Colorado Legal Services

1905 Sherman Street, Suite 400
Denver, Colorado 80203-1811
Telephone 303-837-1321 V / TDD
Fax 303-830-7860

303-866-9399

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

Re: Comments on Proposed Revisions to Rule 45 CFR Part 1626

Dear Mr. Freedman:

Colorado Legal Services (CLS) respectfully submits the following comments in response to Legal Services Corporations' Notice of Proposed Rulemaking (NPRM), Proposed Rule 45 CFR Part 1626, "*Restrictions on Legal Assistance to Aliens*" 78 Fed. Reg. 51696-51704 (Aug. 21, 2013).

Overview

CLS supports the consolidation of the prior anti-abuse provisions into 45 CFR Part 1626. The inclusion of the various anti-abuse statutes, including the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA), the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA) and the other statutes set forth in proposed 45 CFR §1626.2(f) provide clarity to grantees that have had to rely on Legal Services Corporation (LSC) Program Letters, including Program Letter 06-2 and 05-2, to determine eligibility for program services under the anti-abuse statutes. Further, CLS strongly supports the Corporation's proposal to reclassify the information currently contained in the appendix to Part 1626 to a Program Letter. Providing this information in a Program Letter will allow LSC to more easily update, modify and/or add to the list of documents acceptable for determining alien eligibility for services.

Definition of the Terms "Trafficking" and "Severe Forms of Trafficking"

LSC specifically requests comment on the issue of whether the VAWA term "trafficking" differs from the VTVPA/TVPRA/Immigration and Nationality Act (INA) term "severe forms of trafficking," and, if so, how the terms are different and what evidence LSC recipients should rely on in distinguishing between these two terms for prohibited trafficking.

CLS agrees with the definition of "victim of trafficking" set forth in proposed 45 CFR §1626.4(c)(2)(ii). CLS would assert that the VAWA term "trafficking" differs from the VTVPA/TVPRA/INA term "severe forms of trafficking," and encompasses definitions found under state or local laws as well as the VTVPA/TVPRA.

The 2013 State Department Trafficking in Persons (TIP) Report indicates that all 50 states and all but one U.S. territory have enacted anti-trafficking statutes in recent years.[1] The TIP report further addresses the application of these laws and the lack of uniformity and inconsistency across jurisdictions. The fact that the TIP report assesses state laws demonstrates that the U.S. government considers state laws to be important in addressing human trafficking in the U.S. The VAWA, including the Alien Eligibility Provision in Section 502 of the LSC Appropriations Legislation, does not specify that only the VTVPA/TVPRA definition applies. Section 502 also authorizes the provision of legal assistance to individuals who qualify for immigration relief under INA §101(a)(15)(U). That section applies to criminal activity that is in violation of Federal, State, or local criminal law. INA §101(a)(15)(U)(iii). Since there is no explicit limitation to the VTVPA/TVPRA under Section 502, since that section also authorizes services to victims of state or local U visa crimes as well as federal crimes, and since the State Department includes an assessment of state statutes in the TIP report, LSC is correct in defining trafficking as "any conduct in the definition of 'trafficking' under law."

CLS is not certain what exactly is being requested by LSC for the evidence LSC grantees should rely on in distinguishing between forms of prohibited trafficking, but recipients should be able to rely on the definition in the statute that is applicable to the crime involved and evidence that meets that definition.

Location of the Predicate Activity

LSC specifically requests comment on the issue of where the predicate activity must take place. LSC concludes in its Supplementary Information that trafficking and severe forms of trafficking must have occurred in the United States. The proposed regulation reflects this conclusion, and would provide that "[v]ictims of trafficking must be subjected to illegal trafficking in the United States to be eligible for assistance." Proposed 45 CFR §1626.4(d)(1). CLS disagrees with this overly narrow conclusion and asserts that authority provides for a more expansive approach that should not require that the trafficking occur in the U.S.

In reaching this conclusion regarding the location of the trafficking activity, LSC relies in part on the VAWA amendment to section 502 of the appropriations legislation. However section 502 is internally inconsistent. On one hand Sec. 502(a)(2)(C)(i) allows for legal assistance to "an alien who has been battered or subjected to extreme cruelty or a victim of sexual assault or trafficking *in the United States"* (emphasis added). The same sentence, however, allows legal assistance for U-visa-eligible victims, without any requirement that the U visa crime has occurred in the U.S. U visa eligibility can be based on criminal activity that

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[1] U.S. Department of State, *Trafficking in Persons Report 2013,* at p. 383, *found at* http://www.state.gov/documents/organization/210742.pdf (last visited October 18, 2013).

violated the laws of the U.S. *or* occurred in the U.S. Since trafficking is a U visa crime (as are domestic violence and sexual assault), Sec. 502 seems to be internally contradictory, first referring to trafficking in the U.S. but also referencing U visa eligibility, including trafficking, which has no such geographic limitation.

