



**LAW OFFICES OF  
TEXAS RIOGRANDE LEGAL AID, INC.  
4920 NORTH INTERSTATE 35  
AUSTIN, TEXAS 78751**

Telephone: (512) 374-2700  
Toll-Free: 1-800-369-9270

Fax: (512) 447-3940

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Mr. Mark Freedman, Esq.  
Senior Assistant General Counsel  
Legal Services Corporation  
3333 K Street NW  
Washington, D.C. 20007

**RE:                   Comments Concerning Proposed Regulations Regarding Restrictions  
                          on Legal Assistance to Aliens**

Dear Mr. Freedman:

These comments are submitted on behalf of Texas RioGrande Legal Aid (“TRLA”) in response to the Legal Services Corporations’ Notice of Proposed Rulemaking (NPRM), RIN 1205-AB58, Proposed Rules 45 CFR Part 1626, “*Restrictions on Legal Assistance to Aliens*” 78 Fed. Reg. 51696-51704 (Aug. 21, 2013).

TRLA is a legal services provider funded by the Legal Services Corporation. It provides free legal services to low-income residents in sixty-eight counties of Southwest Texas, and represents migrant and seasonal farm workers throughout the state of Texas and six southern states. TRLA is the third largest legal services provider in the nation and the largest in the state of Texas. TRLA counts among its many practice areas a team devoted to human trafficking; in 2013 alone, TRLA has provided legal services to over 100 victims of human trafficking. TRLA also routinely represents eligible forestry workers on employment matters arising from their contract of employment.

TRLA supports many aspects of the rule proposed by the Legal Services Corporation (LSC). We offer these comments primarily in response to LSC’s invitation for comments regarding the definition of the term “victim of trafficking” in the Violence Against Women Act (“VAWA”) and the issue of whether an individual’s trafficking must take place in the United States in order for that person to be eligible for legal assistance. We also write to suggest a clarification and

revision to the proposed language regarding when eligibility of certain aliens ends and to encourage LSC to retain the evidentiary appendix as part of this rule.

## **I. PROPOSED DEFINITION OF TRAFFICKING**

LSC seeks comments regarding whether the VAWA term “trafficking” differs from the definition of a “severe form of trafficking” set forth in other relevant statutes. 78 Fed. Reg. 51696, 51699.

The relevant VAWA provisions do not explicitly define the term “victim of trafficking.” LSC’s proposed interpretation defining “a victim of trafficking” as a person subjected to any conduct included in the definition of “trafficking” under law is, therefore, a reasonable read of the statutory provision.<sup>1</sup> Such definitions include, but are not limited to, the definition of “victim of trafficking” set forth at 22 U.S.C. § 7102(15), 18 U.S.C. § 1590, and relevant state law provisions prohibiting human trafficking, *see, e.g.*, Tex. Penal Code § 20A.01, 20A.02. These definitions are similar to the definition of “severe form of trafficking,” yet differ in subtle, yet important, ways. TRLA therefore supports LSC’s proposed definition of the term “victim of trafficking” as set forth in proposed section 1626.4(c)(2).

## **II. GEOGRAPHIC LOCATION**

LSC also seeks comments regarding the geographic location provisions of the proposed rule. Proposed section 1626.4(d)(1) states:

Except for aliens eligible because they are victims of trafficking or severe forms of trafficking, an alien is eligible under this section if the activity giving rise to eligibility violated a law of the United States, regardless of whether that conduct took place in the United States or a United States territory. Victims of trafficking must be subjected to illegal trafficking in the United States to be eligible for assistance.

Proposed 45 C.F.R. §1626.4(d)(1).

For the reasons detailed below, TRLA believes that the relevant statutory language regarding victims of trafficking “in the United States” should be interpreted to mean that *either* the victim is currently located in the United States *or* the victim’s trafficking occurred in the United States. TRLA additionally recommends that LSC modify proposed section 1626.4(d)(1) to clarify that victims of trafficking who are eligible for U- nonimmigrant status are eligible for legal assistance regardless of whether their trafficking took place in the United States.

