

To: Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation
From: Leslye E. Orloff, Benish Anver, and Charles Palladino, National Immigrant Women's Advocacy Project, American University, Washington College of Law
Date: October 21, 2013
Re: Comments on Proposed Rule Updates to the Legal Service Corporation Regulation on Legal Assistance to Aliens. 45 CFR Part 1626 – 78 Fed.Reg. 51696 (Aug. 21, 2013)

INTRODUCTION

These comments are divided into three sections.

The first section (Section I) of these comments provides support and justification for the many aspects of the proposed rule in which LSC's proposed regulations correctly implement the Violence Against Women Act (VAWA) and Trafficking Victims Protection Act (TVPA) improvements designed to ensure that the full range of immigrant crime victims that receive protection under these statutes gain access to assistance from LSC funded programs.

The second section (Section II) of these comments specifically addresses questions asked by LSC and that the regulations seek input on from the field and experts on immigrant crime victims' needs and immigrant crime victims' legal rights.

The third section (Section III) of these comments addresses areas in which we seek amendments to the proposed regulations in the final regulations. Some of the issues we address in this section are minor (e.g. adding missing statutory references to the rule) and at least one is very significant – recordkeeping requirements that are inconsistent and incompatible with VAWA federal immigrant law and VAWA confidentiality and that could create unintended legal ethical issues.

Finally, as part of these comments we are submitting a number of Appendices that we incorporate by reference to be included in these comments and that we refer to as providing further support for the comments we provide here.

I. The Proposed Regulations That Will Improve Access to Legal Assistance and Access to Justice of Immigrant Victims That Correctly Implement Congressional Intent

1. Creation of New “Anti-Abuse” Category of Immigrants Eligible for Legal Assistance from LSC Funded Program

We strongly support Legal Services Corporation's (LSC) choice in the proposed regulations to create a separate eligibility basis for legal representation for persons to whom alienage restrictions do not apply. Clients eligible under the Anti-abuse laws can receive LSC representation independent of immigration status. § 1626.4 *Permissible assistance to aliens under anti-abuse victim protection laws* implements the Violence Against Women Act's 2006 amendments that were designed to ensure that LSC funded programs could use any source of the program's funding, including LSC funds, to represent an immigrant victim of domestic violence, sexual assault, human trafficking, or other U visa listed criminal activities without regard to the immigrant applicant's immigration status.

The proposed rule contains the amendments needed to clarify immigrant victims of abuse, battering, extreme cruelty, trafficking, sexual assault, and other U visa criminal activities who were previously ineligible for assistance under the prior statutes and regulations are now eligible to receive representation from LSC funded programs. The approach taken in the proposed regulations implements Congressional intent when Congress expanded access to assistance from LSC funded lawyers and programs.

LSC funded programs include some of the nation's leading providers of legal assistance to immigrant victims in VAWA, T, and U visa immigration cases. Revising the current regulation to clarify crime victim eligibility could encourage many more LSC funded programs to undertake this important work. This is particularly important for immigrant crime victims because many LSC funded programs are the only legal services option available to them in many states.

The change included in the proposed rule will provide much needed clarification that had been lacking in the seven years since the passage of VAWA 2006 and the issuance of LSC Program Letter 06-02. Nationwide research conducted by the National Immigrant Women's Advocacy Project (NIWAP), American University, Washington College of Law, found that significant numbers of immigrant victims of abuse, battering, extreme cruelty, sexual assault, trafficking, and other criminal activities were being turned away from LSC funded programs. Many programs in jurisdictions across the country remained unsure about which, if any, immigrant crime victims they could represent because of the language in the previous regulation. The proposed regulation addresses this problem properly so that many more immigrants have adequate access to legal services. NIWAP's full report on immigrant access to LSC services is included in these comments at [Appendix I](#).

2. Access to LCS Representation for Family Members of Immigrant Victims

VAWA and the TVPA are statutes protecting victims that, with each statutory amendment by Congress, have expanded the family members of victims that can be included in their applications and be protected from perpetrators. The ways in which immigrant victims receiving the various forms of immigration relief under VAWA and TVPA can include family members varies by statute, but the underlying premise has been consistent –family members need protection. The proposed LSC rule correctly offers access to legal assistance both for the crime

victims themselves and for their children, spouses, siblings, or adult sons or daughters that they can include in their immigration applications. These family members can qualify under the proposed regulations for legal assistance independent of whether their battered immigrant, sexual assault, trafficking, or U visa listed crime victim principal petitioner is also seeking legal services. In recent years, a growing number of families in the U.S. are “mixed-status” families that contain at least one undocumented immigrant and one citizen family member.¹ Foreign born persons make up 13% of the U.S. population² and 24% of children ages 17 and under live in households with at least one immigrant parent.³ This approach helps ensure that immigrant crime victims and their family members receive legal assistance in the broad array of related legal assistance a family of a crime victim may need. This helps assure, for example, in the custody or benefits context, all children of a battered immigrant or other crime victims will have access to the representation they need whether the child was born in the U.S. or was foreign born and will be included in their parent’s application for immigration relief.

3. Regulation confirms that LSC funded programs can use LSC funds to represent victims whom anti-abuse laws were designed to benefit

The proposed regulations clarify that LSC funded programs can use LSC funds and any other source of funding the LSC funded agency receives to represent victims who qualify for services under 1626.4. A central tenet of the VAWA 2005 amendments was to ensure that LSC funded programs could represent immigrant crime victims and their children under Anti-Abuse statutes using any source of funding available to the program, including LSC funds. This has been a significant area of confusion for programs and a major reason programs have been turning away immigrant crime victims. The clarity of the language in the regulation and the preamble on this issue will be very useful to programs and the victim services agencies they work with. This clarification may also increase LSC funded programs’ competitiveness in applications for other funding (e.g. VAWA, VOCA) that will be interested in seed funding work by LSC program who may then be able to continue the work on behalf of victims with LSC and other funds the agencies receive.

