

RULEMAKING OPTIONS PAPER

TO: Operations & Regulations Committee/Board of Directors

FROM: Ronald S. Flagg, Vice President for Legal Affairs and
General Counsel Office of Legal Affairs

DATE:

obligations for recipients. Fourth, the amendments should be accomplished by notice and comment rulemaking.

II. Background

45 C.F.R. Part 1626 is “designed to ensure that recipients provide legal assistance only to citizens of the United States and eligible aliens.”¹ 45 C.F.R. § 1626.1. Part 1626 consists of twelve substantive sections and an appendix that lists examples of documents acceptable to establish alien eligibility. 45 C.F.R. Part 1626; Appendix.

Part 1626 implements Section 504(a)(11) of the 1996 LSC appropriation , as modified and annually reincorporated in LSC’s appropriation, which prohibits the Corporation from providing funds to any person or entity (“recipient”) that provides legal assistance to ineligible aliens. Pub. L. 104-134, Title V, § 504(a)(11) 110 Stat. 1321, 1321-54 (1996). The statutory restriction on alien eligibility as initially enacted in the 1996 appropriations permitted assistance to six categories of aliens, most of whom have been granted immigration status and are lawfully present in the United States. *Id.* LSC adopted an interim rule to implement these statutory requirements. Restrictions on Legal Assistance to Aliens, 61 Fed. Reg. 45750 (August 29, 1996).

In 1997, while the interim rule was pending for comment, Congress expanded eligibility to aliens who have been battered or subjected to extreme cruelty in the United States by family members. Pub. L. 104-208,

eligibility and defined the “related legal assistance” that the statute authorized for eligible aliens under these amendments. 62 Fed. Reg. 19409

without regard to the immigration status of such victims.” 22 U.S.C. § 7105(b)(1)(B).

The VAWA 2006 Amendments changed the language of the LSC FY 1998 appropriation restricting recipients from representing aliens as follows with additions underlined and deletions struck out:

[S]ubsection (a)(11) of such section 504 [of LSC’s FY 1996 appropriations act incorporated by reference] shall not be construed to prohibit a recipient from ~~using funds derived from a source other than the Corporation to provide~~ providing related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty ~~in the United States by a spouse or a parent, or by a member of the spouse’s or parent’s family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or~~ or 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)); or

(ii) an alien whose child ~~has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the~~

G of the Violence Against Women Act of 1994 (Public Law 103—322; 108 Stat. 1953).

(2) The term ‘related legal assistance’ means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty, sexual assault or trafficking, or the crimes listed in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)(iii). ~~described in such subsection.~~

legal assistance” to this category of abused aliens regardless of who abused them. Previously, only aliens abused by a parent, spouse or household member were eligible, and the current regulation reflects this prior, superseded, limitation.

3. The appropriations act amendments permit recipients to use both LSC funds and non-LSC funds to provide “related legal assistance” to otherwise ineligible aliens. Previously, such assistance was permitted only if supported by non-LSC funds, and the current regulation reflects this prior, superseded restriction.

The assistance permitted to otherwise ineligible aliens under section 502(a)(2)(C) of the current appropriation act is “related legal assistance,” which is defined as “legal assistance directly related to the prevention of, or obtaining relief from, the battery, cruelty, sexual assault or trafficking, or the crimes listed in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act.” Pub. L. 105-119, § 502(b)(2). LSC has interpreted the “related legal assistance” limitation as permitting assistance on a range of issues, provided the recipient can show a connection to an abusive situation, including representation on immigration status, naturalization, work authorization, domestic matters, employment, public benefits and housing. Restrictions on Legal Assistance to Aliens, 62 Fe

temporary service or labor.” 8 U.S.C. § 1101(a)(15)(h)(ii)(b) (“H-2b workers”).

The LSC appropriation’s provision on eligibility for H-2 workers, as amended by the FY 2008 LSC appropriation, is section 504(a)(11)(E), which states that assistance may be provided to

nonimmigrant worker[s] 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. § 1101(a)(15)(H)(ii)(b)) for forestry labor or . . . alien[s] to whom section 305 of the Immigration and Reform Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent the legal assistance provided is the legal assistance described in such section.

Pub. L. 104-134, Title V, § 504(a)(

Section 1626.11 requires amendment for two reasons. First, the provision does not state with precision the limited eligibility of H-2a agricultural workers and could be interpreted as extending eligibility beyond the statutory limit to a broader group of H-2 workers. Second, the provision should be updated to reflect that eligibility for assistance has been extended by the FY 2008 appropriation amendment for H-2b forestry workers.

