
Pages 8140-41

March 18, 1999

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I. SCOPE OF THIS COMMENT

This comment outlines the legislative history behind H-2A workers' eligibility for LSC funded legal assistance. The comment shows how Congress enacted specific legislation intended to give H-2A workers fully effective and comprehensive access to LSC-funded legal assistance for their employment problems related to their lawful work in the U.S. Finally the comment shows how only a broad construction of the phrase "present in the U.S." fulfills this Congressional intent and how the more narrow constructions which have been suggested by some, would actually subvert the intent of Congress.

While this comment describes a few of the essential background facts about H-2A workers' presence in the U.S., it is not within the scope of this comment to attempt to make a full and detailed factual record. That task will be left to other commentators who will submit more fact-oriented comments to the Commission.

Nor does this comment attempt to discuss the law or facts related to non-H-2A alien farm workers, their presence in the U.S. and their eligibility for Legal Services assistance. Because that subject involves a different legislative history and factual pattern it will be addressed in separate comments submitted by other commentators.

II. THE STATUTORY CONSTRUCTION ISSUE TO BE RESOLVED:

Reduced to its essence, the issue with respect to H-2A workers is: **At what point in time must an H-2A worker be "present in the United States." to be eligible for legal assistance from a Legal Services program.** Three constructions of the statute seem to have been suggested by various commentators:

Construction A: The H-2A worker's eligibility is limited to legal assistance rendered during the period she is present in the U.S., - *i.e.*, during the period of her employment. When her work ends (e.g. through injury, termination, or completion of the contract) and she is thereby required to leave the country, she ceases to be eligible for any legal assistance.

Construction B: The H-2A worker's eligibility is limited to legal assistance commenced while he was present in the U.S., but he will remain eligible for continuing assistance on that matter when the work ends and he leaves the country.

Construction C: The H-2A worker's eligibility for legal assistance is limited to the employment injuries and violations directly related to her physical and lawful presence in the U.S. working under an H-2A visa. This comments argues that it is this broader interpretation which is most consistent with the legislative intent and with the purposes of the Legal Services Corp. Act (LSC Act) and the Immigration Reform and Control Act of 1986 (IRCA).

III. FACTUAL BACKGROUND

The following are a few of the facts which have a significant bearing on the proper construction. The Commission is expected to receive comments and testimony confirming and elaborating upon these facts:

A. H-2A “guest workers” are specifically sought out and recruited in their home countries (primarily Mexico and Jamaica) by U.S. employers who, together with the Immigration and Naturalization Service, arrange for the H-2A workers to be lawfully admitted to the U.S. to work for the employer who obtained the worker’s visa. The employer brings the H-2A worker to the United States by arranging the worker’s transportation from their home country to the employer’s work site.

B. While in the U.S. the H-2A workers are “captive” in the sense that (1) they are bound by their visa to work only for that one employer or employer association and (2) their visa expires and they are required to leave the country when the work ends or if the employer decides to terminate them or if they get injured and can’t work.

C. The duration of an H-2A worker’s employment (and hence permissible presence in the U.S.) is typically 2-5 months. Sometimes it last no more than 6 weeks and in the case of a worker who is injured or prematurely terminated, the worker’s employment/presence may be as short as a few days or weeks.

D. While present in the U.S. and working for the employer, the H-2A worker is dependent on the employer for work, earnings, housing, food, transportation, telephone and mail access, the right to remain in the U.S., and return transportation back to the worker’s home country.

E. The H-2A worker’s access to legal assistance is usually very limited while in the U.S., because of his extreme dependence on the employer, his isolation in remote employer controlled housing, his lack of awareness about his legal rights or the availability of legal assistance, and affirmative efforts by many H-2A employers to discourage or bar worker access to legal assistance.

F. Many H-2A employers prefer hiring H-2A workers instead of U.S. migrant workers largely *because of* the H-2A worker’s restricted access to legal assistance.

G. Further restrictions on H-2A workers’ access to legal assistance is virtually certain to result in an increased incentive for many employers to hire H-2A workers and consequent loss of jobs for U.S. migrant workers.