4. Proving Battery, Extreme Cruelty, Sexual Assault, Trafficking or Victimization by Any of the Listed U Visa Criminal Activities

The preamble to the regulations explaining “evidentiary support under paragraph € of the proposed rule states that LSC will use the VAWA *any credible evidence* standard used by DHS and other federal agencies in cases domestic violence and other crime victims. This “any credible evidence” standard is the correct standard to use. However, the discussion of any

¹ Pew Hispanic Center, A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized (January 29, 2013), available at: http://www.pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf

² American Community Survey 2011, U.S. Census Bureau.

³ Emma Britz and Jeanne Batalova, US in Focus: Frequently Requested Statistics on Immigrants and Immigration in the United States (Migration Policy Institute, January 2013), available at: <http://www.migrationinformation.org/USfocus/display.cfm?id=931#7>

credible evidence is only included in the preamble and not in the actual text of the rule. We strongly believe that the text of the regulation should include and name the any credible evidence standard as the evidentiary standard that LSC will use for eligibility determinations under 1626.4.

By including the “any credible evidence” standard in the regulation, LSC will be using the same standard used by DHS, DOJ, and HHS in cases of immigrant crime victims protected by VAWA and the Trafficking Victims Protection Act.⁴ LSC programs should avoid requiring particular documents to prove abuse and for applicants who prove abuse or crime victimization the program should not require collection or review of the victim’s immigration documentation, if any.

Immigrant crime victims applying for assistance and legal representation from an LSC funded program need to be able to establish eligibility using the “any credible evidence standard,” which has been consistently applied in VAWA, T, and U visa immigration cases.⁵ The information upon which LSC programs rely regarding each of these forms of crime victimization should be listed in a notation to the file, but documentary evidence need not be required or retained.

Agency intake procedures can direct that a notation be made to the file of the factual basis for eligibility determination including credible evidence of abuse from the victim’s statements or injuries observed by the interviewer. Evidence of battery or extreme cruelty or crime victimization should be conducted using the “any credible evidence” standard prescribed by Congress to all VAWA adjudicators. Using this standard will promote consistent adjudications by using the same standard under which DHS adjudicates matters.⁶ This standard requires a legal services provider to accept *any* evidence provided, including affidavits from the applicant⁷ or others, to demonstrate battery or extreme cruelty or crime victimization.⁸

The Interim Guidance issued by the Attorney General governing benefits adjudications in cases of immigrant victims instructs that:

⁴ For a complete legislative history of the VAWA any credible evidence standards, see Leslye E. Orloff, Kathryn C. Isom, and Edmundo Saballos, *Mandatory U Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules- A Call for Consistency*, 10 GEO. J. GENDER & L. 619 (2010).

⁵ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v),(vi), (vii), 8 C.F.R. § 244.9 (a). For a complete history of the VAWA any credible evidence standard as it has been applied and interpreted by federal agencies as well as the full legislative history of the any credible evidence standard, see Leslye E. Orloff, Kathryn C. Isom, and Edmundo Saballos, *Mandatory U Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules- A Call for Consistency*, 10 GEO. J. GENDER & L. 619 (2010).

⁶ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v),(vi), (vii); 8 C.F.R. § 244.9 (a).

⁷ A victim’s story, told in her own words, is one of the primary methods of proving battery or extreme cruelty. Both the Department of Homeland Security (DHS) and Health and Human Services (HHS) often considers a victim’s credible story as sufficient proof of abuse. Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 63 Fed. Reg. 61344, 61369 (November 17, 1997).

⁸ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v),(vi), (vii), 8 C.F.R. § 244.9 (a).

an applicant may submit his or her own affidavit, under penalty of perjury (it does not have to be notarized), describing the circumstances of the abuse, and the benefit provider has the discretion to conclude that the affidavit is credible, and, by itself or in conjunction with other evidence, provides relevant evidence of sufficient weight to demonstrate battery or extreme cruelty.⁹

The Interim guidance further explains that:

The benefit provider should bear in mind that, due to the nature of the control and fear dynamics inherent in domestic violence, some applicants will lack the best evidence to support their allegations (*e.g.*, a civil protection order or a police report). Thus, the benefit provider will need to be flexible in working with the applicant as he or she attempts to assemble adequate documentation. In determining the existence of battery or cruelty, it is important that the benefit provider understand both the experience of intimate violence and the applicant's cultural context. The dynamics of domestic violence may have inhibited the applicant from seeking public or professional responses to the abuse prior to applying for benefits needed to enable the applicant to leave the abuser. For many cultural groups, going to outsiders for help is viewed as disloyalty to the community and an embarrassment to the family. In some cultures, for example, women have been conditioned to accept the authority and control of their husbands. Thus, there may be little independent documentary evidence of the abuse; the benefit provider should be sensitive to the needs and situation of the abused applicant when reviewing allegations and evidence of abuse.¹⁰

The legal services provider should be required by regulations to accept any evidence and allow the immigrant applicant to prove eligibility as victim of battery, extreme cruelty, or criminal activity¹¹ through a credible statement in an interview with the LSC program, which may or may not be supplemented by other evidence. The LSC funded program will have the discretion under this any credible evidence standard to assign more or less weight to individual pieces of evidence.¹² This approach allows victims to safely meet each proof requirement in their application allowing them to use evidence safely accessible to them. Some victims may have police reports or medical records while others may be so isolated that the only evidence

⁹ Department of Justice, *Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 63 Fed. Reg. 61344, 61370 (November 17, 1997).

