National Legal Aid & Defender Association
Equal Justice. Of the People. For the People.

Sent by email to *1626rulemaking@lsc.gov*

March 7, 2014

Stefanie K. Davis, Esq.
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 (79 Fed. Reg. 6859-6871 (Feb. 5, 2014))

Dear Ms. Davis:

These comments are submitted in response to LSC's request for further comment regarding the interpretation of the phrase "in the United States" as it applies to eligibility of victims of trafficking under the VAWA and victims of severe forms of trafficking under the TVPRA. 79 Fed. Reg. 6859, 6863. We submit the comments on behalf of NLADA and its civil membership including the undersigned LSC grantees that have significant experience in representing victims of trafficking.

Given the transnational nature of human trafficking, which has been recognized as a grave human rights abuse, the intent to expand LSC eligibility for victims as evidenced in both TVPRA and VAWA, and the broad remedial purposes of the statutes at issue, "in the United States" can reasonably be interpreted to require a nexus to the United States, i.e. that either the victim's trafficking occurred in the United States or the victim be physically present in the United States.

We also write to express support for many other aspects of the proposed rule, including LSC's interpretation of the definition of "trafficking" as set forth in the VAWA, its interpretation of the "U- visa" eligibility provision set forth in the VAWA, and its important recognition that providers may continue representation of victims of trafficking who depart the United States after commencement of legal services.

GEOGRAPHIC LOCATION AND VICTIMS OF TRAFFICKING "IN THE UNITED STATES"

I. Relevant Statutes

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 Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(U))." 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").

II. Analysis

A. LSC Correctly Interprets "U- visa" Eligibility

The FNPRM proposes that aliens who "qualif[y] for immigration relief under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(U))" need not be physically present in the United States to be eligible for assistance under this section of the VAWA. LSC correctly specifies that a person may qualify for such relief as long as the criminal activity giving rise to eligibility "violated the laws of the United States or occurred in the United States…." *See* 79 Fed. Reg. 6859, 6861 (citing 8 U.S.C. § 1101(a)(15)(U)(i)(IV)). We therefore support LSC's interpretation set forth at proposed 45 C.F.R. § 1626.4(c)(1) and (2) finding that aliens, including victims of trafficking, are eligible under this section "if the activity giving rise to eligibility violated a law of the United States . . .. or the territories and possessions of the United States" and that the alien "need not be present in the United States" to be eligible for assistance under this section.

We also support LSC's interpretation of the term "qualifies for immigration relief" as including, *inter alia*, persons who have been granted relief, who have applied for relief, or who have not filed for relief but who the recipient determines have evidentiary support for filing for such relief. Proposed 45 C.F.R. § 1626.2(h)(1)(i-iii).

B. The term "in the United States" in the VAWA Applies Only to Victims of Trafficking

LSC properly interprets the term "in the United States" set forth at Public Law 109-162, § 104(a)(1)(B), 119 Stat. 2960, 2978-79 (2006) as applying only to "victims of trafficking." As LSC noted in the Preamble to the original NPRM, in the VAWA the term "in the United States" was struck from the provision regarding "battered and extreme cruelty." *See* 78 Fed. Reg. 51696, 51699; *see also* Sec. 104(a)(1)(A), Public Law 109-162, 119 Stat. 2979-80. As other commenters have noted, the term "in the United States" in the VAWA provision may have been taken from the TVPRA provision regarding victims of a severe form of trafficking in the United States. As such, LSC has properly read this provision as modifying only the term "victims of trafficking."

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

The Aug. 21, 2013 proposed rule included a clear statement that the alien need not be present in the United States or a United States territory to be eligible for assistance under this section (proposed § 1626.4(d)). Seven commenters, all service providers, agreed with this position. One commenter, who was not a LSC recipient, opposed it. Nonetheless, in the Feb. 5, 2014, FNPRM, LSC reversed its original position and proposed a set of provisions that would impose different geographic presence requirements on three different categories of trafficking victims: those who are U- visa eligible, those who meet the TVPRA definition "victim of a severe form of trafficking" and those who meet the definition for "victim of trafficking" under the VAWA.

