



TO: Operations and Regulations Committee

FROM: Kara Ward, Assistant General Counsel

THROUGH: Victor M. Fortuno, General Counsel

SUBJECT: Approval to Engage in Rulemaking to Conform Part 1626 (Restrictions on Assistance to Aliens) with Existing Statutory Authorizations

DATE: March 25, 2013

On behalf of Management, the Office of Legal Affairs (OLA) requests that the Operations and Regulations Committee (Committee) recommend that the Board of Directors (Board) authorize rulemaking to conform Part 1626 (Restrictions On Assistance to Aliens) with existing statutory authorizations.

I) Summary

Through the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in various sections of the U.S.C.) (VTVPA), the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 104, 119 Stat. 2960 (2005) (VAWA), and the current Omnibus Appropriations legislation, Congress has expanded the scope of aliens to whom recipients may provide legal assistance. For the reasons stated below, Management requests that the Committee recommend to the Board that LSC initiate a rulemaking to consider amending LSC's regulation at 45 CFR Part 1626, Restrictions on Legal Assistance to Aliens, and its companion appendix to conform with the existing statutory authority.

The Part 1626 regulation and its companion appendix is out of date and does not reflect the current statutory authority, which authorizes grantees to represent new categories of eligible clients. Although the statutory authority overrides any regulatory provisions to the contrary, initiating a rulemaking to incorporate the expanded authority into the regulation could be advisable. In the case of new authorities that trace to the VTPA and VAWA, LSC has previously provided guidance to recipients on these matters through program letters.

II) Background

A. Trafficking Victims Protection Act of 2000, 22 U.S.C. 7104, as amended in 2003.

The VTVPA provided that LSC "shall 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.” The VTVPA further provides that LSC may provide services to family members of victims of trafficking.

Pursuant to the VTVPA, LSC grantees are authorized to use LSC or non-LSC funds to represent individuals and their families who would otherwise be ineligible for assistance due to their immigration status under 45 CFR Part 1626. The VTVPA operates as an explicit waiver of the provisions that require legal residency for all grantee clients. Under the VTVPA changes to the LSC Act, LSC grantees may provide representation to victims of trafficking and their family members on a variety of matters, including obtaining certification and/or a visa as well as providing assistance with other legal issues.

B. Violence Against Women Act and the 2006 Amendments.

VAWA amended the 1996 LSC appropriations act to allow LSC grantees to provide legal services to applicants who were previously ineligible because of their immigration status. Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 105-119, § 502, 111 Stat. 2440 (1997). These changes, known as the “2006 VAWA Amendments,” permit LSC grantees to provide representation to victims of battery, cruelty, and sexual assault without regard to immigration status. The 2006 amendments also allow LSC grantees to represent immigrant victims who are eligible for a “U” visa. The Immigration and Nationality Act, 8 U.S.C. § 1011(a)(15)(U)(3) (2012).

The 2006 VAWA Amendments allow LSC grantees to use both LSC and non-LSC funds to provide otherwise ineligible aliens with legal services that are directly related to the prevention of, or obtaining relief from, battery or cruelty, sexual assault or trafficking, or other crimes. Further, LSC grantees may provide otherwise ineligible aliens with representation if the alien’s child has been similarly victimized. Previously, such legal assistance by LSC grantees was permitted only if supported wholly with non-LSC funds.

In addition, LSC grantees are now permitted to provide legal assistance to otherwise ineligible aliens who are victims of domestic abuse, even if they are not married to (or the child of) their abusers. Previously, such assistance was permitted only if the domestic abuse was perpetrated by the spouse or parent of the victim. Finally, LSC grantees may now also provide related legal assistance, supported with LSC funds, to new categories of otherwise ineligible aliens in addition to those who have been battered or subject to extreme cruelty.

C. H2-B Forestry Workers in the 2008 Consolidated Appropriations Act.

Section 540 of Title V, Division B of the Consolidated Appropriations Act, 2008, amends LSC's FY 1996 appropriation legislation to confer eligibility for legal assistance from LSC grantees to forestry workers holding H-2B visas. Specifically, section 504(a)(11)(E), as amended creates a new exception to the prohibition on representation of non-citizens:

A non-immigrant worker admitted to, or permitted to remain in, the United States under section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (8 U.S.C. 1109(a)(15)(H)(ii)(b)) for forestry labor or an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section.