¹⁰ Department of Justice, *Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 63 Fed. Reg. 61344, 61370 (November 17, 1997).

¹¹ U visa qualifying criminal activities includes: Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, solicitation to commit any of the above-mentioned crimes, or *any similar activity* in violation of federal, state, or local criminal law. § 8 U.S.C. 1351 (2013).

¹² See INA § 204 (a) (1) (J).

they have access to is their own affidavit and, perhaps, affidavits of others who may have seen their injuries or witnessed the battery, extreme cruelty, or crime victimization.¹³

We believe that the following information included in the preamble is consistent with DHS and other federal agency interpretations recognizing how difficult it can be for immigrant crime victims, particularly those who suffer domestic violence, workplace violence, or abuse by a trafficker to provide proof and documentation that may be under the control of the perpetrator.

“..[T]he standard permits recipients to make a judgment that an Alien, who may not possess evidence at intake, will be able to do so after further investigation. Third, the rule allows eligibility based on statements taken from an alien, which may, in some cases, be the only evidence available during intake. Fourth, the rule accounts for the reality that the facts underlying eligibility assessments in abuse cases will often be fluid by calling for recipient staff to continue to assess eligibility beyond the intake process and to reverse eligibility determinations when appropriate. Fifth, the rule does not permit a recipient to delay in making eligibility determinations in order to provide assistance to an ineligible alien.”¹⁴

A legal services provider should not require police reports or orders of protection to verify the existence of battery or extreme cruelty, but can accept such evidence if submitted by the victim.¹⁵ Written verification or documentation of the abuse from third parties, such as domestic violence advocates or social service agencies’ eyewitnesses may also serve as evidence of battery, extreme cruelty, or crime victimization.

The following is a non-exclusive list of ways an applicant could establish battery or extreme cruelty. Note that the list is for illustrative purposes only given that a broad range of evidence can serve as proof of battery or extreme cruelty. An applicant is not required to use any of the examples below so that an alternative form of evidence is acceptable as long as it demonstrates battery or extreme cruelty.¹⁶ We recommend that applicants cite and document all

¹³ INA § 204(a)(1)(J) the VAWA credible evidence standard was created as part of VAWA 1994 to assure that immigrant victims of domestic violence to allow a battered alien who files an application for relief under VAWA or the battered spouse waiver protections to “support that application with any credible evidence.” See Report 103-395 Judiciary Committee House of Representatives 103d Congress 1st Session November 20, 1993 page 38. As a result, DHS, in examining evidence in VAWA and U visa cases, permits due consideration to be given to the difficulties some victims experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser’s knowledge or consent.

¹⁴ 78 Fed. Reg. 51700.

¹⁵ This approach has also been adopted by state protection order statutes, which do not require as a matter of law evidence of domestic violence beyond the victim’s testimony about the facts of the abuse. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1045-46 (1993). *State statutes e.g.* Ariz. Rev. Stat. §13-3602; Del. Code Ann. tit. 10 §1043, §1045 §1041; Fla. Stat. Ann. §741.30; Ga. Code Ann. §19-13-4, §19-13-3; 750 ILCS 60/214, 60/201; Me. Rev. Stat. tit. 19-A §4007, §4005; Mich. Comp. Laws Ann. §600.2950; N.Y. Fam. Ct. Act §842, 812; Tex. Fam. Code §85.021, 82.002.

¹⁶ The definition of “battery and extreme cruelty” includes: being the victim of any act of a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule.

applicable factors in their applications, since the presence or absence of any one factor is not determinative. Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances.¹⁷ The evidence must be evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case.¹⁸

Evidence of battery or extreme cruelty may include, but is not limited to:¹⁹

- A victim's statement, testimony, or affidavit outlining the facts of the violence or cruelty in each incident. The statement may include dates when each incident occurred (it does not need to include specific dates), discussion of the applicant's fears and injuries, and/or the effect that each abusive incident has had on the applicant and her/his family and children;²⁰
- Reports, statements, or affidavits from: police; judges; other court officials; medical personnel; school officials; psychologists and psychiatrists; clergy; social workers; any witness; or other social service agency personnel;²¹

Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence. 8 C.F.R. § 204.2(c)(1)(vi) (2004).

¹⁷ DHS and DOJ's Executive Office of Immigration Review (EOIR) both use this standard in cases of battered immigrants. See 64 Fed. Reg. 27856 (5/21/99) [adding §1240.58] EOIR regulations use this standard for measuring "extreme hardship." See also the DHS U-visa regulations 8 CFR 214.14 (b)(1) require that decisions are made as "case-by-case determinations." The U-visa rule sets out a number of factors that DHS will use to consider deciding whether physical or mental abuse occurred. Factors considered in U-visa cases include: the nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim. DHS makes it clear that "[n]o single factor is a prerequisite..." and "a series of abusive acts taken together may constitute ... physical or mental abuse although none of the acts alone would rise to that level." See U visa regulations 72 Fed. Reg. No. 179, 53014, 53018 (September 17, 2007). 22 CFR 214.14 (b)(1).