We disagree with LSC's proposal that the term "in the United States" set forth in the TVRPA at 22 U.S.C. §7105(b)(1)(B) and in the VAWA, Public Law 109-162, § 104(a)(1)(B), 119 Stat. 2960, 2978-79 (2006), requires victims of trafficking to be physically present in the United States in order to be eligible for legal assistance.

The term "in the United States" in the TVPRA and the VAWA can reasonably be read to require that victims of trafficking have a nexus to the United States in order to be eligible for legal assistance; i.e. that victims of trafficking *either* are physically present in the United States *or* that the victims experienced trafficking within the United States.

Both the TVPRA and VAWA were enacted to benefit survivors of particular prohibited activity. Both acts specifically established LSC eligibility for these survivors, regardless of the provisions in the 1996 appropriations act. For LSC to now require survivors to be physically present in the United States to be eligible for services from a program funded by LSC is inconsistent with the intent and purposes behind the TVPRA and VAWA. The intent was to expand LSC eligibility for survivors, not limit eligibility.

This more expansive view is consistent with the transnational nature of trafficking, a grave violation of human rights that the United States seeks to deter through, *inter alia*, the provision of legal services to victims. It is also consistent with the ameliorative purposes of the anti-abuse statutes, which are intended to strengthen the ability of law enforcement agencies to investigate and prosecute crimes, thus improving public safety overall, while, at the same time, offering protection to victims of such crimes.

"The United States and the international community agree that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern." 22 U.S.C. § 7102 (23). Both the TVPRA and the VAWA have a broad remedial purpose. *See, e.g.*, *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1217 (9th Cir. 2011) (noting Congress's "remedial purpose in enacting VAWA"); *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008) (interpreting VAWA provision broadly given the statute's "overtly remedial purpose"); 22 U.S.C. § 7102 (18) (TVPRA seeks to ensure expansive services to all victims of trafficking because "adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assistance); Brief for Amicus Curie Senator Marco Rubio at 7-8, *Cruz v. Maypa et al*., No. 13-2363 (4th Cir. Jan. 6, 2014) (detailing legislative history of TVRPA which provides a "broad and comprehensive remedy to prevent trafficking, prosecute traffickers, and protect victims" and noting that "[t]he purposes of [the TVPRA] are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims") (citing Pub. L. No. 106-386 § 102(a).); *see also* 146 Cong. Rec. 22,044 (Oct. 11, 2000) (statement of Sen. Samuel Brownback) (Congress viewed the practices addressed by the TVPRA as the "new slavery of the world.").

Statutes with such a remedial purpose "must be liberally construed". *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see also Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977) (reading civil rights statute expansively in light of its remedial purpose). 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."). "To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses." 22 U.S.C. § 7102 (24).

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 United States prosecution or could seek to hold their trafficker accountable in the United States courts through a private lawsuit. As the LSC's Preamble to the NPRM and to the FNPRM acknowledge, such a victim might also be eligible for T-nonimmigrant status, which does not require that the trafficking take place in the United States so long as the victim is in the country on account of the trafficking. 78 Fed. Reg. 51696, 51699-700, 79 Fed. Reg. 6859, 6862. Our 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 whose trafficking occurred within the United States may, for a variety of reasons, return to their home country—perhaps the victim never wished to come to the United States or never intended to remain permanently in the United States, perhaps the trafficker forcibly removed the victim from the country, or perhaps the trafficker's threats to have the victim deported were realized—but the victim still wishes to pursue accountability through the United States courts, benefit from Continued Presence, 28 CFR §1100.35, or even return to the United States via public interest parole authorized by law enforcement and then pursue a T- visa. Such a victim would also be eligible for legal assistance under our proposed interpretation.