This provision is expressly limited to H-2B visa holders who are forestry workers. Forestry workers are only a subsection of H-2B visa holders and H-2B visa holders who are not working in the forestry industry remain ineligible for legal assistance from LSC grantee programs. The permission of these forestry workers to access LSC grantees services is limited to legal assistance on matters relating to the terms and conditions of their employment as set forth in their employment contracts.

D. Appendix to Part 1626

Section 1626.7 currently requires that LSC publish an appendix to Part 1626 that provides examples of documents that are acceptable for establishing proof of eligibility.

As proof of eligibility, a recipient may accept originals, certified copies, or photocopies that appear to be complete, correct and authentic, of any of the documents found in the appendix to this part.

45 C.F.R. Part 1626.7(a)(1)(2012).

The appendix to Part 1626 was last updated in 2003, and, like the regulation, it has become out of date. Because revisions to the appendix would not entail policy decisions but, instead, be limited to updating the list of examples, LSC may be well served by limiting the administrative burden in making ministerial updates to the appendix. LSC can do so by removing the appendix from the regulations and instead disseminating authoritative guidance that is available by publishing a “Notice of Availability” or “Notice for Availability and Comment” in the *Federal Register* for each iteration, posting the guidance on the LSC website, and emailing the stakeholder community when updates are made.

III) Discussion of the Rulemaking Protocol

LSC’s Rulemaking Protocol, 67 Fed. Reg. 69762, (November 19, 2002), provides:

The impetus for a rulemaking may come from any one of several sources; Congressional directive; internal LSC initiative (Board or Committee members and/or staff); or a formal request from a member of the regulated community or general public. Decisions on whether to undertake rulemakings will be made by the Board upon the recommendation of the Committee.

When Management believes that rulemaking on a given topic should be undertaken, it makes its recommendation to the Committee, which then determines whether to recommend to the Board that the Board initiate the rulemaking. In most instances, the Committee will base its recommendation upon consideration of a Rulemaking Options Paper (ROP) prepared by OLA. The ROP will contain a discussion of the subject for the potential rulemaking, and will include an outline of the policy and legal issues involved, as well as the mechanisms to accomplish the rulemaking.

IV) Next Steps

Management requests that the Committee recommend to the Board that LSC initiate a rulemaking to consider amending LSC's regulation at 45 C.F.R. Part 1626, Restrictions on Legal Assistance to Aliens, and its companion appendix, to align with the existing statutory authority. LSC will draft a Rulemaking Options Paper for consideration by the Committee and the Board at an upcoming meeting.

Attachment: Draft Guidance (Appendix to Part 1626- Alien Eligibility for Representation by LSC Programs).

ALIEN ELIGIBILITY FOR REPRESENTATION BY LSC PROGRAMS BASED ON THE TRAFFICKING PROTECTION REAUTHORIZATION ACT (TVPA) AND THE VIOLENCE AGAINST WOMEN ACT (VAWA)

Alien Category	Statutory Source for Status	Eligibility Requirements
Victim of human trafficking, as defined by 22 U.S.C. 7101, ¹ and his or her family members, as defined by 8 U.S.C. 1101(a)(15)(T)(ii) ²	22 U.S.C. 7105	A victim of trafficking must be: (1) Under 18 years of age; <i>or</i> (2) A “subject of certification,” as defined by 22 U.S.C. 7105(b)(E)(i). ³
Victim of battery or extreme cruelty as defined by 45 CFR part 1626.2(f), ⁴ or sexual assault, as defined by 42 U.S.C. 13925(a)(23) ⁵	Sec. 104, Pub. L. 103-322	The legal assistance sought must be directly related to preventing or obtaining relief from battery or cruelty, or sexual assault. ⁶ “Related legal assistance” is defined as assisting the client or the client’s child in any one or more of the following activities: (1) Escape from the domestic violence, sexual assault, or battering; <i>or</i> (2) Ameliorate their effects; <i>or</i> (3) Protect against future domestic violence, battering, or sexual assault.

¹ Victims of human trafficking are defined as “persons who have been subject to sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained the age of 18; or the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 22 U.S.C. 7102(8)-(9).

