



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO-2009-1002

Subject: Application of 1626 Documentation Verification Requirements

Date: June 10, 2009

This Office was asked for an opinion by a recipient on whether the program is required to obtain a signed citizenship attestation or verify eligible alien status through the review of appropriate documentation (as applicable) for clients provided advice and counsel or brief services who have sought services by coming into the program's office notwithstanding that they have been provided legal assistance over the telephone while the client sits in the program office.

Brief Answer

The exception to the citizenship/eligible alien status documentation and verification requirements which applies to "brief advice and consultation by telephone" cannot be interpreted to apply in a blanket manner to all clients who appear in person in the recipient's offices provided only that they obtain their assistance over the telephone. Accordingly, absent special other circumstances, the recipient is required to obtain signed citizenship applications or to verify eligible status through the review of appropriate documentation for persons who appear in person to seek services from the recipient even if the recipient chooses to provide that service to those clients via telephone.

Background

In the course of a Case Service Report/Case Management System review of a recipient, the LSC Office of Compliance and Enforcement found that the recipient was not obtaining signed citizenship attestations or verifying eligible alien status through the review of appropriate documentation for certain clients who appeared in person at the recipient's offices to apply for services. As a result of OCE's visits, the recipient was instructed by OCE to begin obtaining signed citizenship attestations or verifying eligible alien status through the review of appropriate documentation for all clients served who had appeared in person at the recipient's offices. The recipient acknowledged that the OCE finding was accurate, however, the recipient took issue with OCE's instruction on the basis that under 45 CFR §§ 1626.6(a) and 1626.7(a), the recipient was excepted from the verification requirements because the services provided to the clients at issue did not involve continuous representation and were provided by telephone. The recipient has inquired with this Office as to the meaning and applicability of the regulation.

As we understand the facts, under the recipient operates a centralized telephone-based intake system, through which applicants for legal assistance are screened for eligibility (financial and citizenship or alien status) and the nature of the legal problem for which legal assistance is sought. The recipient, through the telephone-based intake system, refers all LSC-ineligible applicants to various external providers throughout the state to the extent possible. In addition, some LSC-eligible applicants are also referred to third party providers for various reasons. Some eligible applicants, however, are accepted as clients of the recipient and provided legal assistance by recipient staff. As we understand the facts, most applicants access the intake system remotely by telephone and do not ever appear in the recipient's offices. However, there are some applicants that do appear in person in the recipient's offices. For those applicants, they are asked to use a telephone provided by the recipient in the recipient's offices to call in to the intake system, unless there is some emergency or in the event that the applicant cannot communicate with the intake system via telephone.¹

It is our further understanding that the recipient does not obtain a signed citizenship attestation form or verify eligible alien status through the review of appropriate documentation (depending on whether the client is a citizen or eligible alien) for clients who have appeared in person in one of the recipient's offices and, upon instruction from recipient staff, have used the telephone provided to call into the intake system when the only legal assistance provided to the client is advice and counsel or brief services by telephone either during the initial call or during a subsequent phone call.

Analysis

LSC grant recipients are prohibited by law from providing legal assistance to certain categories of non-citizens. Generally, eligible clients are U.S. citizens or are persons who are among various classes of aliens upon whom Congress has bestowed eligibility for services from LSC-funded legal services providers. See, Pub. L. 97-377, 96 Stat. 1874 (1982); Pub. L. 104-134, 110 Stat. 1321 (1996); Pub. L. 110-161, 121 Stat. 1844 (2007); Pub. L. 110-339 (2008).² LSC's regulation at 45 CFR Part 1626 implementing the statutory restrictions on the provision of legal assistance to non-citizens generally requires that recipients verify applicants' citizenship/alien status eligibility. For applicants who claim to be citizens, recipients must obtain a signed citizenship attestation form from the applicant and for eligible aliens, recipients must visually review approved documentary evidence of the eligible alien status. 45 CFR §§1626.6(a) and 1626.7(a). However, an exception to the verification requirements exists for situations in which "the only service provided ... is brief advice and consultation by telephone which does not include continuous representation."³ *Id.*

¹ The recipient notes that for these in-person applicants the recipient does verify citizenship or eligible alien status. The OCE report does not include a finding that disputes this.

² From 1983 until 1996, LSC-funded legal assistance was restricted, from 1996 through to the present, legal assistance from LSC funded programs, regardless of the source of the funding for the assistance, has been restricted.

³ The phrase found in the regulation, "brief advice and consultation ... which does not include continuous representation," has, in practice, come to mean the legal assistance activities which fall within the categories of "advice and consultation" and "brief services" as defined in the LSC Case Service Reporting Handbook. To avoid

The question presented to this Office is whether this exception applies in situations in which the advice and consultation or brief services has been provided by telephone, notwithstanding that the applicant has appeared in person at the recipient's office to apply for services. The recipient argues that in the instances at issue, since it is providing only advice and consultation or brief services *by telephone*, on its face the exception applies such that no verification of citizenship or eligible alien status is required by the regulation.

