

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: July 8, 2013

SUBJECT: Rulemaking to Amend 45 C.F.R. Part 1626/Alien Eligibility

This Rulemaking Options Paper (“ROP”) has been prepared by the Office of Legal Affairs (“OLA”), after consultation with LSC’s senior management. This ROP is intended to aid the Committee and the Board in the deliberation and decision-making process.

The ROP is organized as follows: a “Summary of Management Recommendation” section; a “Background” section with legal and programmatic context for the issues presented; a “Rulemaking Process Options” section, which sets forth available rulemaking process options; and a “Management Recommendation” section with Management’s recommendations on substance and process. A proposed rule, with preamble, is attached to this ROP.

I. Summary of Management Recommendation

Management makes four recommendations. First, Part 1626 of the LSC regulations, entitled “Restrictions on Legal Assistance to Aliens,” which has not been modified since 1997, should be updated to implement post-1997 statutes that allow recipients to provide legal assistance to certain groups of aliens beyond those identified as eligible in the current regulation. Second, a technical amendment should be made to a provision of the regulation establishing eligibility for persons granted withholding of removal from the U.S. in immigration proceedings to reflect relocation and amendment of the statutory withholding provision. Third, the appendix to the regulation, which lists examples of documents acceptable to establish eligibility for assistance and has not been revised since 2003, should be updated and removed from the regulation and issued as a program letter. This would allow for less burdensome modification in the future. The appendix does not have to be issued as part of the rule because it does not create or alter

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, Div. A, Title V, § 502(a)(2)(C), 110 Stat. 3009, 3009-60, (1997) (FY 1997 LSC appropriation). The FY 1997 amendment, sometimes referred to as “the Kennedy Amendment,” required a recipient to use non-LSC funds for such assistance. *Id.* The Kennedy Amendment permitted recipients to provide “related legal assistance” to the categories of aliens to whom eligibility was extended, and defined “related legal assistance” as “legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.” *Id.*

In 1997, LSC replaced Part 1626 with a new regulation that restated parts of the interim rule and implemented the Kennedy Amendment that expanded

¹ During the April 14, 2013 Operations and Regulations Committee open session, a question was raised about the use of the term “aliens.” To the extent that the statutes implemented by Part 1626 use the term aliens in identifying persons who are eligible for assistance, it is necessary that the regulation use this term as well.

eligibility and defined the “related legal assistance” that the statute authorized for eligible aliens under these amendments. 62 Fed. Reg. 19409 (April 21, 1997); 62 Fed. Reg. 45755 (August 29, 1997). The substantive provisions in Part 1626 have not been changed since 1997. Congress repeated the Kennedy Amendment in the FY 1998 LSC appropriation and has annually reincorporated it by reference thereafter. Pub. L. 105-119, Title V, § 502(a)(2)(C), 111 Stat. 2440, 2511, (1997) incorporated by Pub. L. 113-6, Div. B, Title IV, 127 Stat. 198, 268, (2013) (LSC FY 2013 appropriation).

In 2003, LSC added an appendix to Part 1626 that lists examples of documents acceptable to establish eligibility for assistance. 68 Fed. Reg. 55540 (Sept. 26, 2003). The appendix has not been changed since 2003.

Since the existing Part 1626 was adopted in 1997, Congress has expanded the eligibility of aliens for legal assistance from LSC grant recipients through the Trafficking Victims Protection Act of 2000 (“TVPA”), Pub. L. 106-386, §§ 107(b) and (e), 114 Stat. 1464, 1475, and 1477 (2000), as amended in 2003 by the Trafficking Victim Protection Reauthorization Act (“TVPRA”), Pub. L. 108-193, § 4, 117 Stat. 2875, 2877 (2003) codified at 22 U.S.C. § 7105 and 8 U.S.C. § 1101 ; the Violence Against Women and Department of Justice Reauthorization Act of 2005 (“VAWA”), Pub. L. 109-162, § 104, 119 Stat. 2960, 2978 (2006). In addition, the FY 2008 LSC appropriation expanded eligibility to forestry workers admitted or permitted to remain in the United States as H-2b workers under the Immigration and Nationality Act. Pub. L. 110-161, Div. B, Title V, § 540, 121 Stat. 1844, 1924 (2007). However, these statutory expansions of eligibility are not reflected in Part 1626. During its April 19, 2013, meeting, the Board of Directors approved the Operations and Regulations Committee recommendation to initiate rulemaking to amend Part 1626 to conform with statutory authorizations on assistance to aliens.

The statutes referred to in the preceding paragraph expand eligibility in the ways described below.

A. TVPA, TVPRA and VAWA Amendments

The TVPA as amended by the TVPRA in 2003 provides that the Legal Services Corporation “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.” 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 battery or extreme cruelty), 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, and the alien did not actively participate in such battery or cruelty.~~ without the active participation of the alien, has been battered or subjected to extreme cruelty 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)).

(b) DEFINITIONS— For purposes of subsection (a)(2)(C):

(1) The term ‘battered or subjected to extreme cruelty’ has the meaning given such term under regulations issued pursuant to subtitle

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.~~

Pub. L. 105-119, Title V, § 502(a)(2)(C), as amended by VAWA, Pub. L. 109-162, § 104.

