Date: March 7, 2014

Re: Comments to Further Notice of Proposed Rulemaking for Proposed Rule Updates to the Legal Service Corpo ration Regulation on Legal Assistance to Aliens . 45 CFR Part 1626 – 79 Fed. Reg. 6859 (Feb. 5, 2014)

I. Introduction

The National Immigrant Women's Advocacy Project (NIWAP), American University, Washington College of Law, submits these comments in response to the Further Notice of Proposed Rulemaking (FNPRM) issued by the Legal Services Corporation (LSC) on February 5, 2014. 79 Fed. Reg. 6859. These comments address proposed changes to 45 CFR § 1626.4(c), which covers the ability of immigrant victims of trafficking, battering or extreme cruelty, sexual assault and other crimes to receive LSC funded legal assistance. The comments are responsive to the request for comments made by LSC in its FNPRM, and will assist LSC in ensuring that the final rule fully implements the expressed intent of Congress in a manner that is consistent with the full range of legal relief available to immigrant crime victims under the provisions of the Violence Against Women Act, the Trafficking Victim's Protection Act, and their respective reauthorizations.

The first part of these comments addresses the use of the term "in the United States" to modify "trafficking" in the Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA LSC 2005"), as it amended § 502 of the FY 1996 Appropriations Act. VAWA 2005 § 104. NIWAP strongly supports the LSC's current application of this term in the proposed rule to modify trafficking only. We discuss why LSC was correct in not applying the "in the United States" modifier to victims of battering or extreme cruelty, sexual assault and other U Visa listed qualifying crimes. Applying this limitation to victims of battering or extreme cruelty, sexual assault or U visa criminal activity would be inconsistent with the protections offered these immigrant crime victims under VAWA, the TVPA, and existing DHS regulations, policies, guidance and training materials on VAWA self-petitioning, VAWA cancellation of removal, VAWA suspension of deportation, continued presence, T visas, and U visas. NIWAP fully supports the section of the LSC's proposed rule that states there is no presence requirement for victims who have been subjected to battery or extreme cruelty, victims of crimes who are eligible for U visas, and victims of sexual assault. NIWAP also provides suggestions for revising some portions of this section to bring the LSC regulations into conformity with the anti-abuse statutes.

[1] Prepared with the assistance of Jeanne Cohn-Connor, Stefanie I. Gitler, Sarah A. Piazza & Mark D. Fahey, Kirkland & Ellis LLP.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4801 Massachusetts Avenue NW · Washington, D.C. 20016
(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu

The second part of these comments addresses the various ways victims of human trafficking can qualify for assistance from LCS funded programs—as victims of severe forms of human trafficking, as victims of trafficking eligible for U visas or as victims of trafficking that occurred "in the United States". We will discuss the types of trafficking cases where a victim would need to prove a necessary relationship between the trafficking offense that was

representation of victims who *qualify* for relief under Section 101(a)(15)(U), regardless of whether a petition is ever filed. Victims could, therefore, receive representation if they can show to LSC some form of helpfulness or willingness to be helpful in detection, investigation, prosecution, conviction, or sentencing related to any U visa listed qualifying criminal activity. Immigration and Nationality Act ("INA") § 101(a)(15)(U). There is a broad range of activities that could constitute helpfulness (e.g. having filed or being willing to file a police report, or willingness to file for a protection order).[3] Helpfulness can also be demonstrated by a willingness to seek a temporary protection order that will be served by law enforcement on the perpetrator or by calling 911 to report a crime. So long as the victim is willing to be helpful, is being helpful, or has been helpful in the past, he or she will qualify for a U visa, and can be represented by LSC funded programs under the VAWA 2005 Section 104 LSC appropriations amendment.

Any immigrant who is a victim of a U visa listed criminal activity also should be able to access the assistance of an LSC funded lawyer to assist with any case they may have related to the criminal activity they suffered. The VAWA 2005 Section 104 LSC appropriations amendment specifically allows for providing "related legal assistance." Related legal assistance is defined as "legal assistance directly related to the prevention of, or obtaining relief from" criminal activities, including the U visa criminal activities. The LSC Program Letter 6-2 interpreted this as legal assistance to help qualified immigrates escape from, ameliorate the effects of, or obtain relief from the listed crimes. Helaine M. Barnett, *Letter to All LSC Program Directors Re: Violence Against Women Act 2006 Amendments*, Feb. 21, 2006. LSC funded programs must be able to represent any person who qualifies for a U visa in any form of legal case related to the abuse (e.g. family law, public benefits, housing, and immigration).