¹⁸ DHS and DOJ's Executive Office of Immigration Review (EOIR) both use this standard in cases of battered immigrants. See 64 Fed. Reg. 27856 (5/21/99) [adding §1240.58] EOIR regulations use this standard for measuring "extreme hardship." See also the DHS U-visa regulations 8 CFR 214.14 (b)(1) require that decisions are made as "case-by-case determinations." The U-visa rule sets out a number of factors that DHS will use to consider deciding whether physical or mental abuse occurred. Factors considered in U-visa cases include: the nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim. DHS makes it clear that "[n]o single factor is a prerequisite..." and "a series of abusive acts taken together may constitute ... physical or mental abuse although none of the acts alone would rise to that level." See U visa regulations 72 Fed. Reg. No. 179, 53014, 53018 (September 17, 2007). 22 CFR 214.14 (b)(1).

¹⁹ Much of this list is derived from evidence routinely accepted by INS and state protection order courts in domestic violence cases. 8 C.F.R. § 204.2(C)(1). NOTE: Any of these types of information could be sufficient. Multiple types of evidence are NOT required.

²⁰ Moira Fisher Preda, Cecilia Olavarria, Janice Kaguyutan, and Alicia (Lacy) Cara, *Preparing the VAWA Self-Petition and Applying for Residence* 17 in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2013) (attached here at Appendix X).

²¹ <http://www.ssa.gov/pubs/10093.html>. When applying for a new social security number, one needs to submit, 1) a statement explaining why you need a new number, and 2) evidence documenting harassment or abuse. Evidence from third parties such as police, medical facilities or doctors, and describes the nature and extent of

- Documentation establishing a pattern of abuse and violence.²²
- Statements of workers from a domestic violence shelter or other domestic violence programs attesting to the time the victim spent in the shelter or participating in the domestic violence program that they believe the applicant is a victim and facts they know of regarding the victim’s case;²³
- Medical records;
- Photographs of the visibly injured self-petitioner supported by affidavits;²⁴
- Temporary or Permanent restraining, civil or criminal protection orders or bond orders;²⁵
- Other legal document showing legal steps taken to end the abuse.²⁶
- Evidence that the victim sought safe haven in a battered women’s shelter or similar refuge;²⁷
- Police reports or records of telephone calls or visits to the victim’s address. This may include; telephone calls to the police registering a complaint, a log of police runs made to the residence, copies of all tapes, reports written by officers responding to a call or other reports taken by police of violations including those not taken at the scene of the crime.
- Criminal court records if a batterer was arrested or convicted of any act of domestic violence or destruction of property relating to the victim;
- Evidence of property damage;

harassment, abuse or life endangerment is helpful. Other evidence may include court restraining orders and letters from shelters, family members, friends, counselors or others who have knowledge of the domestic violence or abuse.

²² 8 C.F.R. § 204.2(e)(2)(iv).

²³ Department of Justice, *Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 63 Fed. Reg. 61344, 61369-70 (November 17, 1997). (“Evidence of battery or extreme cruelty (and in the case of a petition on behalf of a child, evidence that the applicant did not actively participate in the abuse) includes, but is not limited to, reports or affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, counseling or mental health personnel, and other social service agency personnel; legal documentation, such as an order of protection against the abuser or an order convicting the abuser of committing an act of domestic violence that chronicles the existence of abuse; evidence that indicates that the applicant sought safe-haven in a battered women’s shelter or similar refuge because of the battery against the applicant or his or her child; or photographs of the visibly injured applicant, child, or (in the case of an alien child) parent supported by affidavits. An applicant may also submit sworn affidavits from family members, friends or other third parties who have personal knowledge of the battery or cruelty.”)

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

- Diagnostic reports from mental health professionals (Post-Traumatic Stress Disorder is NOT required);²⁸ or
- Any other form of credible evidence about the history of abuser, battery, extreme cruelty, domestic violence or sexual assault.

Particularly in communities where representation from LSC funded programs has not been open to immigrant crime victims in the past, it is likely that immigrant crime victims seeking legal representation may have tried to find ways to file their immigration case with the assistance of non-lawyer advocates or, in the worse cases, notarios. Since the legal representation for immigrant crime victims under these anti-abuse regulations includes representation on a range of matters that are related to the abuse, immigrant victims may turn to the LSC funded agency for assistance in a custody, child support, divorce, benefits, or landlord/tenant case who may already have filed their immigration case. In these cases, it is quite possible that an applicant for LSC representation may have to provide to the intake staff at LSC funded programs copies of documentation related to their VAWA, T, or U visa case that was filed *pro se* or otherwise prior to seeking LSC funded legal assistance.

For this reason, it will be important for programs to be able to identify the kinds of documentation that immigrant crime victims will most likely have if they have begun the process of applying for immigration relief. This will assist programs in identifying and providing legal services to immigrant crime victims who may have begun their immigration case *pro se* or with the assistance of pro bono counsel. A crime victim who has already begun the process of applying for immigration benefits is also eligible for legal representation by an LSC funded program in other related matters, which include family law and public benefits representation. Another reason it is important for LSC funded programs to be able to identify the types of immigration documentation an immigrant survivor may include helping immigrant survivors who:

- May have filed an immigration case with the assistance of an unqualified immigration lawyer without expertise on immigrant crime victims legal rights;
- Received “immigration assistance” from a Notario;
- Can no longer sustain the costs of a private immigration attorney;
- Is a victim whose perpetrator is a spouse, child or parent or another family member who has filed an immigration case on the victim’s behalf that is pending or approved by DHS; or
- Is a qualified immigrant eligible to receive public benefits.

