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Re: Comments to Further Notice of Proposed Rulemaking for Proposed Rule Updates to the Legal Service Corporation 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.

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The second part of these comments addresses the various ways victims of human trafficking can qualify for assistance from LSC 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 perpetrated and the United States in order to qualify for LSC funded assistance under the anti-abuse statutes.

We will also discuss the section that covers victims of severe forms of trafficking; this section should make clear that there is no ongoing presence requirement for trafficking victims who are eligible for LSC assistance under the TVPA. This is in conformity with the T visa implementing regulations, the LSC Program Letter for Trafficking Victims, and the savings clause designed to ensure that the VAWA LSC 2005 amendments did not, in any way, limit the access to LSC funded assistance to victims of severe forms of human trafficking already in effect on the date the VAWA 2005 was enacted.

II. The Term “in the United States” in VAWA 2005 Section 104 LSC Appropriation Amendment’s Expansion of LSC Assistance to Aliens Applies Only to “Trafficking”

We strongly support Legal Services Corporation’s current application of the term “in the United States” from the VAWA 2005 Section 104 LSC appropriations amendment solely to the crime of trafficking. As the FNPRM preamble explained, “VAWA 2005 removed the Kennedy Amendment’s restriction on the use of LSC funds to provide representation to aliens who are eligible for services under VAWA 2005.” 79 Fed. Reg. 6860. The application of the term “in the United States” to victims of battering or extreme cruelty, sexual assault or other U visa qualifying crimes would be inconsistent with the statutes governing U visa applicants, VAWA self-petitioners, VAWA suspension of deportation, VAWA cancellation of removal, battered spouse waivers, Immigration and Nationality Act Section 106 battered spouse work authorization cases, and qualified battered immigrant public benefits eligibility under 8 U.S.C. 1641. Such an application would prevent LSC grantees from representing immigrant victim applicants who qualify for these forms of immigration relief and public benefits access in a wide range of legal cases connected to the abuse. This result would be contrary to congressional intent.

A. Immigrants Who Qualify for U Visas

The term “in the United States” should not apply to the victims of battery, extreme cruelty, sexual assault, or victims who qualify for U visas. LSC was correct in its proposed regulation in taking the position that immigrant victims could receive representation from LSC funded programs whether or not all, some, or any of the abuse occurred in the United States and whether or not the victim remained in, left, or returned to the United States.

The VAWA 2005 Section 104 LSC appropriations amendment codifies the ability of LSC funded programs to represent immigrant victims in a wide range of legal cases connected to the victimization.² The VAWA LSC 2005 Section 104 LSC appropriations amendment allowed for

² For our prior comments on what should be included as related legal assistance, see LESLYE E. ORLOFF, BENISH ANVER, & CHARLES PALLADINO, NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, COMMENTS ON PROPOSED RULE UPDATES TO THE LEGAL SERVICES CORPORATION REGULATION ON LEGAL ASSISTANCE TO ALIENS. 45 CFR PART 1626- 78 FED. REG. 51696, at page 12 (Aug. 21, 2013), submitted to LSC on October 21, 2013.

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 immigrants 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).

Further, if the term “in the United States” were applied to the U visa qualifying crimes of domestic violence (as defined under state laws or under immigration law as “battering or extreme cruelty”) and sexual assault, it would create an internal inconsistency with the eligibility of U visa victims for LSC representation. U visa qualifying crimes include abusive sexual contact, domestic violence, incest, prostitution, rape, sexual assault, and sexual exploitation, among others. INA § 101(a)(15)(U)(iii). Many of these activities would qualify as battery, extreme cruelty, and sexual assault, but the U visa qualifying criminal activity expressly does not need to occur in the United States. 72 Fed. Reg. 53021. Approximately 76% of U visa victims are victims of domestic violence, rape, or sexual assault.⁴ For the amendments made by Section 104 to have internal consistency with VAWA 2000 and VAWA 2005’s language that expands and improves upon the U visa protections, the term “in the United States” cannot be applied to applicants who qualify for U visas either with regard to the location of the criminal activity or with regard to the location of the victim at the time of application for assistance from an LSC funded program or any time thereafter.

The U visa itself and the DHS implementing regulations and policies for the U visa do not impose geographic restrictions on where the crime occurred, or whether the victim is in or outside of the U.S. at the time of filing or anytime thereafter. No such restrictions should be imposed by LSC on this group of applicants.