### **A. Relevant Statutes**

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<sup>1</sup> Indeed, this same VAWA provision authorizes the provision of legal assistance to individuals eligible for a U- nonimmigrant status which, as detailed below, is available to victims of trafficking or any similar activity, as defined by any relevant local, state or federal law. *See* 8 C.F.R. § 214.14(a)(9).

*VTVPA/TVPRA*. In 2003, Congress amended the Trafficking Victims Protection Act to require LSC and other federal agencies to expand benefits and services to “victims of severe forms of trafficking in persons in the United States, and aliens classified as a nonimmigrant under section 1101 (a)(15)(T)(ii) of title 8, without regard to the immigration status of such victims.” 22 U.S.C. §7105(b)(1)(B).

*VAWA*. In 2006, Congress amended Public Law 105-119, Title V, § 501(a)(2)(C)(i), 111 Stat. 2439, 2510-11 (1998) to allow LSC-funded organizations to use any funds to provide “related legal assistance” to “a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(U)).”<sup>2</sup> Public Law 109-162, § 104(a)(1)(B), 119 Stat. 2960, 2978-79 (2006). This statute therefore authorizes LSC-funded organizations to provide related legal assistance to *both* “a victim . . . of trafficking in the United States” *and* to individuals who qualify for U- nonimmigrant status (commonly known as a “U- visa”).

## **B. Analysis**

### **1. LSC Should Only Require that a Victim of Trafficking *Either Be Physically Present in the United States or Have Been Trafficked in the United States***

TRLA believes that the statutory language referencing victims of trafficking “in the United States” should be read to mean that the victim of trafficking must either currently be located in the United States or that the victim’s trafficking occurred in the United States.

Human trafficking is “a transnational crime with national implications.” 22 U.S.C. § 7101(24); *see also Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009) (“[H]uman trafficking is by nature an ‘international’ crime; it is difficult clearly to delineate those trafficking acts which are truly ‘extraterritorial’ and those which sufficiently reach across U.S. borders.”). The criminal acts that constitute trafficking may begin in one country and continue or culminate in one or more others or have effects in more than one country. *See Adhikari*, 697 F. Supp at 683 (noting that a trafficker may gain commercial advantage in the United States by engaging in human trafficking outside of American borders). In recognition of this fact, the TVPRA prohibitions against trafficking, which may serve as the basis for a criminal prosecution or a civil action, apply to trafficking that occurred outside the United States. *See* 18 U.S.C. § 1596.

Thus, a victim whose trafficking occurred outside the United States could be a critical witness in a U.S. prosecution or could seek to hold their trafficker accountable in the U.S. courts through a private lawsuit. As the LSC’s Preamble acknowledges, such a victim might also be

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<sup>2</sup> LSC-funded organizations may also provide related legal assistance to aliens who are the parents of children who are victims of trafficking in the United States, or who qualify for U visas, as long as the alien parents had no active participation in the predicate acts. *Id.* § 104(a)(1)(C).

eligible for T- or U- nonimmigrant status. 78 Fed. Reg. 51696, 51699-700. TRLA's proposed interpretation would allow LSC-funded organizations to provide legal assistance to such a victim as long as he or she is present in the United States.

Likewise, a victim of trafficking whose trafficking occurred within the United States may, for a variety of reasons, return to their home country—perhaps the victim never wanted to remain permanently in the United States or perhaps the trafficker's threats to have the person deported were realized—but still wish to pursue accountability through the U.S. courts or apply for U- nonimmigrant status.<sup>3</sup> Such a victim would also be eligible for legal assistance under TRLA's proposed interpretation.