H. Many of the legal problems commonly suffered by H-2A workers are by their nature problems which only become apparent at the end of the worker’s employment, as she is leaving the U.S. or after she has left the U.S. Examples include: work injuries, employer failure to pay the last paycheck, employer failure to provide or reimburse return travel expenses, and employer failure to pay the “three-quarter guarantee” (a requirement that employers pay for at least 3/4 of the amount

of work they promised the workers). The common occurrence of such problems has been documented *inter alia* in reports to the Congress by the GAO and House Committee Staff.¹

I. Like any other client, H-2A workers often want a little time to reflect on their legal options and discuss them with their family before deciding to seek formal legal assistance.

J. For a variety of reasons, including those cited above, the great majority of H-2A workers like most U.S. migrant workers, seek legal assistance on their employment problems only after they have returned home. This typically occurs through a phone call which they make from their home town to a Legal Services office from whom they previously received some community educational material while in the U.S.

K. The U.S. Department of Labor has repeatedly been found unable to effectively enforce employment protections for H-2A workers either during their employment in the U.S. or after they have left the employment.²

L. Employer hiring of H-2A workers in the U.S. has been steadily growing and spreading to new states in recent years.

M. As a result of vigorous lobbying by agricultural employers, the U.S. Congress in 1998 approved a new guestworker bill which would ease the way for employers to quickly secure access to several hundred thousand new guest workers with H-2A visas. That bill, which was attached as a rider to the Commerce/State/Justice Appropriation, was sent to the President and removed from the appropriation only after strenuous negotiations between the White House and Congressional leadership. A similar measure is expected to be introduced in the current Congress.

III. WHY CONSTRUCTION C. (LISTED ABOVE) IS THE MOST REASONABLE STATUTORY CONSTRUCTION

A. When Congress Established LSC Eligibility for H-2A Workers in the 1986 Immigration Reform and Control Act (IRCA), It Intended for All H-2A Workers to Have a Full and Meaningful Remedy for Employment Problems Arising From Their Work Contract, Limited Only by the Proviso That

¹ E.g., *H-2A Agricultural Guestworker Program: Changes Could Improve Services To Employers and Better Protect Workers*, (GAO/HEHS-98-20, Dec. 1997) at pp. 9-10; *Report on The Use of Temporary Foreign Workers in the Florida Sugar Cane Industry*, Serial No. 102-J, prepared by committee staff for the Committee on Education and Labor House of Representatives, at pp. 2 and 21 (July 1991).

² E.g., *H-2A Agricultural Guestworker Program*, (GAO), *id.* at p. 58; *Report on The Use of Temporary Foreign Workers in the Florida Sugar Cane Industry*, *id.* at pp. 1-2 and 21-22.

the Legal Assistance be Related to the Worker's Specific H-2A Contract

(1) The Statutory Language in 1986:

a) Whatever the language “is present in the U.S.” means, that language was part of the LSC alien restriction in 1986 at the time Congress adopted IRCA Sec. 305 (8 U.S.C. 1101 note). Section 305 incorporated H-2A eligibility into the then-existing structure of LSC alien restrictions, by creating the legal fiction that H-2A workers are lawful permanent residents (LPR) for purposes of establishing eligibility for legal services.³ Since 1984, the annual LSC appropriation rider had stated that aliens are ineligible unless “the alien is present in the United States” and falls under one of the four specified immigration categories - one of those being the LPR category.⁴ Thus Congress was aware of the “is present” language in 1986, when it adopted IRCA Sec. 305 making H-2A workers eligible for legal assistance. Implicit in Sec. 305 is the Congressional understanding of how the “is present” language should be applied to H-2A workers. The “is present” language, as it applies to H-2A workers, must therefore be interpreted in the context of what Congress was intending to do by enacting Sec. 305.

b) The plain language, “is present in the U.S.,” doesn’t answer the crucial question: *When* did Congress intend that the H-2A worker be present in order to be eligible? Proposed constructions A., B. *and* C. all require that the alien must be physically present in the U.S. at some relevant time. The proposed constructions differ in identifying the point in time at which the worker’s presence is most relevant to the underlying purposes of the LSC Act and IRCA.