² Eligible family members include the spouse and/or children of an adult victim (age 21 or older) or the spouse, children, unmarried siblings under the age of 18, and parents of a child (under the age of 21). 8 U.S.C. sec. 1101(a)(15)(T)(ii).

³ A victim of trafficking is a “subject of certification” under the TVPA when the victim:
“(I) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking on persons or is unable to cooperate with such a request due to physical or psychological trauma; and
(II)(aa) [the victim] has made a bona fide application for a [T nonimmigrant visa (T visa)] that has not been denied; or

(bb) [the victim] is a person whose continued presence in the United States the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.” 22 U.S.C. 7105(b)(E)(i).

⁴ “Battered or subjected to extreme cruelty includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.” 45 CFR part 1626.2(f).

⁵ “Sexual assault includes, but is not limited to, sexual abuse, aggravated sexual abuse, or abusive sexual conduct, and includes both assaults committed by offenders who are strangers to the victim and assaults committed by offenders who are known or related by blood or marriage to the victim.” 42 U.S.C. 13925(a)(23) *citing* 18 U.S.C. 2241-2248.

⁶ Sec. 502(b)(2), Pub. L. 105-119.

Victim of a crime listed in 8 U.S.C. 1101(a)(15)(U) ⁷	Sec. 104, Pub. L. 103-322	The victim must: (1) Qualify for a U-nonimmigrant visa (U visa) under 8 U.S.C. 1101(a)(15)(U) ⁸ ; <i>and</i> (2) Seek legal assistance directly related to preventing or obtaining relief from a qualifying crime listed in 8 U.S.C. 1101(a)(15)(U). "Related legal assistance" is defined as assisting the client or the client's child— (i) Escape from the qualifying criminal activity; <i>or</i> (ii) Ameliorate their effects; <i>or</i> (iii) To protect against future criminal activity.
The parent of a child who has been the victim of battery, extreme cruelty, sexual assault, trafficking, or qualifies for immigration relief under 8 U.S.C. 1101(a)(15)(U) ⁹	Sec. 104, Pub. L. 103-322	The alien parent must not have actively participated in the battery, extreme cruelty, sexual assault, trafficking, or other qualifying crime listed in 8 U.S.C. 1101(a)(15)(U)(iii) ¹⁰

⁷ Qualifying crimes or any similar activity in violation of Federal, State, or local criminal law include: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; 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; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. 8 U.S.C. 1101(a)(15)(U).

⁸ To qualify for a U-nonimmigrant visa, the Secretary of Homeland Security must determine that, "(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in [8 U.S.C. 1101(a)(15)(U)(iii)]; (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possess information concerning criminal activity described in [8 U.S.C. 1101(a)(15)(U)(iii)]; (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in [8 U.S.C. 1101(a)(15)(U)(iii)]; and (IV) the criminal activity described in [8 U.S.C. 1101(a)(15)(U)(iii)] violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States" 8 U.S.C. 1101(a)(15)(U).

⁹ *Infra* note 8.

¹⁰ Sec. 502(a)(2)(C)(ii), Pub. L. 105-119

ALIEN ELIGIBILITY FOR REPRESENTATION BY LSC PROGRAMS BASED ON
LSC APPROPRIATIONS AND THE ACT

Alien Category	Statutory Authorization	Regulatory Authorization 45 CFR part 1626	Verification Documents (any of the listed documents constitutes evidence of eligible immigration status)
Lawful Permanent Resident	8 U.S.C. 1101(a)(20)	§ 1626.5(a)	<ul style="list-style-type: none"> (1) Alien Registration Receipt Card: Form I-551 or Form I-151; <i>or</i> (2) Memorandum of Creation of Record of Lawful Permanent Residence: Form I-181 with approval stamp; <i>or</i> (3) Passport bearing immigrant visa or stamp indicating admission for lawful permanent residence; <i>or</i> (4) Order granting residency or adjustment of status; <i>or</i> (5) Permit to Reenter the United States: Form I-327; <i>or</i> (6) Arrival/Departure Record: CPB Form I-94 with stamp indicating admission for lawful permanent residence; <i>or</i> (7) Any verification of lawful presence in the U.S. to include any one of the following: authoritative document from the United States Immigration and Naturalization Service (INS);¹¹ or the Department of Homeland Security (DHS) including

¹¹ For any immigration status document obtained prior to March 1, 2003.