## 2. Individuals Eligible for U- nonimmigrant Status Need Not Have Been Trafficked in the United States

Even if LSC is inclined to interpret 22 U.S.C. §7105(b)(1)(B) and the first clause of § 501(a)(2)(C)(i) as requiring that a person's trafficking occur in the United States, victims of trafficking who also qualify for U- nonimmigrant status should be eligible for related legal assistance pursuant to Section 502 (a)(2)(c)(i) of the VAWA regardless of whether their trafficking took place in the United States.

In the Preamble to the proposed rule, LSC acknowledges that U- visa predicate crimes need not take place in the United States and that trafficking is one of the crimes for which a U- visa may be granted. 78 Fed. Reg. 51696, 51696-70 (*citing* 8 U.S.C. § 1101(a)(15)(U)(iii)). However, LSC then states that because both VAWA and the VTPA/TVPPRA mention victims of trafficking “in the United States,” this “narrower . . . language controls on this issue.” *Id.* at 51670. LSC therefore concludes that “trafficking and severe forms of trafficking must have occurred in the United States” in order for a victim to be eligible for legal assistance. *Id.*

To the extent the proposed rule suggests that victims of trafficking who are qualified for “U- visas” under section 101(a)(15)(U) may not receive legal assistance because their trafficking occurred outside the United States, this logic is flawed. It is quite possible that a victim whose trafficking occurred outside the United States could be eligible for a U- visa.<sup>4</sup> For example, an individual may be eligible for a U- visa because the alien was a victim of the trafficking crime

<sup>3</sup> An individual may apply for U- nonimmigrant status from outside the United States. *See* 8 C.F.R. 214.14(c)(5)(i)(B).

<sup>4</sup> An individual is qualified for U- visa relief under this provision if, among other things, he or she has been the “victim of criminal activity” that “*involv[es] one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18) or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.*” 8 U.S.C. § 1101 (15)(U)(i)(I), (III) (emphasis added).

set forth at 8 U.S.C. §1590. The TVPRA explicitly recognizes that the courts have extra-territorial jurisdiction over this offense, *i.e.* that under certain circumstances, trafficking that occurred outside the United States can be prosecuted under §1590. *See* 8 U.S.C. § 1596. LSC’s current proposed language would appear to arbitrarily read this separate and distinct basis of eligibility set forth in Section 502 out of the statute for victims of trafficking. There is no reason that limiting language set forth in different statutes or different sections of the same statute should “control” this entirely separate statutory basis for eligibility.

In sum, TRLA recommends that LSC expressly recognize that individuals who are eligible for U- visas because they are victims of the qualifying criminal activity of trafficking need not have been trafficked within the United States in order to receive legal assistance.

### **III. EVIDENTIARY SUPPORT AND END OF ELIGIBILITY**

#### **A. Evidentiary Support**

With respect to section 1626.4(e) regarding evidentiary support, we believe that the proposed language – which includes a variety of examples of evidentiary support, including “written summaries of statements or interviews of the alien taken by others, including the recipient” – reflects a thoughtful balancing of the need to document findings of alien eligibility with the reality that many noncitizen victims of abuse will not have access to any evidence other than their own testimony at the time they seek legal assistance. It also reflects the broad evidentiary standard that would entitle these individuals to immigration relief, *i.e.* the “any credible evidence” standard utilized by the United States Customs and Immigration Service (“USCIS”) when adjudicating, *inter alia*, self-petitions under VAWA<sup>5</sup> and applications for U-<sup>6</sup> and T- visas. A legal intake with an LSC recipient is often the first time an eligible alien will come into contact with a practitioner who is sufficiently knowledgeable about the anti-abuse statutes to gather the information necessary to make a determination of that alien’s eligibility for relief pursuant to those statutes. Furthermore, in some instances it could be detrimental to an alien’s legal interests to issue affidavits or make signed statements regarding his or her victimization prior to or at the time of a legal intake. In this regard, the inclusion of notes from a recipient’s interview of an alien in 1626.4(e)’s list of examples of acceptable evidentiary support is extremely important.