B. VAWA Self-Petitioners, VAWA Cancellation, VAWA Suspension of Deportation, Battered Spouse Waiver Applicants, INA Section 106 Work Authorization Applicants and Other Immigrants Battered or Subjected to Extreme Cruelty.

The term “in the United States” should not apply to battery and extreme cruelty. LSC was correct in the proposed regulation in making clear that immigrant victims of battering or extreme cruelty could receive representation from LSC funded programs whether or not all, some, or any of the abuse occurred in the U.S., and whether or not the victim remained in, left, or returned to the United States. This is because there is a wide range of protections of immigration and public benefits protections available to immigrant victims of battering or extreme cruelty that do not depend upon the applicant being physically in the United States in order to file and do not require that battering or extreme cruelty that was the basis for the immigration application have occurred in the United States.

For example, though VAWA self-petitions typically require the petitioner to be in the United States when filing, exceptions allow for petitions from outside the United States if the incident took place in the United States⁵ or the abuser was a member of the government or a member of the uniformed services. INA § 204(a)(1)(A)-(B). The petitioners are also not barred from leaving and attempting to reenter the United States if there is a connection to the abuse and

⁴ Leslye E. Orloff & Paige E. Feldman, National Survey on Types of Criminal Activities 2 (Nov. 29, 2011) (Domestic violence 45.9%; Rape, sexual assault, incest, trafficking 30.4%), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/U-visa-recipients-criminal-activity-survey.pdf>

⁵ The ability to file a VAWA self-petition from outside of the United States when the battering or extreme cruelty or part of the pattern of the battering or extreme cruelty occurred in the United States provides a parallel for what we believe Congress did in Section 104 of VAWA 2005 LSC amendments. This would ensure that victims of trafficking that occurred in the U.S., that part of the pattern of trafficking occurred in the U.S. or if at some point the victim was in the U.S. on account of the trafficking that trafficking victim could be represented by LSC funded programs even when the trafficking victim did not meet the definition of a severe form of human trafficking or qualify for a U visa as a trafficking victims.

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.

III. Trafficking Victim Eligibility for LSC Representation Under the Anti-Abuse Statutes

This discussion is provided in three parts, with separate commentary on each provision of proposed 45 CFR §1626.4(c)(2) (“Relationship of alien to the United States”) and the categories of victims of trafficking to which they apply.

A. Physical presence under proposed 45 CFR § 1626.4(c)(2)(i): Victims of human trafficking who are U visa eligible or who have been subject to battering, extreme cruelty or sexual assault.

The regulation correctly states a victim does not need to be present in the United States to qualify for representation as a victim of battery, extreme cruelty, or sexual assault, or as a crime victim eligible for a U visa. Any victim of human trafficking who qualifies for a U visa or is a victim of battery, extreme cruelty, or sexual assault would qualify for LSC funded representation without any geographic or physical presence limitations as discussed above. LSC’s proposed rule for 45 CFR § 1626.4(c)(2)(i), which expressly rejects a presence requirement for victims who have been battered or subjected to extreme cruelty, victims that qualify for U visa status, and victims of sexual assault, is consistent with the anti-abuse statutes and supported by NIWAP. As discussed in section II above, there is no requirement that a victim be present in the United States in order to obtain relief as a victim of battery, extreme cruelty, or sexual assault under U.S. immigration laws. Similarly, there is no physical presence in the United States requirement in order to obtain U visa status under INA § 101(a)(15)(U). Accordingly, there should be no presence requirement for obtaining legal assistance through an LSC funded organization in connection with these statutes.

B. Physical presence under proposed 45 CFR § 1626.4(c)(2)(i): Victims of human trafficking who are U visa eligible or who have been subject to battering, extreme cruelty or sexual assault.

The regulation correctly states a victim does not need to be present in the United States to qualify for representation as a victim of battery, extreme cruelty, or sexual assault, or as a crime victim eligible for a U visa. Any victim of human trafficking who qualifies for a U visa or is a victim of battery, extreme cruelty, or sexual assault would qualify for LSC funded representation

without any geographic or physical presence limitations as discussed above. LSC's proposed rule for 45 CFR § 1626.4(c)(2)(i), which expressly rejects a presence requirement for victims who have been battered or subjected to extreme cruelty, victims that qualify for U visa status, and victims of sexual assault, is consistent with the anti-abuse statutes and supported by NIWAP. As discussed in section II above, there is no requirement that a victim be present in the United States in order to obtain relief as a victim of battery, extreme cruelty, or sexual assault under U.S. immigration laws. Similarly, there is no physical presence in the United States requirement in order to obtain U visa status under INA § 101(a)(15)(U). Accordingly, there should be no presence requirement for obtaining legal assistance through an LSC funded organization in connection with these statutes.