			online or email verification.
Spouse of a U.S. citizen, or a parent of a U.S. citizen, or an unmarried child under 21 of U.S. citizen; <i>and</i> who has filed an application for adjustment of status to the status of a lawful permanent resident	8 U.S.C. 1158(b)(3), 1255, 1255a, 1259	§ 1626.5(b)	(1) Proof of filing of a qualifying application for adjustment of status to permanent residency; ¹² <i>and</i> (2) Proof of relationship to U.S. citizen. ¹³
Asylee	8 U.S.C. sec. 1158	§ 1626.5(c)	(1) Arrival/Departure Record: Form I-94 or passport stamped “asylee” or “§ 208”; <i>or</i> (2) Order granting asylum from INS ¹⁴ , DHS, immigration judge, the Board of Immigration Appeals (BIA), or federal court; <i>or</i> (3) Refugee Travel Document : Form I-571 refugee travel document; <i>or</i> (4) Employment Authorization Card: Form I-688B ¹⁵ or Employment Authorization Document: Form I-766 coded “8 CFR § 274a.12(a)(5)(asylee)” or “A5”;

¹² Proof of filing may include one or more of the following: a fee receipt or an online or email printout showing that the application was filed with U.S. Citizenship and Immigration Services (USCIS), Immigration and Naturalization Service (INS), the Department of Homeland Security (DHS), or the immigration court; *or* a filing stamp showing that the application was filed; *or* a grant of a fee waiver for such application, a biometrics appointment notice indicating such pending application, a printout from the USCIS online service, or a copy of the application accompanied by a notarized statement signed by the alien that such form was filed.

¹³ Proof of relationship to a U.S. Citizen may include one or more of the following: a copy of the person’s marriage certificate accompanied by proof of the spouse’s U.S. Citizenship; *or* a copy of the birth certificate, baptismal certificate, adoption decree, or other document demonstrating the individual is under the age of 21, accompanied by proof that the individual’s parent is a U.S. citizen; *or* a copy of Petition for Alien Relative: Form I-130 or Petition for American, Widow(er) or Special Immigrant: Form I-360 containing information demonstrating the individual is related to such U.S. citizen, accompanied by proof of filing.

¹⁴ *Infra* note 11.

¹⁵ Dated before April 3, 2009.

			<p><i>or</i></p> <p>(5) Any verification of lawful presence in the U.S. or other authoritative document from the United States Immigration and Naturalization Service (INS)¹⁶ or the Department of Homeland Security (DHS), including online or email verification</p>
Refugee	8 U.S.C. 1157	§ 1626.5(c)	<p>(1) Arrival/Departure Record: Form I-94 or passport stamped “refugee” or “§ 207”;</p> <p><i>or</i></p> <p>(2) Employment Authorization Card: Form I-688B¹⁷ or Employment Authorization Document: Form I-766 coded “8 CFR § 274a.12(a)(3)(refugee)” or “A3” or “8 CFR § 274a.12(a)(4)(paroled refugee)” or “A4”;</p> <p><i>or</i></p> <p>(3) Refugee Travel Document: Form I-571;</p> <p><i>or</i></p> <p>(4) Any verification of lawful presence in the U.S. or other authoritative document from the U.S. Immigration and Naturalization Service (INS)¹⁸ or the Department of Homeland Security (DHS) including online or email verification</p>
Individual Granted Withholding of	8 U.S.C. 1231(b)(3)	§ 1626.5(e)	<p>(1) Arrival/Departure Record: Form I-94</p>

¹⁶ *Infra* note 11.

¹⁷ *Infra* note 13.

¹⁸ *Infra* note 11.

Deportation or Removal			<p>stamped “§243(h)” or “§241(b)(3)”;</p> <p><i>or</i></p> <p>(2) Order granting withholding of deportation/deferral of removal from DHS, U.S. Immigration and Customs Enforcement (ICE), immigration court, BIA, or federal court;</p> <p><i>or</i></p> <p>(3) Temporary Resident Card: Form I-688¹⁹ or Employment Authorization Document: Form I-766 coded “8 CFR § 274a.12(a)(10)(withholding of deportation)” or “A10”;</p> <p><i>or</i></p> <p>(4) Refugee Travel Document: Form I-571;</p> <p><i>or</i></p> <p>(5) Any verification of lawful presence in the U.S. or other authoritative document from the United States Immigration and Naturalization Service (INS)²⁰ or the Department of Homeland Security (DHS), including online email verification</p>
Conditional Entrant	8 U.S.C. 1153(a)(7) ²¹	§ 1626.5(d)	<p>(1) Arrival/Departure Record: Form I-94 or passport stamped “conditional entrant”;</p> <p><i>or</i></p> <p>(2) Any verification of lawful presence in the U.S. or other authoritative document from the U. S.</p>

¹⁹ *Infra* note 13.