The term "in the United States" from the VAWA 2005 Section 104 LSC appropriations amendment should not apply to U visa "victims of qualifying crimes" because a petitioner does not need to file from within the United States to qualify for a U visa. 72 Fed. Reg. 53021. A petitioner is eligible for U visa status if the petitioner was a victim of criminal activity in the United States or in violation of United States law, and otherwise meets the requirements for a U visa. INA § 101(a)(15)(U).

The term "violated the laws of the United States" refers to "criminal activity that occurred outside the United States that is in violation of U.S. law." 72 Fed. Reg. 53020. The rule contemplates laws that establish extraterritorial and federal criminal jurisdiction. For example, 18 U.S.C. § 2423(c) gives the United States jurisdiction to investigate and prosecute cases involving U.S. citizens or nationals who engage in illicit sexual conduct outside the United States, such as sexually abusing a minor. The investigation of such a crime can take place either outside or inside the United States, and the United States Citizenship and Immigration Service specifically allows for "victims to submit petitions from outside the United States provid[ing] the certifying agency with the necessary flexibility to further the investigation or prosecution." 72 Fed. Reg. 53021. LSC funded programs must still be able to represent these foreign applicants who qualify for a U visa.

[3] *See* BENISH ANVER, ROCIO MOLINA, ANDREA CARCAMO-CAVAZOS, PETER HELEIN, & DEVON E. TURNER, U-VISA: "HELPFULNESS" (Sept. 25, 2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/U-Visa-Helpfulness.pdf (attached hereto as Appendix A); *see also* LESLYE E. ORLOFF, ALISHA LINESWALA, BENISH ANVER, KAREN DRYHURST, & LUCIA MACIAS, U VISA CERTIFICATION TOOL KIT FOR FEDERAL, STATE AND LOCAL JUDGES AND MAGISTRATES (updated on February 3, 2014), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/Judges-Toolkit.pdf (attached hereto as Appendix B) (discussing examples of how judges assess helpfulness).

the departure. INA § 212(a)(9)(C)(iii). VAWA also allows cancellation of removal proceedings for a battered spouse or child without regard to where the abuse took place if the petitioner was "physically present in the United States" for not less than three years. INA § 240A(b)(2). A petitioner qualifies as "physically present" if there is not a 90 day absence or absences that total 180 days, meaning a petitioner could be only abused during the time spent outside the United States and still qualify for a VAWA petition. INA § 240A(b)(2)(B). Finally, spouses with certain visas can apply for a work authorization (INA 106) and spouses of citizens or lawful permanent residents who obtain conditional permanent residency can apply for battered spouse waivers (INA § 216(c)(4)(C)) without regard to geographic limitations on travel, where the petitioner is applying from, or where the abuse happened. Thus, the proposed LSC regulation is correct in choosing not to apply the "in the United States" to victims of battering or extreme cruelty or victims of sexual assault.

Ongoing presence in the United States is not a requirement for T visa eligibility and, therefore, should not be a requirement for LSC funded assistance provided under the TVPA. In 2002, the Immigration and Naturalization Service (now the United States Citizenship and Immigration Service) issued an interim rule that defines how a trafficking victim may qualify for T visa status. 67 Fed. Reg. 4784. The TVPA limits eligibility for T visa status to persons who

After LSC issued its Program Letter for Trafficking Victims in 2005, Congress further expanded LSC eligibility for immigrants with Section 104 of the VAWA 2005 reauthorization act. The LSC eligibility expansion in VAWA LSC 2005 provides for the use of LSC funds for victims of certain crimes under VAWA, as discussed above in Section II. It also includes a savings clause that expressly states that trafficking victims eligible for LSC assistance under the TVPA may not lose their eligibility due to VAWA LCS 2005's expansion of eligibility.

> Nothing in this Act, or the amendments made by this Act, shall be construed to restrict the legal assistance provided to victims of trafficking and certain family members authorized under section 107(b)(1) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(b)(1)).

VAWA 2005, Pub. L. 109–162, January 5, 2006 § 104(b). Prior to the passage of the VAWA LSC 2005 amendments, TVPA trafficking victims were eligible for LSC funded assistance without a requirement that they be present in the U.S. on an ongoing basis. The Savings Clause ensures that this was not changed by the LSC expansion in VAWA 2005. Therefore, the eligibility of a trafficking victim under the TVPA for LSC assistance does not require ongoing presence in the Unit aeligibilileibl fdthe UETlea(a)4(he)-81.82 10(inal Tm[(re)7(quire)5(on)-9

because the language of § 1626.4(c)(2)(ii) mirrors the presence requirement for T visa eligibility. INA § 101(a)(15)(T)(i)(II). In order to effectuate the language of the TVPA, the following language should be moved from 1626.2(k)(2) to 1626.2(j): "and T-visa holders regardless of certification from the U.S. Department of Health and Human Services (HHS)". With these changes, the regulations would appear as:

1626.2: Definitions

(k)(2) *A victim of trafficking* subjected to any conduct included in the definition of "trafficking" under law, including, but not limited to, local, state, and federal law**.** and T visa holders regardless of certification from the U.S. Department of Health and Human Services (HHS).