LSC also relies on 22 U.S.C. §7102(9) and §7105(b) in reaching its conclusion that the trafficking must actually or solely have occurred in the U.S. Sec. 7102(9) simply sets forth the definition of "severe form of trafficking in persons" and does not reference any geographic location. Sec. 7105(b) is more applicable, and allows for the provision of services "to victims of severe forms of trafficking in persons in the U.S." CLS asserts, however, that this statute does not support a conclusion that the trafficking must have occurred in the U.S. While the statute sets forth a "requirement" that LSC and other agencies expand benefits and services to victims of severe forms of trafficking in persons in the U.S., it does not *prohibit* the provision of services to victims of trafficking that occurred *outside* the U.S. Rather it simply sets forth the mandatory services. The statute also refers only to victims of a severe form of trafficking, not victims of trafficking. Thus the proposed 45 CFR §1626.4(d) is overly broad in applying the geographic limitation to "victims of trafficking." LSC has taken an expansive approach in allowing for legal assistance to aliens not present in the U.S. (*see* next section) and similarly should take a more expansive view here. The geographic limitation on the predicate trafficking activity is inconsistent with the general ameliorative purpose 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.[2]

Furthermore, instances of severe forms of trafficking may involve criminal acts occurring in more than one country. In one recent case an individual was persecuted in one country, where she also was recruited under false pretenses for a housekeeping job in a second country, which she accepted to escape the persecution. The housekeeping position turned out not to be a paying job, but involuntary servitude. The individual then was brought to the U.S. by the traffickers and subjected to involuntary servitude briefly here before she escaped. Had she escaped immediately and not been subjected to the involuntary servitude while in the U.S., she would not have been eligible under this proposed regulation. In another case, a youth trafficked in the desert region of Northern Mexico and Southern Arizona did not know which country he was in during the trafficking acts. The trafficking was clear; the country in which it occurred was not. This geographic limitation also could lead to the unintended consequence, in multi-country trafficking schemes, of LSC grantees determining that an alien is ineligible because part of the trafficking activity occurred outside the U.S. Lastly, the proposed regulation is internally and unnecessarily inconsistent, as LSC reaches a different conclusion with regard to domestic violence and sexual assault, which under the proposed regulation do not and should not have a geographic restriction.

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[2] *See, e.g.,* U.S. Citizenship and Immigration Services, *Questions and Answers: Victims of Criminal Activity, U Nonimmigrant Status, found at* http://www.uscis.gov (last visited October 18, 2013).

Presence in the U.S.

LSC specifically requests comment on the issue regarding whether the alien must be present in the U.S. to be eligible for legal assistance. Proposed 45 CFR §1626.4(d)(2) states that "an alien need not be present in the United States or a United States territory to be eligible for assistance under this section." CLS agrees with proposed 45 CFR §1626.4(d)(2) for the reasons set forth by LSC in the Supplementary Information (p. 51700). CLS asserts that this same reasoning, particularly regarding U visa eligibility, supports a conclusion that the crime -- including a severe form of trafficking -- also need not have occurred in the U.S., as discussed in the previous section.

Evidentiary Support

In proposed 45 CFR §1626.4(e), LSC reviews the types of evidentiary support upon which recipients may base an eligibility determination. The examples cover an appropriately broad range of possible evidence, including statements by the alien, reports from various officials and service providers, and other documentary evidence. It also allows the recipient to make an eligibility determination if the recipient determines there will likely be evidentiary support, provided that the recipient obtain evidentiary support as soon as possible without delay in securing the evidence in order to provide continued assistance. CLS supports this portion of the proposed regulation. LSC recipients may be, and, in our experience, frequently are, the first contact for an individual leaving a trafficking situation. With the existence of national and state anti-trafficking hotlines, LSC recipients such as CLS receive regular referrals of possible trafficking cases. Often the potential victims referred have not yet had any other contact with officials or service providers beyond calling the hotline. It is important for LSC grantees to be able to respond to credible reports of trafficking even where extensive documentation does not yet exist, provided that recipients obtain documentation as soon as possible. LSC is correct in allowing consideration of a broad range of evidence in determining eligibility.

