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MAR 9 1979

The Honorable Daniel K. Inouye, Chairman  
Subcommittee on Foreign Operations  
Committee on Appropriations  
United States Senate

SEND 305

Dear Mr. Chairman:

This is in further reply to your request that this Office determine the propriety of certain proposed actions of the Department of State with respect to the United States Refugee Program. In our letter of January 30, 1979, we dealt with the use of the United States Emergency Refugee and Migration Assistance Fund. In this letter we shall answer your question on whether funds appropriated for Migration and and Refugee Assistance by Title III of the Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, 92 Stat. 1591, are available to pay voluntary agencies for services they provided to refugees during calendar year 1978.

The United States Refugee Program, operating under the provisions of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. §§ 2601-2605 (1976), provides assistance to refugees from communist oppression in Asia, Eastern Europe, and the Soviet Union. Services to these refugees are provided by American voluntary agencies which normally operate under contract with the Department of State.

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The Soviet-East European portion of the program has traditionally been administered on a calendar year basis. The Department of State justifies its budget requests to the Appropriations Committees of Congress on the basis of a calendar year program, and enters into calendar year contracts with the voluntary agencies. For example, with funds appropriated for fiscal year 1978, the Department entered into contracts with the voluntary agencies which covered services to be provided for the period January 1, 1978, through December 31, 1978. These contracts generally provide that the United States will reimburse the agencies for the costs of refugee services performed, up to a ceiling cost for the year.

In preparing its budget for 1978, the Department of State predicted that about 15,000 to 18,000 Soviet and East European refugees would need assistance during calendar year 1978. The Department requested appropriations for 1978 based on this estimate and later entered into contracts with the voluntary agencies for calendar year 1978.

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Letter  
re: contract

During the summer of 1978, the number of Soviet refugees increased significantly because of a liberalization of Soviet policy on exit visas. The increase resulted in a total of approximately 24,000 Soviet and East European refugees during calendar year 1978. The Department of State asserts that it became aware of the change in Soviet policy too late to request a supplemental appropriation for 1978 or to submit a budget amendment for fiscal year 1979.

The increased flow of refugees required the voluntary agencies to expend the full amounts of their 1978 State Department contracts before the end of the calendar year. Because the needs of the refugees continued unabated the voluntary agencies continued to provide services, using their own or borrowed resources. As a result, the agencies are now deeply in debt, and the Department of State fears they may be unable to continue to function, or may go out of business entirely.

In response to the critical situation caused by the increase in Soviet refugees, the Department of State has proposed three actions. It notified the Congress of its intentions by letter of November 30, 1978. First, the Department decided to alter the budget cycle of the program from a calendar year to a fiscal year basis, allowing it to make grants from fiscal year 1979 funds to the voluntary agencies for refugee assistance as of October 1, 1978. By letter of December 13, 1978, you informed the Secretary of State that the Senate Committee on Appropriations objected to the Department's proposed alteration of the budget cycle. Second, the Department would obligate fiscal year 1979 funds at an accelerated rate, and request a supplemental appropriation to continue the program throughout the year. Third, the Secretary would request the President to drawdown the United States Emergency Refugee and Migration Assistance Fund by an amount up to \$1.5 million, to allow the Secretary to make grants to voluntary agencies to preserve their fiscal viability. (This last action we determined was permissible, for the reasons given in our letter to you of January 30.)

Funds for the United States Refugee Program for 1978 were appropriated by the Foreign Assistance and Related Programs Appropriations Act, 1978, Pub. L. No. 95-148, 91 Stat. 1230. The enacting clause of this Act provides that the funds are being appropriated for the fiscal year ending September 30, 1978. Under the heading "Migration and Refugee Assistance" the Act provides:

"For expenses, not otherwise provided for, necessary to enable the Secretary of State to provide, as authorized by law, \*\*\* assistance to refugees, including contributions to the Intergovernmental Committee for European Migration and the United Nations High Commissioner for Refugees \*\*\* \$53,054,000 \*\*\*." 91 Stat. 1236

Funds for the program for 1979 were appropriated by the Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, 92 Stat. 1591. This Act contains in its enacting clause language indicating that the funds are appropriated for the fiscal year ending September 30, 1979. Under the heading "Migration and Refugee Assistance" this Act provides:

