DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60259

FILE: B-133001 DATE: DEC 2 1975

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MATTER OF: South Vietnamese refugee employment

DIGEST: (1) Exception in appropriation act providing that aliens from South Vietnam "lawfully admitted to U.S. for permanent residence" may be employed by Government does not permit such employment of such refugees who are paroled into U.S. under Attorney General's discretionary authority. Parole does not constitute lawful admission for permanent residence under immigration laws.

(2) South Vietnamese refugees, paroled into U.S. under Attorney General's discretionary authority, whose status is adjusted to that of being "lawfully admitted for permanent residence," under 8 U.S.C. § 1255, may be employed by Government pursuant to section 602 of Pub. L. No. 94-91, which permits such employment for aliens from South Vietnam "lawfully admitted to the United States for permanent residence."

This decision is to the Secretary of State in response to a letter of September 26, 1975, from Mr. John Thomas, Assistant Secretary for Administration, requesting our views concerning the employment of South Vietnamese refugees by the United States Government. Several agencies, including the State Department, have apparently curtailed the hiring of South Vietnamese refugees because of uncertainty regarding the legality of such employment. For example, the Public Health Service has deferred the employment of two South Vietnamese doctors in Arkansas, even though medical services are in short supply there.

Section 602 of Pub. L. No. 94-91, 89 Stat. 441, 458, approved August 9, 1975, providing for appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending June 30, 1976, and the period ending September 30, 1976, provides as follows:

"Sec. 602. Unless otherwise specified and during the current fiscal year, and the period July 1, 1976, through September 30, 1976, no part of any appropriation contained in this or any other Act shall be used to pay the compensation

of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States), whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, or (4) is an alien from Cuba, Poland, South Viet Nam, or the Baltic countries lawfully admitted to the United States for permanent residence: Provided, That, for the purpose of this section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with: Provided further, That any person making a false affidavit shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisoned for not more than one year, or both: Provided further, That the above penal-clause shall be in addition to, and not in substitution for, any other provisions of existing law: Provided further, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies." (Emphasis supplied.)

Similar provisions, restricting Federal employment of aliens, have been carried in at least one appropriation Act each year for many years. See, e.g., section 5 of the Act of March 28, 1938, ch. 55, 52 Stat. 148. The fourth exception, permitting employment of aliens from specified certain countries who are "lawfully admitted to the United States for permanent residence," has been carried routinely since the Supplemental Appropriation Act, 1954, ch. 340, § 1302, 67 Stat. 418, 435-436, approved August 7, 1953. That Act provided an exception for a person who "* * *(4) is an alien from the Baltic countries lawfully admitted to the United States for permanent residence." The exception for persons from Poland was added in the Act of August 3, 1961, Pub. L. No. 87-125, § 502, 75 Stat. 268, 282, and Cuba was added in the Act of October 30, 1973, Pub. L. No. 93-143, § 502, 87 Stat. 510, 525.

The term "South Vietnam" was added for the first time at the suggestion of the Department of State in Pub. L. No. 94-91, quoted above. Nationals of South Vietnam apparently were employable under similar legislation in prior years, under the exemption in the last sentence of the section, as "* * * nationals of those countries allied with the United States in the current defense effort." See generally, B-151064, March 25, 1963. The State Department indicates, however, that with the fall of Saigon, the withdrawal of United States forces, and the vitiation of our collective security obligations for the area, that clause became inapplicable.

The question of the propriety of employing South Vietnamese refugees, notwithstanding the exception placed in Pub. L. No. 94-91, arises because most such refugees are not "lawfully admitted to the United States for permanent residence," under the provisions of the Immigration and Nationality Act of 1952, ch. 477, title I, § 101, 66 Stat. 163, June 27, 1952, as amended, 8 U.S.C. § 1101 et seq. (1970). Section 1101(a)(20) of the Immigration Act provides:

> "(20) The 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."

Most of the South Vietnamese refugees have not yet fulfilled all the immigration requirements, discussed infra, to be "* * * lawfully accorded the privilege of residing permanently in the United States." Instead, they have been paroled into the United States under the Attorney General's discretionary authority provided in 8 U.S.C. § 1182(d)(5), which provides as follows:

> "(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

The above-quoted section specifically provides that "* * * parole of such an alien shall not be regarded as an admission of the alien * * *." (Emphasis supplied.) Vietnamese refugees, paroled into the United States, are not, therefore, "lawfully admitted for permanent residence" within the meaning of the Immigration and Nationality Act.

The State Department suggests, however, that the exception in the above-cited appropriation acts, permitting employment of aliens from enumerated countries who are "lawfully admitted to the United States for permanent residence," should not be given the technical meaning that such language is given in immigration law.