Changes in Eligibility

The same proposed provision also refers to 45 CFR §1629.9 as applying when a previously eligible alien is determined to be ineligible. The proposed regulation does not change 45 CFR §1626.9 regarding a change in circumstances. This section provides that if an eligible alien becomes ineligible through a change in circumstances, continued representation is prohibited and a recipient must discontinue representation consistent with applicable rules of professional responsibility. CLS acknowledges that this section would apply when an individual previously determined to be eligible under the anti-abuse statutes is later determined to be ineligible and supports the clear reference to the regulatory requirement.

CLS, however, has concerns about the examples of subsequent ineligibility determinations provided in 45 CFR §1626.4(e): "for example, if an alien's application for U visa relief 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." Both examples are problematic and should not be determinative that the individual is now ineligible for assistance. A U visa applicant could be denied based on a lack of documentation or inadequate paperwork, but be

eligible to reapply after obtaining more evidence or corrected paperwork. For example, a U visa application may be denied due do a determination that the applicant did not provide sufficient evidence that she suffered "substantial physical or mental abuse" as a result of having been the victim of a crime, one of the elements. INA §101(a)(15)(U)(i)(I). If that applicant later obtains additional documentation or experiences additional symptoms of abuse from the crime, she is not barred from reapplying, but would not be able to do so with the assistance of an LSC grantee. Frequently a crime victim will seek assistance from an LSC grantee after filing an insufficient application *pro se* or through an unauthorized immigration provider (either a "notario" or non-attorney service provider). If that application has errors that resulted in the denial, the LSC grantee would be precluded inappropriately from assisting the crime victim to refile a correct application. CLS understands that Program Letter 06-2 also included a requirement that grantees discontinue representation if there is a final denial of the U visa petition. CLS asserts, however, that the authority underlying this Program Letter -- VAWA and Sec. 502 of the LSC Appropriations Legislation -- contains no such requirement and this should be corrected in the revised regulation. In Sec. 502, eligibility is based on "qualifying for immigration relief," which arguably applies when there a need for corrected documents or there is after-acquired evidence.

Similarly, the requirement of an "official DHS determination" that an individual was not a victim of trafficking is overly broad. DHS has a number of various branches or divisions besides U.S. Citizenship and Immigration Services, which has sole authority to adjudicate applications for T and U nonimmigrant status. Other branches include Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CPB). Under the proposed regulation, officials in these branches of DHS could be in a position of rendering a noncitizen ineligible for continued legal services regardless of whether they are qualified to make such a determination. For example, an ICE agent, whose primary duties involve drug trafficking investigations, could be assigned to a human trafficking investigation without having extensive experience in human trafficking. If that uninformed agent initially determines there has not been human trafficking, the LSC grantee would have to discontinue representation, under this provision. CLS suggests that the specific examples be omitted from 45 CFR §1626.4(e). LSC grantees regularly are in the position of making determinations regarding changed circumstances and have the responsibility to do so when they determine an individual no longer is eligible under the anti-abuse laws, without unnecessarily-limiting examples that may be overly narrow or lead to premature and inappropriate termination of services when, in fact, continued representation may be essential and most important to protect the legitimate legal rights of a victim of trafficking or abuse. Frequently examples are helpful in insuring compliance with a regulation. These examples, however, are not helpful and would serve to unnecessarily limit legal services when most needed.

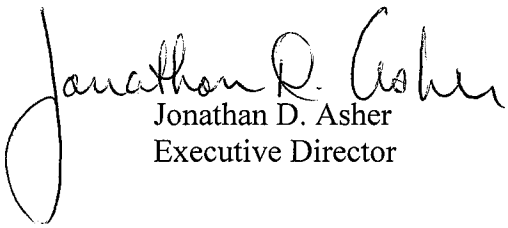
Conclusion

CLS agrees that the proposed rule consolidating existing anti-abuse provisions into 45 CFR Part 1626 and implementing other technical corrections serves to clarify the existing authority that governs LSC grantees in determining noncitizen eligibility for legal assistance. CLS has provided these comments to highlight a number of specific issues, including the definition of "trafficking," the location of the predicate activity, presence in the U.S.,

evidentiary support and changes in eligibility. CLS believes it is important to draw attention to these particular issues, while in no way disagreeing with the overall intent and most of the language of the proposed rule.

Thank you for your kind consideration of these comments. If you have any questions concerning these comments, or if CLS can be of any further assistance in LSC's consideration of these proposed revisions to the rule please inform me at your convenience.

Respectfully,



Jonathan D. Asher
Executive Director

JDA/cog
Enclosures