

CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

631 Howard Street, Suite 300 - San Francisco, CA 94105

Telephone (415) 777-2752 - FAX (415) 543-2752

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TO: Mark Freedman Senior Assistant General Counsel	FAX: 202-337-6519
FROM: Gladys Briscoe for Dan Torres	FAX: 415 543-2752

Additional notes:

Please see attached re Comments to Proposed Rule Change to 45 CFR Part 1626, Restrictions on Legal Assistance to Aliens.



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**CALIFORNIA RURAL LEGAL ASSISTANCE, INC.****FIGHTING FOR JUSTICE, CHANGING LIVES**

October 21, 2013

Sent via Facsimile (202) 337-6519

Mark Freedman, Senior Assistant General Counsel

Legal Services Corporation

3333 K Street NW

Washington, D.C. 20007

RE: Comments to Proposed Rule Change to 45 CFR Part 1626, Restrictions on Legal Assistance to Aliens

In response to LSC's request for comments to the proposed regulation, we respectfully submit the following recommendations.

I. LSC specifically seeks comment on whether the VAWA 2005 term "trafficking" differs from the VTVPA/TVPPRA/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.

The Supplementary Information Section of the Proposed Rule provides an overview of how the term "trafficking" was introduced into LSC Appropriations Legislation through the Violence Against Women Act of 2005 (VAWA 2005). It is important to consider the surrounding VAWA 2005 sections that amended existing LSC Appropriations Legislation, in particular the Savings Clause in section 104(b) of VAWA 2005. The Savings Clause added that "Nothing in the Act (VAWA 2005)...shall be construed to restrict the legal assistance provided to victims of trafficking and certain family members

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authorized under section 107(b)(1) the Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. section 7105(b)(1)).¹

Legal assistance provided to victims of "trafficking," as the term was used in VAWA 2005, minimally includes victims that are authorized for legal services under section 107(b)(1) the VTVPA of 2000.² The VTVPA, authorizes benefits and services to a "victim of severe forms of trafficking in persons" and to certain family members eligible for T visas under INA 101(a)(15)(T)(ii). Section 107(b)(1)(C) of the VTVPA defines a "victim of severe form of trafficking" as someone who is a victim of the crime of trafficking, as defined in 22 U.S.C section 7102, and is under 18 years of age; or is subject to certification by the Department of Health and Human Services as a someone who willing to assist with the investigation or prosecution of severe forms of trafficking (or cannot assist because of trauma); and has a pending good faith T visa application or whose physical presence in the United States is needed by prosecutors.³

To further refine this definition, it is important to look at the requirements for a T visa.⁴ Under 8 U.S.C. 1101(a)(15)(T), the first requirement for establishing T-visa eligibility is

¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Section 104(b).

² 22 U.S.C. section 7105(b)(1).

³ 22 USC 7105(b)(1)(C) "Definition of victim of a severe form of trafficking in persons. For the purposes of this paragraph, the term "victim of a severe form of trafficking in persons" means only a person--

(i) who has been subjected to an act or practice described in section 103(8) [22 USCS § 7102(8)] as in effect on the date of the enactment of this Act [enacted Oct. 28, 2000]; and

(ii) (I) who has not attained 18 years of age; or

(II) who is the subject of a certification under subparagraph (E).

(D) [Deleted]

(E) Certification.

(i) In general. Subject to clause (ii), the certification referred to in subparagraph (C) is a certification by the Secretary of Health and Human Services, after consultation with the Attorney General and the Secretary of Homeland Security, that the person referred to in subparagraph (C)(ii)(II)--

(I) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or is unable to cooperate with such a request due to physical or psychological trauma; and

(II)

(aa) has made a bona fide application for a visa under section 101(a)(15)(T) of the Immigration and Nationality Act [8 USCS § 1101(a)(15)(T)], as added by subsection (e), that has not been denied; or

(bb) is a person whose continued presence in the United States the Attorney General and the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.

⁴ 8 USC 1101(a)(15) (T). "(T) (i) subject to section 214(o) [8 USCS § 1184(o)], an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

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that the applicant must establish that he or she meets the definition of “a victim of severe forms of trafficking in persons” as defined in section 103 of the VTVPA of 2000 (22 U.S.C. section 7102).⁵ Section 103 of the VTVPA (22 USC 7102) defines the term “severe forms of trafficking” as sex trafficking induced by force, fraud or coercion, sex trafficking of a minor, or labor trafficking induced by force, fraud or coercion.⁶ Section 103 of the VTVPA contains separate definitions for the terms “victims of trafficking” and “victims of severe forms of trafficking.”⁷ The term “victims of trafficking” includes the

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000 [22 USCS § 7102];

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III) (aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request de-scribed in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(iii) [Deleted]”

⁵ VTVPA section 103, amending 22 U.S.C. section 7102.

⁶ 22 U.S.C. section 7102:

“(9) Severe forms of trafficking in persons. The term “severe forms of trafficking in persons” means--

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) 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.

(10) Sex trafficking. The term “sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”

⁷ 22 U.S.C. section 7102:

“(14) Victim of a severe form of trafficking. The term “victim of a severe form of trafficking” means a person subject to an act or practice described in paragraph (9).

(15) Victim of trafficking. The term “victim of trafficking” means a person subjected to an act or practice described in paragraph (9) or (10).”