c) The plain language of IRCA Sec. 305 authorizes LSC eligibility for a “worker admitted to *or* permitted to remain in United States under [an H-2A visa].” (Emphasis added). This language at least negates construction A. which would read the statute to provide eligibility only for a “worker admitted to *and* permitted to remain in the U.S. under an H-2A visa.” Thus the plain language of the IRCA language at least suggests that eligibility may be based on presence in the U.S. at some relevant point in the past.

d) The language of IRCA Sec. 305 contains a very specific limitation restricting legal services eligibility to matters relating to contractual employment rights, indicating an

³ Congress was aware that LPR’s are generally eligible for legal services so long as they comply with the terms of their immigration status. Congress obviously knew also that H-2A workers’ status does not permit them to remain indefinitely in the U.S. like LPR’s nor to come and go like LPR’s. Nonetheless Congress said H-2A workers “shall be considered to be [LPR’s] for purposes of establishing eligibility for legal services.” *See* the attached Statutory Appendix for the full language of IRCA Sec. 305 and other relevant statutory provisions.

⁴ *See* the attached Statutory Appendix for the specific language.

acute Congressional concern about precisely restricting the scope of eligibility. Yet it is significant that the statute contains no indication of concern about limiting the eligibility to a narrow period of time, so long as the worker “is admitted to or is permitted to remain in the United States under [an H-2A visa].

(2) The 1986 Legislative History

a) There appears to be no instructive legislative history on the meaning of “is present” as used in the appropriations rider in 1986 nor in any of the other years in which it has appeared in the appropriations acts (1984 to the present)

b) On the other hand, there is a significant amount of legislative history surrounding IRCA Sec. 305. All of that legislative history suggests that Congress meant for H-2A workers to have general eligibility for LSC legal assistance without limitation as to when the H-2A worker is present in the U.S., just so long as the legal assistance relates to the employment contract under which the H-2A worker was admitted. Every statement in the legislative history about Legal Services eligibility assumes that it applies to all H-2A workers, limited only by the substantive restriction to employment contract matters. There is not a single statement suggesting that Legal Services eligibility is limited only to some H-2A workers or to some time periods.

(i) The Conference Report for the IRCA explains the purpose of section 305 under the heading “Legal Services For H-2 Workers”: “It is the intent of the Conferees that contracts entered into shall not violate any provision of the Immigration and Nationality Act authorizing the H-2 program or any regulations issued pursuant to that Act. Further, the Conferees intend that the Conference substitute will secure the rights of H-2 agricultural workers under the specific contract under which they were admitted to this country.” House Conference Rep. No 91-1000, 1986 U.S. Code Cong. & Admin. News, 99th Cong., 2d Sess., 5840 at 5850.

(ii) Sec. 305 went to conference as part of the House bill. Prior to the conference, Rep. Lungren offered a motion to instruct the House conferees to recede to the Senate version of the bill, which did not provide Legal Services eligibility for H-2A workers. Among other points Rep. Lungren argued that H-2A workers “ought not to be a group of people given taxpayers’ attorneys that are otherwise supposed to help American citizens and nationals who are here that are unable to pay themselves.” Opposing the Lungren motion, Rep. Berman stated that H-2A eligibility was “part and parcel” of the larger agreement on the H-2 program, “because without that the protections contained for those workers...become utterly meaningless. The fact is the history of abuses in that H-2 program, which has been documented time and again, cannot be corrected without effective representation, as

you could easily contemplate guest workers coming here for a short period of time, hoping to come back again, anxious to pick up a wage considerably higher than the wage they might be making in their own country, have no individual ability and no effective collective ability to enforce the protections that the U.S. law is supposed to guarantee them.” Legal Services eligibility for H-2A workers was “a position [the growers] agreed to in detailed negotiations and for which they got numerous changes in existing law, changes which they have been seeking for years and years.” 132 Cong. Rec. H9866-67 (Oct. 10, 1986).