"For expenses, not otherwise provided for, necessary to enable the Secretary of State to provide, as authorized by law, \*\*\* assistance to refugees, including contributions to the Intergovernmental Committee for European Migration and the United Nations High Commissioner for Refugees \*\*\* \$111,544,200 \*\*\*." 92 Stat. 1597

The legislative history of both of these acts indicates that the Administration and the Congressional appropriations committees expected that part of these funds would be expended on a calendar year basis. However, there is no language in either statute providing that the availability of these funds is limited to any period other than the fiscal year for which they are appropriated. We must conclude that the funds appropriated by the 1978 appropriation act were available for obligation only during fiscal year 1978, and those appropriated by the 1979 appropriation act are available only during fiscal year 1979.

Section 1 of the Surplus Fund-Certified Claims Act of 1949, 31 U.S.C. § 712a (1976), provides:

"Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year."

The purpose of this provision is to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they were made. 55 Comp. Gen. 768, 773 (1976). Under this provision, any claim asserted against a one year appropriation is chargeable to the appropriation for the fiscal year in which the liability was incurred. Id.

Any services rendered to refugees by the voluntary agencies during calendar year 1978 but prior to October 1, 1978, were performed during fiscal year 1978. Under 31 U.S.C. § 712a, supra., fiscal

year 1979 funds cannot be used to pay for services performed in fiscal year 1978 because they constitute neither "the payment of expenses properly incurred" nor "the fulfillment of contracts properly made" in fiscal year 1979. See id. at 774.

On the other hand services performed during the last three months of calendar year 1978 may give rise to valid obligations for fiscal year 1979. Although the Congress may have intended that 1979 funds for the Refugee Program be applied only during calendar year 1979, the funds were actually appropriated for the fiscal year ending September 30, 1979. Therefore, unless some other language in Public Law 95-481 provides to the contrary, funds appropriated for the United States Refugee Program could have been available for obligation during the last quarter of calendar year 1978, had the Office of Management and Budget apportioned these funds for that period.

The following language appears in Title I of Public Law 95-481:

"None of the funds made available under this Act for \*\*\* 'Migration and Refugee Assistance,' shall be available for obligation for activities, programs, projects, type of materiel assistance, countries, or other operation not justified or in excess of the amount justified to the Appropriations Committees for obligation under any of these specific headings for fiscal year 1979 unless the Appropriations Committees of both Houses of the Congress are previously notified fifteen days in advance." 92 Stat. at 1593.

The Senate Committee on Appropriations explained the meaning of the term "justified" in its report as follows:

"Any activity, program, project, country, type of materiel assistance, or other operation specifically set forth by amount to be obligated in FY 1979, and by country in the FY 1979 Congressional Presentation Document shall be deemed to have been justified and the Committee informed. Conversely, any activity, program, project, country, type of materiel assistance, or other operation not specifically set forth by amount to be obligated in FY 1979, and by country in the FY 1979 Congressional Presentation Document shall be deemed not to have been justified and the Committee not informed." S. Rept. No. 95-1194, 95th Cong., 2d Sess. 23 (1978) (Emphasis added.)

The State Department proposal to alter the budget cycle of the United States Refugee Program, and to provide assistance by grant instead of by contract, does not change the amount to be obligated in fiscal year 1979 or the recipients of the assistance set forth in the fiscal year 1979 Congressional Presentation Document. It is therefore not clear that the limitation in the appropriation act applies to the proposal. However, assuming that the State Department changes were not "justified", the notification letter of November 30, 1978, fully satisfies the legal requirements of the statutory provision, and 15 days after the notification, the Department was legally free to implement its proposal.

A similar provision to that in the fiscal year 1979 appropriation act appeared in both the fiscal year 1978 and 1977 acts. The legislative history of those provisions indicates that the Congress intended that the Administration would abide by any objection either Appropriation Committee might have to a proposed program change. Thus the fiscal year 1978 conference report stated:

"The managers on the part of the Senate and the managers on the part of the House have agreed to this action with the firm expectation that the Executive Branch will follow the historical pattern of honoring objections to the obligation of funds for activities, programs, projects, type of materiel assistance, countries or other operations not justified or in excess of the amount justified to the Appropriations Committees for obligations under any of the specific headings mentioned in this section."  
H.R. Rept. No. 95-633, 95th Cong., 1st Sess. 9 (1977).