The regulations indicate that LSC will be removing from the current regulations the list of statutes and documentation immigrants may have who are applying for legal representation

²⁸ VAWA 1994, Title IV of the Violent Crime Control and Law Enforcement Act of 1994; Pub. L. 103-322, Stat. 1902-1955 (September 13, 1994). *See* Report 103-395 Judiciary Committee House of Representatives 103d Congress 1st Session November 20, 1993 page 38. (VAWA 1994 ended the practice of immigration officials requiring evidence from licensed mental health professionals and in doing so stated that this practice “focuses the inquiry on the effect of the cruelty on the victim rather than on the violent behavior of the abuser, and it may be discriminatory against non-English-speaking individuals who have limited access to bilingual mental health professionals.”)

from an LSC program under 1626.5. We support this approach which will facilitate that speed with which in the future LSC can make amendments to the document and quickly as immigration laws change and get the information out to the field. It would be useful for LSC in developing future lists of documents an immigrant applicant may have to create a separate list to help programs identify victims eligible under 1626.4 will have even when they are not also eligible under 1626.5.

To assist LSC in this process, we have developed Appendix IV which provides a chart tracking the various immigration and benefits statuses a crime victim may have annotated to identify the types of DHS documents victims who have begun the immigration and benefits process may be able to submit. It is important to note that several of the listed statuses include points in time after filing of an immigration cases in which an immigrant would not be eligible for LSC funded legal assistance unless the applicant for legal assistance is an immigrant crime victim.

Incorporating the use of the “any credible evidence” standard into the LSC regulation allows legal service providers to move from an immigration status focus to a victimization focus that, in turn, would encourage immigrant victims to feel secure enough to seek crucial legal assistance. Incorporating a victimization-based screening process focuses on and satisfies the goals of VAWA to provide much needed assistance to victims of abuse.

5. Elimination of Requirement That Perpetrator Be a Family Member or Household Member

The VAWA 2005 LSC amendments carefully chose the categories of victims who would be covered by the anti-abuse laws to be given access to LSC funded legal services. In 1997, Congress wrote VAWA confidentiality legislation that is a central component of the VAWA immigration legislative scheme.²⁹ VAWA Confidentiality provides protection from harm resulting from DHS, DOJ, and State Department officials relying on information provided by the crime perpetrator or the crime perpetrator’s family member to a broad range of family violence victims without regard to whether or not that individual crime victim ever applies for immigration relief.³⁰ This VAWA confidentiality protection only extends to T and U visa victims once they file their immigration case.³¹

In drafting the access to LSC funded legal services, Congress decided not to limit access by requiring that the crime victims receiving legal assistance ever be required to file for VAWA< T or U or any form of immigration relief. Congress understood that immigrant crime victims needed and should be eligible for assistance whether or not the victim is seeking assistance for an immigration or VAWA, T or U visa immigration case. There are LSC funded programs that

²⁹ For an overview of VAWA confidentiality legislative history, purpose and implementation up to but not including the VAWA 2013 amendments, see Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Purpose of VAWA Confidentiality Protections*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (2013) (attached here at Appendix IX).

³⁰ 8 U.S.C. 1367(a)(1)(A)-(F)

³¹ Id.

provide a range of legal representation that victims and their family members need that may not include immigration relief – e.g. family law, protection orders, public benefits they or their U.S.C. children qualify to receive, housing are examples. For this reason when Congress drafted the VAWA 2005 LSC amendments Congress explicitly opened up representation to all of the following crime victims and did not require that to be eligible the victims ever have to file any form of immigration case. The following are the LSC eligible categories of crime victims:

- Immigrant victims of battering or extreme cruelty;³²
- Sexual assault;³³
- Trafficking in the United States; or
- Qualifies for relief under section INA 101(a)(15)(U).

It is important to note that the first three categories, domestic violence, sexual assault, and trafficking, are eligible for LSC funded assistance without regard to any eligibility under any immigration laws. If a non-citizen is a victim of one of these crimes they qualify for legal assistance. Since U visa covered a long and potentially changing list of crimes, Congress sought a way to offer LSC funded representation for these victims. Congress wanted to be more generous than the approach it had taken with VAWA confidentiality and offer assistance to all victims who suffered trafficking in the United States, and to offer representation to any non-citizen victim of any U visa listed crime who *qualified* for relief under INA section 101(a)(15)(U). Congress chose the word “qualified” because they understood that there would be U visa victims who would be seeking legal assistance, who qualify under the U visa protections, but who may have available to them other immigration options that the victim could pursue more safely than having to confront the perpetrator in a U visa related criminal investigation or prosecution.

A review of the data on the types of crimes that are the basis for U visas reinforces the importance of this approach. Most U visa victims are victims of domestic violence or sexual assault which are crimes that are recidivist in nature and where in all family violence cases, and in many sexual assault cases, the victim knows the perpetrator. The data on U visa cases shows the following types of criminal activities make up the following proportions of U visa case filings:

- Domestic violence 45.9%
- Rape, sexual assault, incest, trafficking 30.4%
- Felonious assault, murder, manslaughter 9.9%
- Kidnapping, being held hostage, unlawful criminal restraint, torture 8.47%

³² Battering or extreme cruelty is the immigration law definition of domestic violence that is broader and covers victims of forms of emotional abuse that would not be sufficient in most states to reach the level of abuse required under state protection order statutes. See Appendix III.