Under LSC's current interpretation, victims of trafficking who leave the United States would not be eligible for legal services unless they also qualify for a U- visa or initiated representation while still in the United States. However, a victim may not learn about his or her legal rights or have the opportunity to reach out to a legal services provider until they have left the country. This is especially true if the victim is forcibly removed from the United States by the trafficker. Victims are also sometimes initially too afraid to report their victimization or consider legal action, but later wish to do so from their home country. This often happens after the victim learns about a lawsuit or the availability of legal services from another victim who remained in the United States. Finally, not all trafficking victims necessarily qualify for a U-visa.

D. LSC Should Not Require that Victims of Severe Forms of Trafficking in Persons be "In the Country on Account of the Trafficking" to Establish Eligibility

Proposed § 1626.4(c)(2)(ii) would require that aliens eligible under the TVPRA be "present in the United States on account of such trafficking" to be eligible for LSC-funded services. A review of the underlying statute, 22 U.S.C. § 7105(b)(1)(B), cited in the preamble to the FNPRM at 79 Fed. Reg. 6859, demonstrates that the "on account of" requirement is unnecessarily broad and is not compelled by the statute.

Under 22 U.S.C. § 7105(b)(1), the definition of a "victim of a severe form of trafficking in persons" for the purposes of eligibility means only a person who is a victim of a severe form of trafficking as defined at 22 U.S.C. § 7102(8) and who is under 18 or is the subject of a certification. An individual subject to certification under 22 U.S.C. § 7105(b)(1)(E) includes one who has made a bona fide application for T- nonimmigrant status ("T visa") or for whom the government is ensuring continued presence. The authority to permit continued presence is found at 28 CFR § 1100.35.

Of these three categories—youths under 18, a T-visa applicant, or an individual granted continued presence—only the T- visa requires that the individual be "present in the United States . . . on account of such trafficking." 8 U.S.C. § 101(a)(15)(T)(i)(II).

Thus the proposed rule improperly extends the "on account of" language to individuals under 18 and those granted continued presence, when the statutes and regulations contain no such requirement. An interpretation that 22 U.S.C. § 7105(b)(1) requires that services can be provided only to an individual who is present on account of such trafficking is incorrect and inappropriately over-broad.

Vulnerable trafficked populations could be excluded from eligibility for legal services by the "on account of" requirement. For example, in states such as Texas, legal services programs may have a number of offices very close to an international border. Texas RioGrande Legal Aid (TRLA), for example, has represented clients in that region who have what are sometimes referred to as "border crossing cards." Such a document is available to Mexican nationals who travel to and from the United States frequently, and it allows them to remain within 25 miles of the Texas-Mexico border for up to 30 days. TRLA has represented clients who came to the United States using these cards and were subsequently forced to work. After the victims escaped their trafficking, many of them crossed back over to Mexico, which was only a couple miles away, to see their families, and again returned to the United States using their border crossing cards.

Under the relevant regulations, these victims quite possibly would not be considered to be in the United States "on account of [their] trafficking" because they left the country after escaping their trafficking and their subsequent return to the United States was unrelated to the trafficking, even though they might still be eligible for certification. Thus, these individuals would no longer be eligible for any legal services unrelated to their trafficking, because services would be limited to "related services" under the VAWA criteria. Many trafficking victims desperately need such services. For example, some programs receive requests from victims to handle pressing family law matters that are not necessarily related to their trafficking, but are a part of stabilizing that victim and preventing re-victimization. Requiring that their presence be "on account of the trafficking" is unnecessarily restrictive and unsupported by 21 U.S.C. § 7105(b).

Furthermore, defining "in the United States" differently under the TVPRA and the VAWA creates unnecessary confusion and complications for providers assessing eligibility requirements.