(j) *Victim of severe forms of trafficking* means any person described at 22 U.S.C. 7105(b)(1)(C), and **T visa holders regardless of certification from the U.S. Department of Health and Human Services (HHS).**

> Immigrant factory workers whose employers know they are undocumented, and who are locked into the venues where they work, do not know on any given day when they will be allowed to leave, risk being fired if they do leave, and fear contacting law enforcement because they could lose their employment or be turned over to DHS for deportation.

When these types of trafficking offenses occur in the United States, victims would be eligible for representation under the VAWA 2005 Section 104 LSC amendments as victims of human trafficking occurring "in the United States."

LSC must also address the scope of the language "present in the United States" in the proposed 45 CFR § 1626.4(c)(2)(iii). As with the TVPA's use of "in the United States", and the T and U visa statutory requirements, eligibility for LSC funded assistance for trafficking victims under 45 CFR § 1626.4(c)(2)(iii) should not be premised on the victim being in the United States on an ongoing basis. The preamble to the T visa regulations discusses the situation of a trafficking victim leaving the United States and then returning as a result of continued victimization. 67 Fed. Reg. 4787. Such a victim should not be denied assistance because the trafficker opted to temporarily move the victim outside the United States, or the victim was otherwise compelled to leave and return. The T visa regulations make clear that a victim in this situation is still eligible for protection under the TVPA. *Id*. The preamble also discusses the possibility that a victim will leave the United States and return pursuant to a new incident of trafficking, and similarly makes clear that a departure from the United States does not deprive the victim of the protections of the TVPA. *Id.*

In its Further Notice of Proposed Rule-Making issued Feb. 5, 2014, LSC noted that its reading of "in the United States" in VAWA LSC 2005 is "consistent with the reading that LSC is applying to the term 'victim of severe forms of trafficking in the United States' in the TVPA." 79 Fed. Reg. 6863. This consistency means that the language extends to provide for brief or occasional departures from the United States for VAWA 2005 trafficking victims similar to that which is presently allowed for trafficking victims under the TVPA. As discussed above, the anti-abuse statutes that protect victims of crime uniformly allow for limited departures from the United States without forfeiting federal assistance. Victims of battery, extreme cruelty, and sexual assault under VAWA LSC 2005, along with VAWA self-petitioners, TVPA trafficking victims, and U and T visa holders are all permitted to leave the United States under limited circumstances without jeopardizing their eligibility for LSC funded legal assistance. The regulations should apply this approach equally to all victims receiving relief under LSC anti-abuse regulations including victims of trafficking that occurred in the United States who are eligible for legal representation under the VAWA 2005 Section 104 LSC amendments.

IV. Conclusion

NIWAP strongly supports LSC's decision in the current proposed regulations to not apply any physical presence requirement or any requirement that the abuse they suffered occurred in the United States to victims seeking LSC funded assistance as victims of battery, extreme forms of cruelty, and sexual assault, and for victims who qualify for U visa status. However, amendments need to be made as discussed in these comments to proposed 45 CFR §§

4626.4(c)(2)(ii) and (iii) to fully implement the level of access to services for victims of trafficking provided by Congress.

Amendments are needed to remove requirements in the proposed regulations that in any way reduce access to LSC funded assistance below what was in place for victims of severe forms of human trafficking based on the October 6, 2005 LSC program letter.

The final regulations must, at a minimum, also ensure that victims of human trafficking occurring in the United States can be represented by LSC funded programs without regard to whether the victim is in the U.S. at the time they seek representation, or whether they leave or return to the United States after representation is initiated. "In the United States" should be defined broadly to allow events in which trafficking, a portion of the trafficking, or the victim ever being present in the U.S. on account of trafficking, is sufficient for representation.

Finally, NIWAP urges LSC to think broadly about the ongoing commitment Congress has shown to victims of trafficking, sexual assault, battering or extreme cruelty, and U visa listed criminal activities as these regulations are finalized. There is no question that VAWA and the TVPA are broad statutes that Congress has continually expanded because they improve victim safety, facilitate successful prosecution of perpetrators, and because protection of immigrant crime victims is in the humanitarian interest of the United States.[7]

The immigration law protections for immigrant crime victims under U.S. anti-abuse laws are complex and virtually unnavigable for many immigrant crime victims without access to qualified trained lawyers. LSC funded programs are the larAo 4(msn61.9 588.82i3ETBTp 0 . 72.024 5mTp 0 . 7