³³ The VAWA definition of sexual assault would apply. VAWA 2013 amended the VAWA definition of sexual assault to be “SEXUAL ASSAULT- The term ‘sexual assault’ means any nonconsensual sexual act proscribed by Federal, tribal or State law, including when a victim lacks capacity to consent.” 42 U.S.C. 13925(a)(29)

- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation 5.3%³⁴

6. Related Legal Assistance

The proposed regulations at 1424.4(b)(2) does an excellent job of confirming two important points. First, the representation may or may not include representation in immigration matters, although the applicant is a non-citizen crime victim. Second, the regulation contains an illustrative list of many of the forms of legal assistance that are likely to be most often needed by immigrant crime victims. The regulation covers each of the major forms of representation that a crime victim may need for covering family law, employment, benefits, and housing matters.

Our only suggestion for improvement would be to add to this list in the regulation assistance with privacy and confidentiality protection and access to the protections of education laws and benefits (post-secondary educational grants and loans). Both of these remedies are particularly important for immigrants who are victims of sexual assault. Many sexual assault victims are school aged girls for whom access to educational benefits and remedies under education laws to address the subsequent problems that stem from the abuse and accommodations sexual assault survivors may need in the educational context to move on with their lives and maintain their ability to stay in school following rape. Similarly, a significant component of effective representation of sexual assault victims and domestic violence victims in many cultural communities is ensuring privacy and confidentiality. That is why compliance with confidentially laws and grant requirements are prerequisites for receiving funding from federal and state programs funding assistance to crime victims (e.g. VOCA, VAWA and Family Violence Prevention and Services Act funding). The proposed regulation would be improved by adding “education, privacy and confidentiality” to the list of categories of assistance that could be offered as related legal assistance under the regulation.³⁵

7. Moving Lists of Documentation From Appendix to Regulation to Program Letter

We support LSC’s decision in the proposed rule to move the documentation list to a program letter. This is a positive change that will give LSC the flexibility to make amendments as needed to keep up with changes in immigration laws as they happen. As discussed above, as the program letter is developed we suggest that a section of the documentation list be devoted to the

³⁴ Leslye E. Orloff and Paige E. Feldman, *National Survey on Types of Criminal Activities Experienced By U visa Recipients* (2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-9-12-2012-san-diego-ca/research/U-visa-recipients-criminal-activity-survey.pdf/view> (attached here at Appendix XI).

³⁵ For a non-exclusive list of potential legal actions that would be related legal assistance under this rule, see Appendix VII.

special forms of documentation that immigrant victims who benefit from anti-abuse statuses receive from DHS as they proceed through the application process.³⁶

II. Responses to Specific Requests for Clarification in the Proposed Regulation

1. Differing Trafficking Definitions

There is an important difference between the terms “trafficking,” used in the U visa and VAWA 2005 LSC amendments, and “severe forms of human trafficking,” which applies in the T visa and continued presence context. VAWA 2005 LSC amendments and U visa 2000 used the generic term trafficking to cover all forms even those that do not reach the level of severity described for the T visa or continued presence purposes. Congress wrote the U visa and the T visa at the same time in the same time. Both visas became law together, one in VAWA (the U visa) and the other in TVPA (the T visa). Congress intended to cover a broader array of behaviors and prosecutions of traffickers in the U visa than the persons who were covered in the TVPA. A victim of trafficking must satisfy several requirements in order to establish eligibility for a T visa. The victim must establish that he or she is a victim of a severe form of human trafficking, which can be summarized as follows:

A T Visa Applicant Must Prove³⁷

- **Severe Form of Human Trafficking applies for continued presence and for T-visas:** The immigrant is or has been the victim of a severe form of human trafficking.³⁸
 1. **Labor trafficking:** In order to constitute a “severe form of trafficking” in persons, three elements must be present in cases involving labor or services.
 1. **The Process** through which the labor is attained was by recruiting, harboring, transporting, providing, or obtaining a person for labor;
 2. **The Means:** the means used to procure the labor included force, fraud, or coercion; and
 3. **The End:** the labor has to be procured for a certain purpose. Involuntary servitude, peonage, debt bondage, or slavery.
 2. **Sex trafficking:** Victims of a “severe form of trafficking” must prove
 1. **The End:** A commercial sex act; and
 2. **The Means:** that was induced by force, fraud, or coercion.
 3. **Under 18 year old sex trafficking victims** are only required to prove the commercial sex and are not required to prove the means.

To qualify for a T-visa a victim must additionally prove –

- **Physically present on account of trafficking:** The victim is currently being subjected to trafficking, recently liberated from their traffickers, or the immigrant is here because of past

³⁶ See Appendix IV.

³⁷ 22 U.S.C. § 7102(8); 8 C.F.R. § 214.11(a).

³⁸ Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”) § 103(8); 22 USC §7102(8) (2000).

trafficking and their current presence is directly related to the original trafficking.³⁹ Victims who escape traffickers without law enforcement assistance must prove that they did not have a clear chance to leave the U.S. between their escape and contacting law enforcement.⁴⁰ If the trafficking did not recently occur, the victim must demonstrate that they did not have the opportunity to depart through proof of “trauma, injury, lack of resources, or travel documents that have been seized by the traffickers”⁴¹

- Extreme hardship involving unusual and severe harm to the victim will occur if the victim is removed from the United States; and
- Cooperation: The victim is under 18 years of age and is not required to cooperate; or the victim meets one of the following conditions:
 - The victim has cooperated and is willing to cooperate with reasonable requests for assistance by federal, state, or local law enforcement in investigating or prosecuting crimes related to human trafficking; or
 - The victim is excused by the Attorney General from failing to cooperate with reasonable requests for assistance by federal, state, or local law enforcement in investigating or prosecuting crimes related to human trafficking because of physical or psychological trauma.