However, the language of the statute itself does not require that the Department of State honor an objection by either Appropriation Committee. The statutory language requires only that the Department notify the Committees 15 days in advance of any proposed obligation which was not justified in its budget submission for the fiscal year. If Congress desires to legally bind the Administration to honor an objection to a proposed change of program, it must use language similar to that used in the Foreign Assistance and Related Programs Appropriations Act, 1976, Pub. L. No. 94-330, which provided that funds were unavailable for such changes "without the approval of the Appropriations Committees of both Houses of the Congress."

We are not aware of any other provision in Public Law 95-481 which would make funds for the United States Refugee Program unavailable during the first quarter of fiscal year 1979. Thus had the Department of State decided to implement its proposal, and had the Office of Management

and Budget apportioned the funds for use during the first quarter of fiscal year 1979, the Department could have obligated these funds to pay for refugee services provided during that quarter. In fact, however, this did not occur. The question remains whether the Department may now obligate these funds to reimburse the voluntary agencies for refugee services provided between October 1, 1978, and December 31, 1978.

In the past, we have held that federal grants may reimburse grantees for costs incurred prior to the making of the grant. See, e.g., 31 Comp. Gen. 308, 309 (1952). More recently we have decided that federal grants may even cover costs incurred by a grantee prior to the availability of appropriations if the language of the authorizing statute, the legislative history, and the particular factors operative in a case indicate that the payment of such costs would aid in achieving the purposes of the federal program involved. 56 Comp. Gen. 31, 35-36 (1976).

Section 2(b) of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. § 2601(b), under which the United States Refugee Program is administered, provides, in part:

"There are authorized to be appropriated such amounts as may be necessary from time to time--

\* \* \* \* \*

(2) for assistance to or in behalf of refugees designated by the President (by class, group, or designation of their respective countries of origin or areas of residence) when the President determines that such assistance will contribute to the defense, or to the security, or to the foreign policy interests of the United States."

Section 3(a) of the same act, 22 U.S.C. § 2602(a) states:

"In carrying out the purposes of this chapter, the President is authorized--

(1) to make loans, advances, and grants to, make and perform agreements and contracts with, or enter into other transactions with, any individual, corporation, or other body of persons, government or government agency, whether within or without the United States, and international and intergovernmental organizations \*\*\*."

The functions under this Act were delegated to the Secretary of State by Executive Order No. 11077 (January 22, 1963).

There is nothing in the language of these sections--or elsewhere in the act--which prohibits the Secretary of State from making grants to voluntary agencies to cover costs they have already incurred in providing services to refugees during the first quarter of fiscal year 1979. The language of section 2(b)(2) is broad enough to authorize such grants when the Secretary of State "determines that such assistance will contribute" to the defense, security, or foreign policy interests of the United States.

In reporting the language which later became section 2(b)(2) of the Act, the House Committee on the Judiciary included the following quotation from a letter from the Deputy Under Secretary of State for Administration:

"\*\*\*The U.S. escapee program (U.S.E.P.) established in 1952, provides reception, interim care and maintenance, re-settlement and local integration assistance to recent escapees from the Soviet Union and satellite countries in Europe and to selected escapee groups or individuals in other areas of the world including the Far East. The purpose of this unilateral effort is to serve the U.S. interests by demonstrating the concern of the West for those who escape communist oppression and seek asylum in the free countries of the world.

"Operating primarily through contracts with the nonprofit voluntary agencies, the U.S. escapee program reimburses these agencies for actual expenses incurred under individually approved projects that implement escapee program policy objectives and are in keeping with the humanitarian objectives of the agencies themselves. All projects, closely supervised by the U.S.E.P. staff, are developed with an eye to the overall operational objective of establishing the escapees as useful and self-sustaining citizens of the free world community." H.R. Rept. No. 1369, 87th Cong., 2d Sess. 29 (1962).