As to the imprecision with the regulation's statement of H-2a eligibility, the statutory basis for LSC recipients to assist H-2a agricultural workers is Section 305 of the Immigration Reform and Control Act of 1986 ("IRCA"). 8 U.S.C. 1101, note. This provision states

A nonimmigrant worker admitted to or permitted to remain in the United States under section 101

(a)(15)(H)(ii)(-1m1Tef.8(d TD.01995TJ17.01 is 31767 0 TD.0009 Tc-.008 Twiation and

act to render forestry workers holding H-2b visas eligible for legal assistance from LSC grantees through addition of the italicized language:

[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 [“IRCA”] 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.

Pub. L. 104-134, Title V, § 504(a)(11)(E) as amended in 2008 by Pub. L. 110-161, Div. B, Title V, § 540 (emphasis added). The amendment to section 504(a)(11)(E) 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.

Further, section 1626.11 should conform to the amended language in section 504(a)(11)(E), which refers both to the section H-2b forestry workers and to the Section 305 workers, and states that such workers are eligible “only to the extent that the legal assistance provided is the legal assistance described in such section.” *Id.* We believe the most logical construction of this is to apply the Section 305 limits to the H-2b forestry workers as well as the H-2a/Section 305 workers.

C. Changes in Statutory Eligibility for Aliens Granted Withholding of Removal

Section 1626.5 of the regulation allows recipients to provide assistance to several categories of aliens who are la(em). T

. We3r peatot hr section he i6Vp,

D. Amending the Appendix and Reissuing as a Program Letter

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 for assistance. 45 C.F.R. Part 1626.7(a)(1)

The appendix to Part 1626 was last updated in 2003, and, like the regulation, it is out of date. Revision of the list of eligibility documents in the appendix does not entail policy decisions or rights of grantees, as it is limited to administrative updates to the list of examples of documents or information for demonstrating eligibility. In view of the frequency with which immigration forms change, and the ministerial nature of those changes, subjecting eligibility list updates to the process of repeated Board approval and the LSC rulemaking protocol would be unnecessarily complicated. LSC would be well served by limiting the administrative burden in making ministerial updates to the list. LSC can do so by classifying the information currently contained in the appendix as a program letter posted on the LSC website, and emailed to grant recipients.

The initial revision of the appendix and reclassification as a program letter would be done pursuant to the LSC rulemaking protocol, which requires Board review and approval prior to publication for notice and comment. Legal Services Corporation Rulemaking Protocol, Fed. Reg. 69762 (November 19, 2002). This is necessary because these changes modify an existing regulation. However, subsequent revision of the guidelines would allow for, but not require, notice and comment and Board consideration and approval (tnd Bo.lc.0oughca

appendix in a program letter that would not be subject to the Rulemaking Protocol, but could still be published for notice and comment at LSC's discretion. The last process question is what length of time to provide for notice and comment before the rule becomes final.

IV. Management Recommendations

A. Substance

Section 1626.4.

Management recommends that section 1626.4 be replaced by a new provision that conforms to the current statutory language in the TVPA, TVPRA, VAWA and the FY 2008 LSC appropriation. The language of the new provision would accomplish the following:

1. Add to the existing categories of eligible aliens (1) victims of sexual assault or trafficking in the United States and (2) persons who qualify for immigration relief under section 101(a)(15)(U) of the Immigration and Nationality Act.
2. Remove restrictions that limit eligibility to victims who are battered or subjected to extreme cruelty based on the identity of the abuser and the location of the abuse in the United States.
3. Permit recipients to use LSC funds and non-LSC funds to provide allowable legal assistance to all categories of eligible aliens.
4. Clarify the definition of related legal assistance that may be provided to the categories of aliens eligible under section 1626.4.

Section 1626.11

Section 1626.11 should be replaced by a new provision that conforms to the amended language in section 504(a)(11)(E) of the annual LSC appropriations riders. The language of the new provision would accomplish the following:

1. State that H-2b forestry laborers are eligible for legal assistance.
2. Precisely identify the eligibility of H-2a agricultural workers for assistance by referencing section H-2a rather than section H-2 of the INA.

Section 1626.5

Section 1626.5(e) should be amended to reflect that the withholding of removal status upon which this eligibility is based has been relocated to a different section of the INA, 8 U.S.C. § 1231(b)(3).

Appendix

The appendix to 1626 should be updated and published as a program letter.

B. Process

The amendments to the substantive sections of Part 1626 should be developed and considered by the Board as required under LSC's Rulemaking Protocol and considered through notice and comment rulemaking (without workshops) as required by the LSC Act. The decision to remove the appendix from the regulation and reclassify the appendix as a program letter is a change in the regulation. Accordingly, the initial decision to update the appendix and reclassify it should also be subject to notice and comment. Subsequent administrative updates to the program letter would not be required for submission to notice and comment or to Board consideration and approval under the LSC Rulemaking Protocol, although notice and comment and/or Board consideration would be permitted.

On timing, OLA recommends a sixty-day period for notice and comment for the proposed rule. This allows consideration of issues related to the implementation of the statutory expansion of eligibility in the new regulation.