#### **B. End of Eligibility**

TRLA believes that the following language in proposed section 1626.4(e) is problematic and confusing:

Section 1626.9 applies for situations in which a previously eligible alien is determined to be ineligible, for example, if an alien’s application for U visa relief

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<sup>5</sup> 8 C.F.R. 204.2(c)(1)(vi).

<sup>6</sup> 8 C.F.R. 214.14(c)(4).

is denied or if there is an official DHS determination that an alien whose eligibility is based on trafficking was not a victim of trafficking.

Proposed 45 C.F.R. § 1626.4(e).

Because adjudicator-level determinations of U- visa eligibility are subject to several layers of administrative and judicial review, this language should be altered to clarify that only final orders denying an alien's U- visa application that are not subject to further appeal should trigger the requirements of Section 1626.9. *Compare, e.g.,* 45 C.F.R. §1626.2(d) (clarifying that the term "rejected" in the context of an adjustment of status application means a denial not subjected to appeal).

Likewise, it is unclear what the term "official DHS determination that an alien ... was not a victim of trafficking" means.

First of all, a DHS determination that a person is "not a victim of trafficking" could only be a determination that a person was not a victim of a "severe form of trafficking in persons", as set forth at 8 U.S.C. 1101(a)(15)(T) (incorporating definition of "severe form of trafficking in persons as defined at 22 U.S.C. 7102(9)). This would not necessarily constitute a decision that the person is not a "victim of trafficking" pursuant to the VAWA, which is currently interpreted to include other legal prohibitions against trafficking. The individual may, therefore, still be eligible for other related legal services. Thus, a DHS determination that an alien is "not a victim of trafficking" should not trigger Section 1626.9 if that person's eligibility derives from Section 502 of the VAWA.

Furthermore, as with U- visas, DHS adjudications of T- visas also are subject to review. Thus, this phrase should also be clarified to reflect that only a final, non-appealable order by DHS denying an alien's T- or U- visa application based on a finding that the alien was not a victim of trafficking should trigger Section 1626.9.

#### **IV. EXAMPLES OF DOCUMENTS AND OTHER INFORMATION ESTABLISHING ELIGIBILITY**

LSC proposes reclassifying as a program letter the information presently contained in the Appendix to Part 1626, which lists examples of acceptable documents which may be used to establish eligibility for noncitizens. *See* 79 Fed. Reg. 51696, 51701. LSC states that revisions to the list of acceptable documents do not entail policy decisions, and that administrative updates to the list should not be burdened by the LSC rulemaking protocol.

TRLA believes that the Appendix should remain in the text of the regulation. There are countless ways in which a given immigration status may be documented, and the types of documents which may evidence a status is often understood only by an experienced immigration practitioner. The present list is thoughtful, comprehensive, and reflects input from practitioners

and experts. It is crucial that LSC hear the voices of these practitioners and experts prior to altering the list, because even an apparently minor administrative update may have broad, unintended implications for our client population. Because rulemaking is the only way to ensure an opportunity for public input, and is consistent with LSC's preferences for cooperative dialogue with recipients and interested parties, TRLA encourages the LSC to retain the Appendix in the regulation itself.

## **V. SUPPORT FOR OTHER PROVISIONS OF PROPOSED RULE**

### **A. Clarification of "Related Legal Assistance"**

TRLA appreciates that LSC's proposed definition of "related legal assistance" in section 1626.4(c) conforms to the definition adopted in the February 21, 2006 Program Letter 06-2. LSC's interpretation of "related legal assistance" as assistance preventing future abuse, escaping or protecting from current abuse, and ameliorating past abuse, has proven to be a sound one which accords with both the statutory text and the practical realities of our client population. TRLA supports the application of this definition of "related legal assistance" to all aliens eligible under the anti-abuse statutes.