There is some support for this position in S. Rep. No. 94-294, 94th Cong., 1st Sess. 57 (July 22, 1975), on H.R. 8597, eventually enacted as Pub. L. No. 94-91, wherein it is stated:

> "The Committee has recommended language in section 602 of title VI of the bill to permit the U.S. Government to employ refugees of South Vietnam in the same manner as refugees from Cuba, Poland or the Baltic countries. This provision was included at the request of the State Department."

See also Statement of Senator Montoya, 121 Cong. Rec. S13855 (daily ed. July 26, 1975).

The above language indicates that the intent behind inclusion of the term "South Vietnam" within the section 602 exception, was to permit the employment of South Vietnamese refugees. The quoted language, however, also indicates that no greater right to Government employment was intended to be given to persons from South Vietnam, than to persons from Cuba, Poland, or the Baltic countries, for whom this exception was created in previous years.

Since the appropriation acts creating these exceptions are in para materia, they should be construed together. In this regard, we have not found anything in the legislative histories of the appropriation acts containing these exceptions since 1953 to indicate that the language was not used in the technical sense, as defined in the Immigration and Nationality Act, nor are we aware of any evidence that the exceptions were enacted to permit persons from the above-listed countries who are paroled into the United States to obtain Government employment. For example, the exception for Poland was included for the first time in 1961 in Pub. L. No. 87-125, § 502, 75 Stat. 268, 282 (August 3, 1961). The legislative history indicates that the

exception was included for the specific purpose of permitting certain alien veterinarians from Poland to be employed by the Department of Agriculture. See H.R. Rep. No. 497, 87th Cong., 1st Sess. 16 (June 8, 1961); S. Rep. No. 442, 87th Cong., 1st Sess. 23 (June 23, 1961); and 105 Cong. Rec. 9002 (1959). However, there is no indication in the legislative history that these veterinarians had been paroled into the United States.

Moreover, in view of the clear statutory statement in 8 U.S.C. § 1182(d)(5), supra, that the status of being paroled into the United States should not be regarded as an admission of an alien, we would have difficulty in accepting parole as the equivalent of lawful admission even without regard to the technical definition of "lawfully admitted into the United States for permanent residence" in 8 U.S.C. § 1101(a)(20).

This does not mean, however, that South Vietnamese refugees cannot have their parole status adjusted to that of being lawfully admitted for permanent residence, and apply at such time for Government employment, if they qualify for such change of status under the immigration laws.

In this regard, section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255 (1970) provides in pertinent part, as follows:

"§ 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence; record; natives of contiguous country or adjacent island

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

"(b) Upon the approval of an application for adjustment made under subsection (a) of this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the

> order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under section 1153(a) of this title within the class to which the alien is chargeable, for the fiscal year then current."

To be eligible for admission, generally a valid unexpired immigrant visa and an unexpired passport or other suitable travel document are required. See 8 U.S.C. §§ 1181, 1182(a)(20) (1970). Section 1255, however, offers relief to aliens who cannot satisfy such documentary requirements. See, in this regard, 8 C.F.R. § 245.5 (1975) wherein it is provided that:

> "§ 245.5 Documentary requirements.
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> "The provisions of Part 211 of this chapter /which parallels 8 U.S.C. § 1181/ relating to the documentary requirements for immigrants shall not apply to an applicant under this part."

One of the other requirements for relief under 8 U.S.C. § 1255, however, is that an immigrant visa be immediately available to the alien at the time his application is received. Doug Yup Lee v. U.S. Immigration and Naturalization Service, 407 F.2d 1110 (9th Cir. 1969).

Availability of visas to aliens is limited by the numerical limitations in 8 U.S.C. §§ 1151 and 1153, and also by strict requirements in 8 U.S.C. § 1182 as to which aliens are eligible to receive visas. Any alien applying for admission must demonstrate that he is not within one of the excludable classes listed in that section.

We have been informally advised that many of the South Vietnamese are ineligible for admission at this time because of the provisions of 8 U.S.C. § 1182(a)(14). This subsection provides that:

> "(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor /shall be ineligible to receive visas/, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able,

> willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title;"

Although this so-called "labor certification" is apparently difficult to obtain for most South Vietnamese refugees, it is readily available for physicians. See, in this regard, 29 C.F.R. §§ 60.2(a)(1), 60.3, and 60.7.

Accordingly, if each of the two physicians which the Public Health Service wishes to employ applies for adjustment of status under 8 U.S.C. § 1255, and can establish that (1) he qualifies for a labor certification under the above-cited sections of the Code of Federal Regulations, (2) he would be otherwise eligible to receive an immigrant visa, and (3) an immigrant visa is immediately available to him, his status could be adjusted, pursuant to the Attorney General's discretionary authority, to that of an alien lawfully admitted for permanent residence and each would be eligible to be employed by the United States Government pursuant to section 602 of Pub. L. No. 94-91, discussed above. The propriety of employment of all other South Vietnamese aliens would similarly depend on their ability to qualify for "lawfully admitted" status, either initially, or under the requirements for adjusted status, discussed above.

R.F. KELLER

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of the United States