(iii) Rep. Schumer, also opposing the Lungren motion, said: “The issue of legal services really means something very dear and near, at least to me. That is that you can give people all the rights you want, but if they have no way to enforce those rights, those rights are meaningless. We all know that INS is terribly overburdened; we all know that the Department of Agriculture, the Department of Labor are overburdened; they have been the subject of cuts...If we are not going to have legal services, why kid ourselves? Why not just abolish all the laws that are supposed to protect these folk; because if you do not have legal services, the laws are unenforceable and useless.” 132 Cong. Rec. H9867 (Oct. 10, 1986).

(iv.) Rep. Morrison likewise spoke against the amendment saying: “We have a serious problem of rights that are given U.S. law (sic) to these people who are here for the convenience of the U.S. economy. For those people to be denied a realistic way to enforce their rights, I think, is a great mistake.” 132 Cong. Rec. H9868 (Oct. 10, 1986). The Lungren motion was defeated and the Senate receded to the House provision establishing Legal Services eligibility for H-2A workers.

(v) During House floor debate on the Conference Report, House sponsor and conferee, Rep. Mazoli stated: “Ladies and Gentlemen of the House, your conferees kept faith with you and the votes that you cast on this bill. It has generous legalization. You sent us to conference to keep it, and we kept it. It has tough anti-discrimination provisions. You sent us to conference to keep it and we kept it. It has legal services for H-2 workers. You sent us to conference to keep it and we kept it.” 132 Cong. Rec. H10586 (daily ed. Oct. 1, 1986).

(vi) The chairman of the House conferees and bill co-sponsor, Rep. Rodino stated during that same floor debate on the Conference Report: “When we provided that it was our intent that H-2A contracts ‘shall not violate any provision of the Immigration and Nationality Act authorizing the H-2 Program or any regulations’ and went on to authorize legal services representation to secure ‘the rights under the contract,’ we obviously intended that such workers could use Legal Services attorneys to sue not only to enforce breaches of their contract, but also, obviously, when those contracts violated the act or regulations. To hold otherwise is to deny the plain meaning of those two dictates.” 132 Cong. Rec. H10590 (daily ed. Oct. 15,

1986)

(vii) Even when emphasizing the “very specific and limited conditions under which an H-2 agricultural worker might be provided legal assistance by the Legal Services Corporation,” House conferee, Rep. McCollum cited only the restriction as to substantive employment contract matters: “These services may only be provided on matters concerning wages, housing, transportation, and other employment-related matters under the provisions of the specific contract under which each individual comes here to work.” 132 Cong. Rec. H10588 (daily ed. Oct. 15, 1986).

(viii) In the Senate, Sen. Kennedy, a Senate conferee, offered the same remarks as those of Rep. Rodino, cited above. 132 Cong. Rec. S16911 (October 17, 1986);

(ix) Sen. Simpson, another conferee, underscored the eligibility limitations by citing only the substantive restriction as to employment matters: “The legal services that will be available to H-2 workers - and they are foreign nationals...- are limited only to housing, and transportation and wages and anything within the terms of the contract, nothing more. No adventurism, no domestic problems, no anything. The legal services are strictly limited to that.” 132 Cong. Rec. S16900 (October 17, 1986);

(c) There is no legislative history suggesting that an H-2A worker is eligible only during the period when the worker is present in the U.S. or only for legal assistance commenced while the worker is present in the U.S. That silence stands in marked contrast to the repeated, and otherwise unqualified statements confirming the intention that H-2A workers should be eligible for legal assistance related to their employment contracts. These two factors strongly favor Construction C. over Constructions A. and B.

B. When Congress Modified the Language of the Alien Restriction in the 1996 Appropriation, It Made No Substantive Change in the Restriction and Expressed No Legislative Intent to Do So

(1) The 1996 LSC appropriations rider made a technical change in the LSC alien restriction, specifically listing the H-2A eligibility provision (IRCA Sec. 305) among the other categories of eligible aliens. However, there is no indication of any intent to change the purpose and scope of IRCA Sec. 305 as it was enacted in 1986. The language of the 1996 appropriation rider is still framed in terms of “an alien to whom section 305 of the [IRCA] applies” and in terms of the “legal assistance described in such section.”⁵ It is impossible to view this as anything more than a technical, conforming revision to bring about uniformity between the two statutes. It merely cross-references the Sec. 305 provision which had already been existence for a decade. From the

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See attached Statutory Appendix.

beginning, Sec. 305 had been subject to the “is present” through its incorporation into the LPR category. Nothing about the 1996 or subsequent appropriations language applies the “is present” language to Sec. 305 in a way different from the way Congress intended it to apply when Sec. 305 was enacted.