When Congress passed VAWA 2005's LSC appropriation amendments, it included a savings clause that stated that nothing in the VAWA 2005 LSC appropriation amendments shall restrict the existing right to LSC representation of trafficking victims. Pub. L. 109-162, January 5, 2006 § 104(b). Congress included this savings clause to ensure that the VAWA 2005 Section 104 LSC amendments would maintain all of the rights trafficking victims had under Program Letter 5-2, and that the amendments made by VAWA would not result in any restrictions on access to LSC funded representation for victims of severe forms of human trafficking that did not exist in the program letter prior to the passage of VAWA LSC 2005.

The T visa implementing regulations provide a broad and inclusive definition of "in the United States" as part of the definition of victims of severe forms of trafficking that embraces victims who have departed the United States. The LSC's Program Letter from October 6, 2005, which provides the eligibility requirements for LSC legal assistance under the TVPA prior to the passage of the VAWA 2005 Section 104 LSC appropriations amendments, does not require TVPA trafficking victims to be present in the United States. When the VAWA 2005 Section 104 LSC appropriations amendments were passed by Congress in January 2006, and expanded the categories of trafficking victims eligible for LSC funded assistance, Congress expressly provided a savings clause to ensure no one who was previously eligible under the LSC program letter would lose representation as a result of the VAWA amendments. Taken together, these three documents make clear that trafficking victims eligible for assistance as victims of severe forms of trafficking under the TVPA are not required to maintain ongoing presence in the United States.

The Trafficking Victims Protection Act provides that eligibility for LSC funded services is based on a person's status as a victim of a severe form of trafficking or eligibility for a T visa under INA § 101(a)(15)(T)(ii).

[T]he Board of Directors of 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).

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 are “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.” INA § 101(a)(15)(T)(i)(II). The preamble to the T visa regulations, in discussing the nature of “present in the United States,” anticipates that the T visa victim may not always be in the United States. 67 Fed. Reg. 4787 (“Aliens who have traveled out of the United States and then returned . . . will have to show that their presence here is the result of continued victimization”). Thus, it is apparent that the victim need not remain present in the United States on an ongoing basis as a requirement of T visa eligibility.

Likewise, there is no ongoing presence requirement during the process of applying for lawful permanent residency while in T status. T visa lawful permanent residency applicants are permitted to depart the United States for up to 90 days at a time, so long as they are not absent from the U.S. for a total of more than 180 days during the 3 years preceding adjustment of status to permanent residence. INA § 255(i)(3). T visa lawful permanent residency applicants may leave the United States for periods longer than 90 days or aggregate periods longer than 180 days if the absence is necessary for the investigation or prosecution of trafficking, or if an involved official certifies that the absence was otherwise justified. *Id.* at § 255(i)(3)(A)-(B). Again, this demonstrates that a trafficking victim under the TVPA does not need to remain present in the United States on an ongoing basis. The same analysis should apply to the eligibility of trafficking victims for LSC funded legal assistance.

LSC’s existing guidance on the eligibility of TVPA trafficking victims for LSC assistance makes clear that presence in the United States is not a requirement for this group of victims. On October 6, 2005, Legal Services Corporation issued Program Letter 5-2 regarding the eligibility of TVPA trafficking victims for legal services paid for with LSC funds. Helaine M. Barnett, *Letter to All LSC Program Directors Re: Eligibility of Immigration Victims of Severe Forms of Trafficking and Family Members for Legal Services*, Oct. 6, 2005. The LSC Program Letter for trafficking victims updates the previous program letter to include the eligibility expansion for family members of victims provided in the 2003 TVPA amendments. The letter specifies when LSC grantees may provide legal assistance to TVPA trafficking victims. For instance, it makes clear that TVPA victims are eligible for legal services “in obtaining certification and/or a visa as well as . . . with other legal issues.”⁶ The letter also discusses the steps that grantees can take to verify that a TVPA trafficking victim is eligible for LSC assistance. Nowhere does the letter say that victims must be “in the United States” in order to receive LSC assistance. In fact, the words “in the United States” never appear in the program letter. It would be wrong for LSC to introduce a new presence requirement for this group of victims with the new CFR regulations.