The purpose of the Migration and Refugee Assistance Act is to demonstrate to the world our national commitment to human rights by providing assistance to refugees from oppressive regimes who seek asylum in the United States or elsewhere in the free world. We believe that the refugees who received services from the voluntary agencies during October, November, and December of 1978, were the kind of people who were meant to be assisted by the Act. Thus, granting monies to the voluntary agencies to reimburse them for the cost of services which they provided to such refugees during the first quarter of fiscal year 1979 appears to be a justified purpose of the United States refugee assistance program.

We therefore conclude that funds appropriated for Migration and Refugee Assistance by the Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, may be used to make grants to voluntary agencies to cover the costs of services provided to refugees during the first quarter of fiscal year 1979, if the Secretary of State determines that such assistance will help fulfill the purposes of the Migration and Refugee Assistance Act.

Although the Department of State may grant money to the voluntary agencies to cover costs of services performed during October, November, and December 1978, we must point out that these services cannot be paid for under the calendar year contracts between the Department and the agencies. This would be so even had the agencies not expended the full ceiling amounts of their contracts prior to September 30, 1978.

Section 1 of the Surplus Fund-Certified Claims Act of 1949, 31 U.S.C. § 712a (1976), quoted above, provides that fiscal year funds may be used only to pay for expenses incurred during the fiscal year or to fulfill contracts properly made within the fiscal year. In interpreting this statute, we have long held that in order to obligate a fiscal year appropriation for payments to be made in a succeeding year, the contract imposing the obligation must not only have been made within the fiscal year sought to be charged, but the contract must also have been made to meet a bona fide need of that fiscal year. E.g. 33 Comp. Gen. 57, 61 (1953). Although determination of what constitutes a bona fide need of a particular fiscal year will depend on the facts, we have generally held that contracts for services may be made only for the duration of the fiscal year because the bona fide need for services generally arises when they are performed. See B-187881, October 3, 1977; B-174226, March 13, 1972.

Under 31 U.S.C. § 712a, and 31 U.S.C. § 665(a)--which prohibits entering into contracts prior to the availability of appropriations made for that purpose--contracts entered into under fiscal year appropriations purporting to bind the Government beyond the fiscal year involved must be construed as binding the Government only to the end of the fiscal year. Goodyear Tire and Rubber Company v. United States, 276 U.S. 287 (1928); Leiter v. United States, 271 U.S. 204 (1926); Burroughs Corp., 56 Comp. Gen. 144, 153-54 (1976).

The contracts entered into between the Department of State and the voluntary agencies are contracts for services. The agencies provide care and maintenance, vocational and language training, assistance in getting documents, reception and placement assistance, and other



services. The bona fide need for these services arises when they are performed for the refugees. The contracts also provide for reimbursement of the salaries and operating expenses of the agencies. With respect both to the services rendered by the agencies and salaries and expenses, those rendered or incurred during October, November, and December of the calendar year contract period are not bona fide needs of the fiscal year in which the contract was entered. It would appear, therefore, that the Department of State cannot use calendar year contracts to obligate fiscal year funds to pay for operations of the voluntary agencies during October, November, and December of the following fiscal year. To the extent that these contracts purport to extend beyond the end of the fiscal year, they are not binding on the Government.

We previously expressed our objections to Department of State contracting practices which ignored the fact that funds appropriated for Migration and Refugee Assistance were fiscal year funds. See B-147196, April 5, 1965. In response to our decision, the Congress, beginning with the appropriation for fiscal year 1966, made Migration and Refugee Assistance funds available through the December 31 following the fiscal year for which they were appropriated, thus permitting calendar year contracting. See H. R. Rept. No. 955, 89th Cong., 1st Sess. 12-13 (1965); S. Rept. No. 708, 89th Cong., 1st Sess. 16 (1965). However, in the fiscal years 1977, 1978, and 1979 appropriations, the Congress did not extend the availability of Migration and Refugee Assistance funds beyond the end of the fiscal year. It is this change in the language of the appropriation acts which creates the difficulties we have just described. If Congress desires that the United States Refugee Program continue to operate on a calendar year basis, we suggest it restore to the appropriations acts language making these funds available through December 31.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General  
of the United States