The term “trafficking” was included in the U visa to cover forms of human trafficking in which trafficking was occurring but victims may have difficulty proving that the trafficking they suffered met the federal T visa and continued presence definition of “severe forms of human trafficking.” There are significant differences in the level of public benefits and services victims of severe forms of human trafficking receive as recipients of T bona fide determinations and continued presence (benefits equal to those available to refugees) compared to U visa victims who have no eligibility for federal public benefits. The goal was to be able offer protection and help both the trafficking victims who could meet the severe forms test and those who could not.

Congress also understood that there would be many trafficking victims who would have difficulty meeting the strict requirements of proving physical presence on account of trafficking and extreme hardship that would need to obtain immigration relief through the U visa trafficking coverage rather than the T visa. Also, the level of law enforcement cooperation required in the U visa is a lower standard than in the T visa. The cooperation requirement in the T visa requires compliance with reasonable requests from law enforcement unless DHS agrees the victim qualifies for the physical or psychological trauma exception. In the U visa context, victims are required to be, have been, or be willing to be helpful to obtain a U visa. Once granted, the victim has an ongoing requirement to cooperate with reasonable requests for assistance. However, a U visa victim can maintain her U visa even when the victim does not cooperate so long as they did not unreasonably refuse to cooperate with reasonable requests for assistance.

2. Geographic Considerations

³⁹ 8 CFR §214.11(g) (2002).

⁴⁰ 8 CFR §214.11(g)(2) (2002)

⁴¹ 8 CFR §214.11(g)(2) (2002).

A. LSC Correctly Eliminates the Requirement That Abuse Take Place in the United States

As to the location of the abuse, we want to confirm that for VAWA and all U visa crimes, except “trafficking,” the eligibility for legal services includes criminal activities or the battering or extreme cruelty that has occurred inside or outside of the United States. VAWA 2000 explicitly designed the U visa to include criminal activities regardless of where they occurred so long as the criminal activity is *a violation of the laws of the United States*.⁴² IN VAWA 2000, Congress removed the requirement that battering or extreme cruelty occur in the United States. The law was amended to allow victims to file from abroad. Additionally VAWA 2000 removed the requirement that abuse occur in the United States. This was done for two reasons. First, Congress recognized that domestic violence in families is a pattern of abuse that crosses borders in some instances. The full range of and history of abuse could be considered as part of the VAWA self-petition by removing the requirement that DHS only consider abuse occurring in the U.S. Additionally, VAWA 2000 expanded self-petitioning to cover victims in cases in which all of the abuse occurred abroad and the perpetrator was the victim’s U.S. citizen or lawful permanent resident spouse, parent or over 21 year old citizen child who is or was a member of the U.S. uniformed services or a U.S. government employee.⁴³ However, with regard to human trafficking, the limitation that the trafficking must have occurred in the United States is correct.

B. Victim location in the U.S.

As to the location of victims in the United States, the LSC proposed regulation is correct when it stated the following:

[I]t is LSC’s view that the predicate activity for eligibility under the anti-abuse statutes need not take place in the United States so long as the activity violates a law of the United States, with the exception of trafficking and severe forms of trafficking, which must occur in the United States as described above.”⁴⁴

One of the early lessons learned as VAWA self-petitioning was implemented was the extent to which domestic violence perpetrators would remove the victim from the United States either forcibly, or by trickery, cutting victims off from VAWA self-petitioning eligibility. Other victims, particularly those living in border areas would cross the border and return home seeking help in healing from abuse with family across the border. These victims would get stuck abroad and not be able to enter the United States and pursue VAWA immigration relief. This would end up resulting in courts awarding custody to perpetrators and perpetrators not being able to be prosecuted. For that reason, Congress amended VAWA self-petitioning in VAWA 2000 to allow eligible victims to file their VAWA cases from outside of the United States. At the same time, the U visa statute was written to allow victims to file whether or not they were physically

⁴² INA 101(a)(15)(U)

⁴³ INA 204(a)(1)(A) (v); INA 204(s)(I)(B)(iv).

⁴⁴ 78 Fed. Reg. 51700

in the United States at the time of filing. The proposed LSC regulation tracks this approach correctly.

III. Suggested Improvements to Regulations and Preamble

1. Amend regulation 1626.4(d)(1) to remove “illegal” trafficking

The regulation currently reads “Victims of trafficking must be subjected to *illegal* trafficking in the United States to be eligible for assistance.”⁴⁵ This makes no sense human trafficking however it is defined is illegal there is not legal trafficking. Delete the word illegal to remove confusion in the regulation.

2. Eligible not classified: 1626.4(a)(2)(ii) Aliens eligible for assistance under anti-abuse laws⁴⁶

As discussed above, the VAWA 2005 regulations are clear that all trafficking victims qualify for assistance. This is also clear from the TVPA Section 107. Since section (2)(i) already includes eligibility based upon a victim being a victim of a severe form of human trafficking, the regulation should only include this form of eligibility in subsection (2) and subsection (ii) should be deleted. Subsection (ii) introduces a concept that is not called for in the statute be limiting eligibility to victims “classified” as T visa holders which means that their case would have had to be adjudicated by DHS. This is incorrect and too limited and should be deleted from the proposed regulation. The language that should be deleted is as follows:

“ an alien classified as a non- immigrant under section 101 (a)(15)(T)(ii) of the INA (8 U.S.C. 1101(a)(15)(T)(ii) regarding others related to the victim).”

3. 1626.2(f) list of statutes is incomplete.

We commend the inclusion of the list of anti-abuse statutes in the regulation. However, there were several provisions and key reauthorizations that were not included in the list. 1626.2(f) should be rewritten as follows. The additions made to the list have been italicized.

