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ASSISTANT ATTORNEY GENERAL  
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29 JAN 1980

MEMORANDUM TO JOHN H. SHENEFIELD  
Acting Associate Attorney General

Re: Exclusion of Homosexual Aliens Under 8 U.S.C.  
§ 1182(a)(4)

At the request of Deputy Associate Attorney General Dong, we have reviewed a January 24, 1980 memorandum ("the Advocates' memo") to you from Gay Rights Advocates, Inc. and two other individual attorneys concerning the Department's interpretation of 8 U.S.C. § 1182(a)(4), which requires the exclusion of homosexual aliens from the United States. This memorandum does not offer any new information or arguments that would cause us to change our conclusion that the Immigration and Nationality Act of 1952 imposes an obligation on the INS to exclude from the United States those aliens who the INS determines, based on nonmedical evidence, to be homosexual. Our December 10, 1979 memorandum to Acting Commissioner Crosland did not opine on the appropriateness of any particular policy for implementing this obligation; we were asked to consider only the underlying principle of law.

We must call to your attention several seriously misleading portions of the Advocates' memo. Under 8 U.S.C. § 1226(d), an INS special inquiry must find an alien excludable if he is certified by the Public Health Service to be within a medically excludable class. We concluded in our earlier memorandum that this provision does not relieve a special inquiry officer of the authority or the obligation to exclude any alien afflicted with conditions specified in 8 U.S.C. § 1182(a)(4) on the basis of nonmedical evidence obtained by immigration officers demonstrating that the alien is in the mandatorily excludable class. The Advocates' memo discusses this issue as follows:

Clearly, this provision [8 U.S.C. § 1226(d)] denies the special inquiry officer of [sic] any discretion with regard to making a factual determination as to the existence of a medical condition requiring exclusion. Precisely, this point was established in United States ex rel. Wolf [sic] v. Esperdy (2 Cir. 1960) 227 [sic] F. 2d 537, 538, where the court held:

"[Title 8, section 1226(d)] states that 'the decision of the special inquiry officer shall be based solely upon such certification.' 'Solely' means 'exclusively,' the 'only one.' The Court discussed the purpose of this provision and found that, historically, immigration courts had considered other evidence in addition to the official medical certificate. The purpose of the language of the 1952 Act was to change this procedure and to preclude trial of medical issues in the special inquiry proceedings" (emphasis added).

Advocates' memo at 9. The case upon which the Advocates presumably purport to rely, United States ex rel. Wulf v. Esperdy, 277 F. 2d 537 (2d Cir. 1960), held that an alien certified by the Public Health Service as afflicted with tuberculosis could not contest such certification. What the court actually said at 277 F. 2d 538 is:

[8 U.S.C. § 1226(d)] states that "the decision of the special inquiry officer shall be based solely upon such certification." "Solely" means "exclusively," the "only one." The apparent purpose of Congress in using this language was to provide a summary procedure when persons certified as having contagious diseases were involved.

Thus, the language that actually appears in the opinion after the phrase "the 'only one,'" is far different from the purported quotation offered by the Advocates. In fact, the language supposedly quoted in their memorandum from "The Court" to "proceedings" does not appear anywhere at all in the three-page Wulf decision. Moreover, it is not even an accurate paraphrase of the holding.

As further support for their interpretation, the Advocates, on page 11 of their memo, cite legislative history interpreting 8 U.S.C. § 1226(d):

"Where a medical officer or civil surgeon has certified that an alien is afflicted with a disease specified in section 212(a)(6) or with any mental defect, disease, or disability, within any of the excludable classes under paragraphs (1), (2), (3), (4), and (5) of section 212(a), the special inquiry officer under section 236(d) must base his decision solely upon such certification and there is no right of appeal from an excluding decision \* \* \*. These procedures are made the sole and exclusive ones in such matters" (S. Rept. 1137, 82d Cong., 2d Sess. 45, 1952) (emphasis added).

Advocates' memo at 11. Again, the only language inconsistent with our memorandum -- "These procedures are made the sole and exclusive ones in such matters" -- is not a quote from the Senate Report, but rather an unjustified paraphrase of its meaning. The Senate interpretation, which appears at page 29, and not 45, of S. Rept. No. 1137, 82d Cong., 2d Sess. (1952), simply ends with the words "excluding decision."

Only slightly less fanciful are the Advocates' quotations from and characterizations of the OLC memorandum. To take but one example, the Advocates state:

It is clear . . . that the Surgeon General does not regard examination of aliens suspected of being homosexual as a medical procedure, nor as a procedure that could be based on a medical diagnosis. As the OLC memorandum concedes, the Surgeon General is authorized by section 1224 to promulgate in his discretion such a medical regulation. Further, the OLC memorandum also admits that such a medical decision is not capable of "legislative alteration" (OLC Memo., p. 6).

Advocates' memo at 4. Our memorandum, at page 6, in fact states hypothetically that if "doctors do not have available any procedure helpful in determining homosexuality -- that fact, it appears, would not be subject to legislative alteration." As to the Surgeon General's authority not to certify homosexuals on the ground that, in his judgment, homosexuality is not a defect or disease, we said on the same page: "[T]his is a determination that the Surgeon General is without authority to make."

The Advocates' memo also relies on an unreported District Court opinion and four unreported opinions of the Bureau of Immigration Appeals -- one of which antedates the 1952 Act. Advocates' memo at 12. Although we are trying to secure copies of these materials, it is Board practice, as it is court practice, to leave unreported those opinions that are not to be given any precedential weight. In an effort to locate reported decisions supporting the Advocates' point of view, we reviewed, during our research, their submissions in Hill v. Richmond discussed in the Advocates' memo at page 2 and Appendix A. We thoroughly considered those materials and the cases cited therein.

As to the content of our earlier analysis and its objectivity,  
we believe our memorandum speaks for itself.

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