E. Recipients Should Be Allowed to Continue Representation of Victims of Trafficking who Leave the United States After the Commencement of Legal Services

We support LSC's statement in the preamble to the FNPRM recognizing that once a program commences legal services, a victim of trafficking's subsequent departure does not necessarily render the client ineligible for services. 79 Fed. Reg. 6859, 6863 (discussing Program Letter 2000-2). We encourage a broad interpretation of this policy in light of the range of situations that can lead to, and result from, trafficking, as described above.

Such a situation may arise for a victim of trafficking under a variety of circumstances. For example, in addition to the situations described above, victims of trafficking who have obtained T- visas may return temporarily to their home country on advance parole for a variety of purposes, including the need to help their minor children obtain the proper documentation and complete the necessary steps at the American consulate that will allow them to reunite with their parent in the United States. Victims of trafficking should be eligible for continuing representation throughout such a temporary absence.

Furthermore, as in the case of H-2A workers, representation of victims of trafficking who depart the country during the course of the representation should be allowed if the ongoing representation is related to their trafficking even if the victims' absence is not temporary. Among other things, such representation would allow victims to hold their traffickers accountable through a civil lawsuit or to assist as a witness in a criminal prosecution.

F. LSC Should Explicitly Clarify that Aliens Eligible for Assistance Under More Than One Section are Eligible for the Most Expansive Level of Services

Victims of trafficking who are eligible for legal services under the TVPRA are eligible for all services, while those rendered eligible under the aforementioned provisions of the VAWA are eligible for "related" services. We recommend that LSC explicitly add a statement in the rule clarifying that those aliens eligible for services under more than one section of the proposed rule may receive the most expansive level of service available. This is in accordance with the explicit language set forth in the VAWA provision stating that nothing in the VAWA 2005 amendments shall limit the existing right to LSC representation of trafficking victims. VAWA 2005, Pub. L. 109-162, Jan. 5, 2006 § 104(b).

CONCLUSION

We concur and agree with LSC's interpretation of the VAWA provision authorizing representation of aliens who qualify for what is commonly known as "U- visa" relief. Likewise, we agree with and appreciate LSC's interpretation of the definition of a "victim of trafficking" under the VAWA.

Regarding geographic location, we urge LSC to apply the term "in the United States" as set forth in the VAWA only to victims of trafficking and not to victims of battering, extreme cruelty or sexual assault. We recommend that "in the United States" be read, consistent with the transnational nature of this grave human rights abuse, the intent to expand LSC eligibility for victims as evidenced in both TVPRA and VAWA, and the broad remedial purposes of the relevant statutes, to allow representation of victims of trafficking and a severe form of trafficking who have a nexus to the United States, either because they were trafficked within the United States or because they are physically present within the United States. The TVPRA does not require these victims to be "in the country on account of such trafficking," and the interpretation of the term in both the TVPRA and the VAWA should be consistent. We also support LSC's interpretation that recipients may continue to serve victims of trafficking who commence representation in the United States, even if the victim subsequently departs the country.

Sincerely,

Dennis Groenenboom, Chair, Civil Policy Group (CPG)
Silvia Argueta, Chair, CPG Regulations and Policies Committee

National Legal Aid and Defender Association

NLADA Member Programs with Particular Expertise in Human Trafficking Issues

Bay Area Legal Aid
Alex Gulotta, Executive Director

California Rural Legal Assistance
Jose Padilla, Executive Director

Legal Aid Society of Cleveland
Colleen Cotter, Executive Director

Colorado Legal Services
Jonathan D. Asher, Executive Director

Florida Rural Legal Services
Don Issac, Executive Director

Legal Aid Foundation of Los Angeles
Silvia Argueta, Executive Director

Legal Aid of North Carolina
George Hausen, Executive Director

Neighborhood Legal Services
Neal Dudovitz, Executive Director

Northwest Justice Project
Cesar Torres, Executive Director

Texas RioGrande Legal Assistance
David Hall, Executive Director

Utah Legal Services
Anne Milne, Executive Director