It is true that generally accepted principles of statutory construction (which apply equally to regulations) provide that when the language of a statute is clear and unambiguous on its face it is to be given its plain language meaning. *Public Citizen, Inc. v. Rubber Manufacturers Association*, 533 F.3d 810 (C.A.D.C. 2008); see also, 73 C.J.S. Public Administrative Law and Procedure § 211. However, "statutory construction leading to an absurd result is to be avoided." *Environmental Defense Fund v. Reilly*, 909 F.2d 1497, (C.A.D.C.,1990). In such cases, the statute is to be construed so as to be consistent with the legislative history. See, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 102 S.Ct. 3245 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Sutherland Statutory Construction* § 46:7 (7th ed.).

In this case, a literal reading of the "by telephone" exception would yield an absurd result at odds with the express intent behind the exception. The "by telephone" exception was originally adopted as a way to ameliorate the administrative burden presented to the program when the client has no in person contact with any program staff and the relationship with the client is brief. The preamble to the final rule in which the "by telephone" exception was originally adopted explains the rationale behind the exception as follows:

A number of recipients serving rural areas or other areas of dispersed client population noted that they frequently provide brief advice and consultation by telephone. They questioned the feasibility of applying the verification procedures in proposed §1625.5^[4] in these instances. The Corporation has therefore added a new paragraph (f) to the final rule which provides that no verification is required when the only service is brief advice and consultation by telephone. However in the event that the recipient provides ongoing representation in the matter, the verification procedures provided in the final rule must be followed. In such cases, there normally will be adequate opportunity to acquire the documentation required by the regulation.

confusion, this Opinion will refer to the "advice and consultation" and "brief services" as they are the relevant terms currently in use.

⁴ The verification requirement in §1626.5 of the previous version of the regulation is now reflected in the verification requirements in §§1626.6(a) and 1626.7(a). When the current version of the regulation was adopted in 1997, the "by telephone" exception to the verification requirement was retained in these respective sections of the regulation "with no substantive changes intended." 62 Fed. Reg. 19409, 19411, 19412 (April 21, 1997).

48 Fed. Reg. 28089, 289091 (June 20, 1983). The key to the “by telephone” exception was not the method of communication *per se*, but rather that the remote physical connection between client and attorney limited the opportunity to comply with the verification provisions required by the regulation. The verification requirements help protect both recipients and LSC by helping to ensure that recipients have reasonable assurance that applicants are, in fact, eligible for the services they are seeking. In adopting the “by telephone” exception, the Corporation was recognizing that in some cases complying with the verification requirements could be more time-consuming or complicated than the actual work performed for the client. LSC determined that in these limited cases oral answers and related assurances were sufficient when balanced with the level of service provided and burdens involved.

In circumstances in which the opportunity to comply with the verification requirements was not so limited or compromised, however, the intent of the Corporation was that the recipient would comply with the verification requirements. There is no indication the LSC contemplated a situation in which an applicant would appear in person but nevertheless be directed to a telephone for intake. In instances, as here, when applicants appear in person to apply for and obtain services, the opportunity to comply with the verification requirements is not usually significantly limited or compromised. This is true notwithstanding the fact that the intake worker may be in a separate physical location from the client, because the client still has in person contact with program staff who can follow the verification requirements. The fact that the recipient can and does comply with the verification requirement for some persons who seek and obtain legal services in person demonstrates that a reasonable opportunity to comply with the requirement generally exists.

Were LSC to agree with the recipient’s proposed interpretation that the exception applies to all clients who appear in person provided only that they obtain their assistance over the telephone, the exception would swallow the rule. Under such an interpretation, the “by telephone” exception would cease to be a limited exception intended to overcome a physical obstacle to compliance. It is not reasonable for LSC to adopt such an interpretation particularly given the clear regulatory history explaining the intent and purpose of the exception. Accordingly, the “by telephone” exception to the citizenship/eligible alien status documentation and verification requirements does not generally apply when the client appears in person in the recipient’s office. Unless the recipient can make a particularized showing that, notwithstanding a specific client’s appearance at its office, there is a physical obstacle to verifying that client’s eligibility as provided in §1626.6(a) or 1626.7(a), as appropriate, the recipient is required to obtain signed citizenship applications or to verify eligible status through the review of appropriate documentation for persons who appear in person to seek services in person from the recipient even if the recipient chooses to provide those services to those clients appearing in the office via telephone through its intake system.



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