### **B. Change in Basis of Eligibility**

With reference to LSC's proposed addition of section 1626.4(g), TRLA agrees with LSC's stated intention that any client initially eligible under section 1626.4 for related services only, but who is later determined to be eligible under section 1626.5, should be considered eligible for all available legal services. Both because an initial intake may not reveal all bases of a client's eligibility, and because those bases may change during the course of the representation, it is crucial that a client's eligibility not remain static.

### **C. Geographic Location of U- Applicants and Qualifying Criminal Activity**

TRLA supports LSC's proposal that aliens who qualify for relief under section 101(a)(15)(U) of the INA need not be physically present in the U.S. to be eligible for related legal assistance, as described in proposed section 1626.4(d)(2). As the LSC notes, and as discussed above, this reading accords with both the text of the INA, which does not require a physical presence requirement, and implementing regulations by USCIS, which contemplate that an applicant may seek a U- visa from outside the United States. 8 C.F.R. 214.14(c)(5)(i)(B). Similarly, TRLA agrees with LSC that the qualifying criminal activity giving rise to U- visa eligibility need not have taken place within the United States, as described in proposed section 1626.4(d)(1). The INA clearly provides that criminal activity which occurred outside the United States but which violates U.S. law counts as the predicate criminal activity. Any other reading would contravene Congress's clear intent regarding the geographic parameters of U- visa eligibility.

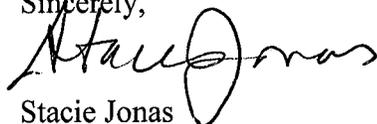
### **D. Recognition of Eligibility of H-2B Workers**

TRLA appreciates the proposed regulation's recognition that H-2B forestry workers are eligible for legal services. *See* Proposed Section 1626.11(b). Although these clients do not represent a large number of cases each year, TRLA and the national legal community have found representation of H-2B workers to be important work that addresses very significant abuse.<sup>7</sup> Representation is not only permitted under LSC appropriation legislation,<sup>8</sup> it is required by international commitments of the United States under Articles 4 and 5, and Labor Principles 6, 9, 10 and 11 of the North American Agreement on Labor Cooperation requiring the United States to provide reasonable access to competent American tribunals for redress of labor rights.<sup>9</sup>

## VI. CONCLUSION

For the reasons stated above, TRLA supports many parts of the proposed rule, including LSC's interpretation of the definition of "victim of trafficking" as set forth in the relevant VAWA statutory provision. TRLA urges LSC to interpret the relevant TVPRA and VAWA provisions to authorize legal assistance for victims of trafficking or a severe form of trafficking who are either located in the United States or whose trafficking took place in the United States. TRLA supports LSC's interpretation regarding documentation of eligibility, but also asks that LSC clarify that individuals do not become ineligible for services until there is a final, non-appealable decision on that person's eligibility for relevant immigration relief and that DHS determinations regarding "severe form of trafficking" do not control whether an individual is a "victim of trafficking" eligible under VAWA Section 502. Finally, TRLA asks that the LSC retain the Appendix of Example Documents within the text of the regulation to ensure opportunity for future comment on this critical portion of the regulation.

Sincerely,



Stacie Jonas  
Lead Attorney, Human Trafficking Project  
Texas RioGrande Legal Aid

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<sup>7</sup> *See, e.g.*, Close to Slavery: Guestworker Programs in the United States, Southern Poverty Law Center, Feb. 2013, <http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf>; *Pineros, Men of the Pines*, SACRAMENTO BEE, May 2006, <http://www.sacbee.com/static/content/news/projects/pineros/>.

<sup>8</sup> Pub. L. 104-134, section 504(a)(11)(E), 110 Stat. at 1321-55, amended by Pub. L. 110-161, Div. B, Title V, section 540, 121 Stat. 1844, 1924 (2007).

<sup>9</sup> *See* Mexico NAO Submission 2005-1 (H-2B VISA WORKERS), <http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01petition.htm>, <http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01memo.htm>.