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terms “victims of severe forms of trafficking” and “victims of sex trafficking.”⁸ This broader definition of “victims of trafficking” apparently includes victims of sex trafficking that are not necessarily minors or induced into sex trafficking by force, fraud or coercion.⁹

The Savings Clause in VAWA 2005’s amendment to LSC’s Appropriations Legislation used the phrase “victims of trafficking” but it linked the term to the VTVPA’s section 107(b), which refers to “victims of severe forms of trafficking.” The T visa requirements also refer to the VTVPA’s definition of “victims of severe forms of trafficking.” More recently, although not binding here, Congress passed VAWA 2013, in which it inserted a Clarification Clause regarding the legal services authorized by VAWA grantees. In the Clarification Clause, VAWA 2013 provides that “Victims services and legal assistance under this title also include services and assistance to victims of severe forms of trafficking as defined in section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).”¹⁰

Because the overarching approach of these statutes, VAWA 2005, INA/T visa, and more recently VAWA 2013, is to link and cross-reference the term “victims of trafficking” to the VTVPA’s definition of “victims of severe forms of trafficking,” it is the VTVPA’s definition of “victims of severe forms of trafficking” that controls for purposes of the proposed regulation. Since the VTVPA’s definition controls, there is no need for LSC recipients to distinguish between the two terms for prohibited trafficking and would only need sufficient evidence to conclude that the person has suffered the crime of trafficking and is either under the age of 18 or is subject to certification by the Department of Health and Human Services as willing to assist (or is unable to assist to due to trauma) with the investigation or prosecution of trafficking.

⁸ Id.

⁹ Id. Note that the term “sex trafficking” in paragraph (10) is not limited to acts induced by force, fraud or coercion or acts involving a victim under the age of 18.

¹⁰ Violence Against Women Reauthorization Act of 2013, section 3.

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II. Predicate activity for "trafficking" does not have to take place exclusively in the United States.

Even a narrow interpretation of Public Law 104-134, section 502(a)(2)(C), as amended by VAWA 2005, would allow for assisting victims of trafficking who suffered the predicate offense outside of the United States. That is because section 502(a)(2)(C) offers two options for assisting victims of trafficking. It contains language that allows legal assistance to victims of "trafficking in the United States" or an immigrant who "qualifies for immigration relief under section 101(a)(15)(U) of the INA. As the proposed regulation acknowledges, there is no requirement that a victim who qualifies for U visa suffer the predicate offense of trafficking inside the United States. At the very least, the proposed 1626 regulation should be drafted to acknowledge the possibility that section 502(a)(2)(C) allows for assistance to victims of trafficking who suffered a predicate offense of trafficking outside of the United States and are eligible for a U visa.

But a more comprehensive reading of section 502(a)(2)(C) in the context of the T visa statute leads to a broader interpretation of where the predicate offense can occur. Section 502(a)(2)(C)'s language that "an alien who has been...a victim of... trafficking in the United States" may refer to the T visa requirement that the victim be present in the United States to qualify.¹¹ But that would not require that the predicate offense of trafficking occur within the United States. Indeed the T visa statute itself qualifies a victim who is allowed to enter the United States by the U.S. government for purposes of participating in the investigation or judicial process of a trafficking offense.¹² That victim would be in the United States for purposes of his or participation, but qualifies for a T visa on the basis of the predicate offense occurring outside of the United States. This reading of the statute is supported by the Congressional findings in the VTVPA which created the T visa. When Congress passed the VTVPA it found that trafficking is a "transnational crime with national implications."¹³ Therefore, for purposes of the

¹¹ 8 U.S.C. section 1101(a)(15)(T).

¹² 8 U.S.C. section 1101(a)(15)(T)(i)(II).

¹³ VTVPA of 2000 section 102(b)(24): " Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the

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proposed regulation it would be contrary to Congressional intent to limit legal services to victims of trafficking who suffered a predicate offense in the United States exclusively.

III. *LSC specifically requests comment on the issue regarding presence in the United States.*

We agree that there should be no requirement that the noncitizen applicant be physically present in the United States when receiving assistance based on an anti-abuse statute.

The U visa statutory provision does not impose a physical presence requirement.¹⁴ Additionally, the section 502(a)(2)(C) of LSC's Appropriations Legislation, as amended by VAWA 2005, permits recipients to provide legal assistance to any person qualified for a U visa. Recently, LSC issued an advisory opinion in which it determined that U visa derivative applicants can be represented when not present within the United States.¹⁵ This well-reasoned opinion supports LSC's proposed rule here as well.

IV. *LSC seeks comment on how an alien, eligible by means of VAWA, U visa or T visa, may prove up eligibility.*

As the proposed rule acknowledges, establishing proof that a crime has occurred and that a noncitizen is a victim to such circumstances may not always be accessible at the intake stage of a case. In the initial stages, a statement from the victim should be sufficient for purposes of establishing eligibility for legal assistance. It is appropriate that a standard based on Rule 11 of the Federal Rule of Civil Procedure be adopted for filing and continuing with claims. Immigrants do not have readily available access or sufficient

United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims."

¹⁴ 8 U.S.C. §1101(a)(15)(U), also see 8 CFR §214.14.

¹⁵ Legal Services Corporation Advisory Opinion # AO-2013-03, Derivative U Visas for Family Members of U Visa Applicants Represented by LSC Recipients, pg. 1 (June 13, 2013).

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understanding of how to operate different channels of assistance within the United States, making it very unlikely that she or he will have actual documentation to establish her or his eligibility. It would be fair to recognize this reality at the commencement of representation to this individual. A victim of abuse could be put through more harm or remain in harm's way if expected to produce documents and evidence of abuse at the early stages of intake and investigation. Given the vulnerability of immigrant victims of abuse, fairness would weigh in favor of allowing a statement from the victim as proof of establishing a prima facie case and meeting the eligibility requirements for representation. Once representation is established, a grantee could assist the victim in collecting documents and otherwise assist the victim with contacting and cooperating with law enforcement.

We hope these comments are helpful in your drafting of the regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel Torres', with a long horizontal flourish extending to the right.

Daniel Torres, Esq.

(415) 777-2846 ext. 322