(2) Moreover, the 1996 legislative history is silent about any purpose behind this modification. If Congress had intended any substantive change, surely it would have said something, especially if it had intended to cut back on H-2A worker eligibility for legal assistance as drastically as Constructions A. or B.

C. Construction C. is Most Consistent With the Underlying Purposes of The IRCA and LSC Appropriations Acts.

(1) It is a well established rule of statutory construction that a statutory provision should be interpreted in the manner most consistent with the underlying purpose of the statute.

(2) The purpose of IRCA Sec. 305, as declared in the Conference Report, is “to secure the rights of H-2 agricultural workers under the specific contract under which they were admitted to this country.” House Conference Rep. No 91-1000, 1986 U.S. Code Cong. & Admin. News, 99th Cong., 2d Sess., 5840 at 5850.

(3) The current LSC appropriations act is intended to carry out the purposes of the LSC Act of 1974, as amended. Among the purposes of the LSC Act are: “to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;...to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel;...[and to] provid[e] legal assistance to those who face an economic barrier to adequate legal counsel.” 42 U.S.C. 2996.

(4) Construction C. would ensure that H-2A workers are normally eligible for legal assistance to protect their contract rights arising directly from their lawful presence in the U.S. It would better serve the cited purposes of the IRCA and LSC Act than either Construction A., which would limit eligibility only to the brief period of employment, or construction B., which would bar eligibility to most H-2A workers based on the mere fortuity that the assistance didn’t or couldn’t commence before the worker was required to leave the country. The discussion below demonstrates in more detail how Constructions A. and B. would vitiate the Congressional intent.

IV. CONSTRUCTIONS A. AND B. WOULD VITIATE BOTH THE PURPOSE OF IRCA SEC. 305 AS WELL AS THE PURPOSES OF THE LSC ACT.

A. Construction A:

(1) Construction A. would entail a number of self-defeating results which are inconsistent with the avowed Congressional purposes. For example Congress was well aware that H-2A workers are present in the U.S. only during the brief term of their employment - a few weeks to a few months. Yet a typical employment problem takes longer than that to resolve. It is unreasonable to assume that Congress intended for legal services staff to initiate legal assistance to H-2A clients, investigate the claim, file a complaint, complete discovery and pre-trial proceedings, negotiate a settlement, go to trial, etc., all within that brief period. To attribute such a self-defeating intention to the Congress violates one of the cardinal rules of statutory construction.⁶

(2) Similarly, construction A. unreasonably assumes that Congress intended to discriminate among H-2A workers in the following ways:

a) in favor of H-2A workers with simple, easily resolved claims versus those with more serious and complex claims;

b) in favor of H-2A workers whose employment problems arise early in their work period versus those whose employment problems become apparent late in the season or even after the work is completed (*e.g.*, workers who are injured, who never get their last paycheck, whose return transportation expenses are not reimbursed, or who are not paid the 3/4 guarantee at the end of the season);

c) in favor of those H-2A workers with the most knowledge about their legal rights and about how to obtain legal assistance versus those with the least knowledge.

d) in favor of H-2A workers whose employers permit the most access to legal

⁶ It could be suggested that even after an H-2A client departs from the U.S., a Legal Services attorney might be required by professional responsibility to continue providing legal assistance. However, this is potentially problematic for several reasons:

- ▶ First this limited exception is of no help to the H-2A client who can't/doesn't seek help until after leaving the country.
- ▶ State codes of professional responsibility may well allow the attorney to withdraw where there is no litigation pending, and substantial work has not yet been done on the case.
- ▶ In most states withdrawal may well be *required* on the grounds that continued representation would result in a violation of law, i.e. the LSC eligibility restrictions.
- ▶ At least in some states it may be that the requirements of professional responsibility merely require that the attorney not to start legal assistance she is unlikely to be able to complete or that she inform the client at the outset of the legal assistance that she will have to withdraw as soon as the client becomes ineligible.
- ▶ Most important is the practical reality that few Legal Services programs will take the risk of starting or continuing legal assistance if there is any substantial risk of being later found in violation of the regulations because the client has become ineligible.