⁶ As discussed above in Section II, victims of crimes who are eligible for U visas are also eligible for related legal assistance with respect to non-immigration matters, as well as with immigration matters other than U visa petitions. LSC eligibility established by the VAWA 2005 amendments allows funds to be used for non-U visa legal assistance *because of U visa eligibility*, regardless of whether the crime victim applies for a U visa. Helaine M. Barnett, *Letter to All LSC Program Directors Re: Violence Against Women Act 2006 Amendments*, Feb. 21, 2006.

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 LSC 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 United States, and this should be made clear in the final publication of 45 CFR § 2426.4(c)(2)(ii).

C. Physical presence under 45 CFR § 1626.4(c)(2)(iii): This section should be limited to victims of trafficking who do not qualify for U or T visas, and thus are only eligible for LSC representation as trafficking victims under the VAWA 2005 Section 104 LSC amendments.

Amendments to the proposed LSC regulations are needed to ensure consistency with the TVPA and VAWA statutes' requirements for obtaining LSC funded legal assistance. Victims of severe forms of human trafficking who qualify for T visas or continued presence are not subject to an ongoing presence requirement in order to obtain LSC funded legal assistance. The only group of trafficking victims for whom a nexus with the United States is required is victims whose experience of trafficking is connected to the United States on some way and who are not eligible for representation as victims eligible for U or T visas, or as victims of battering, extreme cruelty or sexual assault. As written, the proposed rule conflicts with the requirements of VAWA and the TVPA.

As an initial matter, LSC's proposed rule at § 1626.4(c)(2)(iii), which provides that victims of trafficking under law "must be present in the United States" to receive LSC funded legal assistance, is inconsistent with the proposed 45 CFR § 1626.4(c)(2)(i) as currently written. Section 1626.4(c)(2)(iii) applies to victims of trafficking under law *regardless of whether they qualify for a U visa*. Section 1626.4(c)(2)(i) makes clear that victims who are eligible for U visas are not subject to a presence requirement. Therefore, Section 1626.4(c)(2)(iii) requires what 1626.4(c)(2)(i) expressly does not—presence in the United States for trafficking victims who qualify for U visas. One way to address this inconsistency is to insert the language "and not covered by 1626.4(c)(2)(i) or (ii)" into this section of the rule.

The proposed 45 CFR § 1626.4(c)(2)(iii) also includes trafficking victims who hold T visas. T visa holders are more appropriately included under § 1626.4(c)(2)(ii), discussed above,

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).**

1626.4(c)(2): Relationship of alien to the United States.

(i) An alien defined in § 1626.2(b), (h), or (k)(1) need not be present in the United States to be eligible for assistance under this section.

(ii) An alien defined in § 1626.2(j) must be present in the United States on account of such trafficking to be eligible for assistance under this section.

(iii) An alien defined in § 1626.2(k)(2), **who does not qualify for representation under 1626.4(c)(2)(i) or (ii)**, must demonstrate that they have been a victim of trafficking in the United States, that a portion of the trafficking or pattern of trafficking they suffered took place in the United States, or that they now or in the past have been present in the United States on account of trafficking to be eligible for assistance under this section.

1. Victims of trafficking occurring in or connected to the United States

With the above changes, the requirement that a trafficking victim be “present in the United States to be eligible for assistance” would continue to apply to victims of trafficking who do not qualify for U or T visas and who do not qualify for LSC representation as victims of battering, extreme cruelty, or sexual assault. This group includes, for instance:

- Trafficking victims who are adults but have not been subjected to force or coercion (as required for a T visa);
- Trafficking victims who cannot show that they would be subject to extreme hardship if forced to return to their home countries (as required for a T visa);
- Trafficking victims who cannot show they are able to assist law enforcement in connection with their victimization (as required for a U visa). Examples include:
 - A nanny whose passport is stolen by the family she serves and whose family is threatened with violence if she approaches the police, or

- 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 un navigable for many immigrant crime victims without access to qualified trained lawyers. LSC funded programs are the largest resource for legal representation for poor and low income crime victims in the country. When LSC finalizes these regulations, it should do all it can to promote access to legal services for immigrant crime victims, and do so in a manner that will reduce the complexity for LSC programs who serve victims under these anti-abuse regulations. LSC should ensure that victims can easily access the legal assistance they desperately need, and ensure that victims receive the legal assistance they need so that the laws Congress created and DHS and other federal agencies are implementing *really do make a difference* in the lives of immigrant crime victims.

⁷ See Section 1513(a) of the Violence Against Women Act of 2000, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-legislative-history/congressional-record-violence-against-women-act/congressional-record-vawa-2000/VAWA%202000%20U%20visa%20Findings%20and%20Purpose.pdf/view>