The current LSC regulatory provision establishing eligibility for assistance for aliens who are victims of abuse, section 1626.4, was last amended in 1997. This provision does not reflect the following TVPRA and VAWA changes in the law under the present appropriations act:

1. The appropriations act amendments add the following categories of otherwise ineligible aliens to whom recipients may provide “related legal assistance:” (a) victims of sexual assault or trafficking in the United States, and (b) persons eligible for immigration relief under section 101(a)(15)(U) of the Immigration and Nationality Act. This latter category, sometimes referred to as “Section U” or “U visa” status, includes eligibility for victims of enumerated crimes, as well as for persons accompanying or following such victims and persons with information regarding such crimes who can assist in investigation and prosecution. Previously, only victims of battery or extreme cruelty by family members in the United States were eligible, and the current regulation reflects this prior, superseded description of eligible aliens.
2. The appropriations act amendments expand the currently recognized category of eligible aliens under the regulation, *i.e.*, aliens who are battered or subjected to extreme cruelty, in two ways that are not reflected in the regulation. First, prior to the amendments, it was required that the abuse occur in the United States, while now some victims of abuse are eligible regardless of where the abuse takes place.² Second, the amendments allow recipients to provide “related

² The categories differ with regard to the effect the location of abuse has on eligibility for assistance. Victims who are battered or subjected to extreme cruelty are eligible for assistance regardless of where abuse took place, while victims of trafficking must be subject to abuse in the United States in order to be

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 Fed. Reg. 45757 (August 29, 1997). The regulatory definition of “related legal assistance” should be updated to incorporate LSC’s interpretation of that term in Program Letter 06-2 and thus clarify for recipients the scope of assistance they are permitted to provide.

B. H2 Visa Holders-- Forestry Workers and Agricultural Workers - Consolidated Appropriations Act, 2008

The INA statutory “H-2” provision, 8 U.S.C. § 1101(a)(15)(h)(ii), establishes two categories of admissible non-immigrant workers in the United States temporarily: 1) agricultural workers, 8 U.S.C. §1101(a)(15)(h)(ii)(a) (“H-2a workers”), and 2) a more generalized category of workers “coming temporarily to the United States to perform other

eligible for assistance. Pub. L. 105-119, Title V, § 502(a)(2)(C), as amended by VAWA, Pub. L. 109-162, § 104. For the category of aliens who qualify for U visa relief as the result of criminal abuse, the criminal activity giving rise to eligibility must have “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)(i)(IV).

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)(11)(E), as amended, Pub. L. 110-161, Div. B, Title V, § 540. Section 305 is discussed below.

Section 1626.11, as currently in effect, establishes eligibility for H-2 agricultural workers and reads as follows:

§ 1626.11 H-2 agricultural workers

- (a) Nonimmigrant agricultural workers admitted under the provisions of 8 U.S.C § 1101(a)(15)(h)(ii), commonly called H-2 workers, may be provided legal assistance regarding the matters specified in paragraph (b) of this section.
- (b) The following matters which arise under the provisions of the workers specific employment contract may be the subject of legal assistance by an LSC-funded program:
 - (1) Wages;
 - (2) Housing;
 - (3) Transportation; and
 - (4) Other employment rights as provided in the worker’s specific contract under which the nonimmigrant worker was admitted.

45 C.F.R. § 1626.11.

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)(a) of the Immigration and Naturalization Act (8 U.S.C. § 1101 (a)(15)(H)(ii)(a)) for agricultural labor or service shall be considered to be an alien . . . for purposes of establishing eligibility for legal assistance under the Legal Services Corporation Act . . . but only with respect to legal assistance on matters related to wages, housing, transportation, and other employment rights as provided in the worker's specific contract under which the nonimmigrant was admitted.

Id.

Section 1626.11 states that "[n]onimmigrant agricultural workers admitted under the provisions of 8 U.S.C. 1101(a)(15)(h)(ii), commonly called H-2 workers, may be provided legal assistance" as provided in that section. 45 C.F.R. § 1626.11(a). This 1626 provision refers broadly to "H-2" agricultural workers and not specifically to the "H-2a" workers eligible under Section 305 of IRCA and Section 101 (a)(15)(H)(ii)(a) of the INA. This language could lead to confusion since H-2 covers a broader class of workers than H-2a. In order to identify the agricultural worker eligibility with precision, Section 1626.11 should be amended to specifically state that the workers eligible are those under Section 101(a)(15)(H)(ii)(a) of the INA.

Section 1626.11 should also be amended because it does not include the eligibility for H-2b forestry workers established by the FY 2008 LSC appropriation that amended Section 504(a)(11)(E) of the LSC appropriation

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 lawfully present or admitted to the United States. 45 C.F.R. § 1626.5. One category eligible under this section is “alien[s] who [are] lawfully present in the United States as a result of the Attorney General’s withholding of deportation pursuant to section 243(h) of the INA (8 U.S.C. § 1253(h)).” 45 C.F.R. § 1626.5(e).

The withholding provision has been relocated to another section of the INA, and is now codified at 8 U.S.C. § 1231(b)(3). The regulation should be amended to correctly identify the citation to the statutory basis for withholding.

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 (though LSC could submit subsequent revisions to the Board and to the public for comment).

III. Rulemaking Process Options

As to the substantive amendments in Part 1626, the options are to proceed under (a) notice and comment rulemaking without workshops, (b) notice and comment rulemaking with workshops, or (c) negotiated rulemaking. As to the amendments of the appendix, the options are to (a) retain the appendix as part of the regulation, which would require action by the board, publication, and a notice and comment period prior to each future updated appendix under the Rulemaking Protocol, or (b) to publish the information in the

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.