²⁰ *Infra* note 11.

²¹ As in effect prior to April 1, 1980.

			Immigration and Naturalization Service (INS) ²² or the Department of Homeland Security (DHS), including online or email verification
Special Agricultural Worker Temporary Resident	8 U.S.C. 1160	§ 1626.10(d)	(1) Temporary Resident Card: Form I-688 ²³ , I-688A, Employment Authorization Card: Form I-688B ²⁴ , or Employment Authorization Document: Form I-766 indicating issuance under INA § 210 (or under 8 CFR part 274a.12(a)(2) or coded “A2,” with other evidence indicating eligibility under INA § 210); <i>or</i> (2) Any verification of lawful presence in the U.S. or other authoritative document from the United States Immigration and Naturalization Service (INS) or the Department of Homeland Security (DHS), including online or email verification
H-2A Temporary Agricultural Worker ²⁵	8 U.S.C. sec. 1101(a)(15)(H)	§ 1626.11	(1) Arrival/Departure Record: Form I-94 or passport stamped “H-2A”; <i>or</i> (2) Any verification of lawful presence in the U.S. or other authoritative document

²² *Infra* note 11.

²³ *Infra* note 13.

²⁴ *Infra* note 13.

²⁵ Legal assistance is limited to matters arising under the provisions of the worker’ employment contract concerning wages, housing, transportation, and other employment rights as provided in the worker’s specific contract. 45 CFR part 1626.11(b).

			from the United States Immigration and Naturalization Service (INS) ²⁶ or the Department of Homeland Security (DHS) including online or email verification
H-2B Temporary Non-Agricultural Worker ²⁷	8 U.S.C. sec. 1101(a)(15)(H)		(1) Arrival/Departure Record: Form I-94 or passport stamped “H-2B” and evidence that the worker is employed in forestry; <i>or</i> (2) Any verification of lawful presence in the U.S. or other authoritative document from the United States Immigration and Naturalization Service (INS) ²⁸ or the Department of Homeland Security (DHS) including online or email verification
Spouse of a U.S. citizen, or a parent of a U.S. citizen, or an unmarried child under 21 of U.S. citizen; <i>and</i> who has filed an application for adjustment of status to	8 U.S.C. 1158(b)(3), 1255, 1255a, 1259	§ 1626.5(b)	(1) Proof of filing of a qualifying application for adjustment of status to permanent residency ²⁹ ; <i>and</i> (2) Proof of relationship to U.S. citizen ³⁰

²⁶ *Infra* note 11.

²⁷ Legal assistance is limited to matters arising under the provisions of the worker’ employment contract.

²⁸ *Infra* note 11.

²⁹ Proof of filing may include one or more of the following: a fee receipt or an online or email printout showing that the application was filed with U.S. Citizenship and Immigration Services (USCIS), Immigration and Naturalization Service (INS), the Department of Homeland Security (DHS), or the immigration court; *or* a filing stamp showing that the application was filed; *or* a grant of a fee waiver for such application, a biometrics appointment notice indicating such pending application, a printout from the USCIS online service, or a copy of the application accompanied by a notarized statement signed by the alien that such form was filed.

³⁰ Proof of relationship to a U.S. Citizen may include one or more of the following: a copy of the person’s marriage certificate accompanied by proof of the spouse’s U.S. Citizenship; *or* a copy of the birth certificate, baptismal certificate, adoption decree, or other document demonstrating the individual is under the age of 21, accompanied by proof that the individual’s parent is a U.S. citizen; *or* a copy of Petition for Alien Relative: Form I-130 or Petition for American, Widow(er) or Special Immigrant: Form I-360 containing information demonstrating the individual is related to such U.S. citizen, accompanied by proof of filing.

the status of a lawful permanent resident			
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