assistance versus those workers whose employers most egregiously block their access to legal assistance;

(3) Construction A. would give the adverse party in an employment claim, *i.e.* the employer, the ability to veto the worker's legal assistance by the simple expedient of terminating the worker, thereby requiring the worker to leave the country immediately or by merely stalling resolution of the claim until the work is completed, whereupon the worker must leave the country. Indeed Construction A would provide an employer an *incentive* to terminate and get rid of an aggrieved H-2A worker.

(4) Construction A. would have the practical effect of almost completely nullifying the H-2A legal assistance which Congress sought to ensure with IRCA Sec. 305, since very few H-2A workers are in a position to seek legal assistance on employment claims, while they are still working and still dependent on the employer for work, housing, food, the right to remain in the U.S. and for their transportation back home.

(5) Construction A. would also have the practical effect of diminishing job opportunities for low-income U.S. agricultural workers (U.S. citizens and LPR's), contrary to the goals of the LSC Act. 42 U.S.C. Sec. 2996 (3). This is because Construction A. would so seriously limit the ability of H-2A workers to protect their legal rights, it would make the employment of H-2A workers much more attractive to potential employers - especially the less scrupulous employers. This would encourage more such employers to prefer hiring the poorly protected H-2A workers rather than U.S. workers who are more likely to enforce their rights.

B. Construction B.:

(1) Construction B. though a little less drastic in its effects would still largely undermine the ability of H-2A workers to obtain the legal assistance intended by Congress. Construction B. would also produce many (though not all) of all of the same self-defeating results as Construction A.

(2) Construction B. unreasonably assumes that Congress intended to discriminate among H-2A workers in the following ways:

a) in favor of H-2A workers whose employment problems become apparent during their work period versus those whose employment problems become apparent either after they have left the country or too late for them to commence legal assistance before they have to leave (*e.g.*, workers who are injured, who never get their last paycheck, whose return transportation expenses are not reimbursed, or who are not paid the 3/4 guarantee at the end of the season);

b) in favor of those H-2A workers with the most knowledge about their legal rights and about how to get legal assistance versus those with the least knowledge.

c) in favor of H-2A workers whose employers permit the most access to legal assistance versus those workers whose employers most egregiously block their access to legal assistance;

d) in favor of H-2A workers who are quick to complain and seek legal assistance versus those who choose to reflect on their situation and discuss their options with family members back home.

(3) Construction B. would give the adverse party in an employment claim, *i.e.* the employer, an incentive to terminate an aggrieved H-2A worker and quickly send the worker out of the country as a means of preventing her from securing legal assistance.

(4) Construction B. would have the practical effect of curtailing most of the H-2A legal assistance which Congress sought to ensure with IRCA Sec. 305, since few H-2A workers are in a position to seek legal assistance on employment claims, while they are still working and still dependent on the employer for work, housing, food, the right to remain in the U.S. and for their transportation back home.

(5) Construction B. would also have the same practical effect as Construction A. with respect to diminishing job opportunities for low-income U.S. agricultural workers (U.S. citizens and LPR's), as outlined in point IV.A.(5), contrary to the purposes of the LSC Act.

CONCLUSION:

Construction C. more clearly comports with the statutory language and legislative history of the IRCA and LSC appropriations acts, than either Construction A. or B. An H-2A worker's presence in the U.S. at the time the employment injury or violation was suffered is more relevant to the underlying purposes of IRCA Sec. 305 and the LSC Act than either the worker's presence throughout the duration of the legal assistance or the worker's presence at the moment the legal assistance commences. Finally, Constructions A. and B. would produce self-defeating results which are affirmatively *contrary* to the purposes of IRCA Sec. 305 and the LSC Act. The vital interests of both H-2A workers and U.S. migrant agricultural workers can only be fully protected by Construction C.