“f) Anti-abuse statutes means the *Battered Spouse Waiver (Public Law 101-649, 104 Stat. 4978, codified at INA § 216(c)(4)(C))*; the Violence Against Women Act of 1994 (Public Law 103–322, 108 Stat. 1941, as amended), and the Violence Against Women and Department of Justice Reauthorization Act of 2000 (Public Law 106-386, 114 Stat. 1491), *2005 (Public Law*

⁴⁵ 78 Fed. Reg. 51703

⁴⁶ 78 Fed. Reg. 51702

109–162, 119 Stat. 2960), and 2013 (Public Law 113-14, 127 Stat. 54) (collectively referred to as “VAWA”); the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106–386, 114 Stat. 1464) (“TVPA”), 2003 (Public Law 108-193, 117 Stat. 2875), 2005 (Public Law 109-164, 119 Stat. 3558), 2008 (Public Law 110-457, 122 Stat. 5044), and 2013 (Public Law 113-31) (collectively referred to as “TVPRA”); Section 101(a)(15)(T) of the Immigration and Naturalization Act (“INA”), 8 U.S.C. 1101(a)(15)(T); Section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U); and the incorporation of these statutory provisions in section 502(a)(2)(C) of LSC’s FY 1998 appropriation, Public Law 105–119, Title V, 111 Stat. 2440, 2510 as incorporated by reference thereafter. E.g., Public Law 113–6, 127 Stat. 198, 267 (2013) (LSC’s FY 2013 appropriation).”⁴⁷

4. LSC Must Amend the Proposed Regulations to Ensure That No Record Keeping Requirements With Regard to Immigration Status or Immigration Case Information Is Required Under 1624.4(f)

The most significant flaw in the proposed regulations relates to the requirements of Section 1624.4(f). This section requires that LSC funded agencies keep or retain copies and supporting documentation for U-visa, T-visa and “any other grant of immigration status” for victims receiving legal services from LSC funded organizations.⁴⁸ This is a serious problem for a number of reasons.

First, this requirement is directly contrary to motivations and the direction of the evolution of federal VAWA confidentiality law. VAWA Confidentiality protects a victim in a potentially dangerous situation from any person who could in any way potentially share or abuse information, from obtaining that information about a VAWA confidentiality protected case. VAWA Confidentiality not only protects information in a VAWA, T, or U application, it prevents any third party from obtaining information about the very existence of any VAWA, T or U visas VAWA confidentiality protected case.⁴⁹

There are limited exceptions to VAWA confidentiality protections that Congress has recently, as part of VAWA 2013, narrowed.⁵⁰ The exceptions to VAWA confidentiality protections, as amended by VAWA 2013 require that, when law enforcement or national security officials gain access to VAWA confidentiality protected cases, their access is limited for law enforcement and national security purposes and require that the information released must be handled in a manner that protects the confidentiality of the information. Similarly, when House and Senate Judiciary staff gains access to VAWA, T or U visa files for Congressional oversight purposes, access is limited to closed cases and to redacted files that do not contain any personally identifying information.⁵¹ Information protected by VAWA confidentiality and the existence of

⁴⁷ 78 Fed. Reg. 51702.

⁴⁸ Proposed Regulations 1626.4(f)(1).

⁴⁹ For more in depth information about the implications of VAWA confidentiality violations and the importance of maintaining confidentiality of the application and its existence, see Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality* (2013) (attached here at Appendix VI).

⁵⁰ Section 810 of VAWA 2013.

⁵¹ 8 U.S.C. 1367(b)(6)

VAWA confidentiality protected case is also not discoverable in family court cases⁵² and may not even be discoverable in criminal court cases.⁵³ Records of these applications should not be kept because they are protected under VAWA Confidentiality. These records are not open to review without redaction, even for the purposes of congressional oversight, and, therefore, should not be maintained in records for the purposes of access to legal services.

As the preamble to the LSC Regulations correctly notes

“ the proposed rule is a revision of paragraph (d) of the existing regulation, which states that recipients are not required to maintain records regarding the immigration status of clients represented under § 1626.4(a).

The reason for this waiver of immigration status recordkeeping for clients eligible under § 1626.4 is that, under the existing regulation, clients are eligible under § 1626.4 because they are victims of abuse and not because of their immigration status. For clients who are eligible because they are battered, subjected to extreme cruelty, victims of sexual abuse, or victims of trafficking or severe forms of trafficking, but who have not been granted visa, eligibility is based on abuse and not on immigration status.”

The regulation and the preamble, however, go on to require recordkeeping regarding immigration status. This is an incorrect interpretation of the VAWA LSC amendments and the access to legal services to be provided to trafficking victims under the Trafficking Victims Protection Act. As discussed in detail above, victims under 1626.4 are eligible for legal representation because of crime victimization, not immigration status. Victims of battering or extreme cruelty, sexual assault and trafficking are eligible for related legal assistance, as the regulations correctly note could be on a range of issues that may or may not include immigration status. Secondly, U visa victim eligibility is based on victimization by criminal activity and it is open, as discussed in detail above, to victims without regard to whether or not they ever file an immigration case or whether the immigration case they file is a U visa case.

⁵² *Hawke v. United States Dep't of Homeland Sec.*, No. C-07-03456 RMW, 2008 U.S. Dist. LEXIS 87603, at *19 (N.D. Cal. Sept. 29, 2008); For a brief on discovery in family court cases, *see* <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/vawa-confidentiality/AmicusinVAWADiscoveryCase%20DI-10-10-12.pdf/view>

⁵³ For a brief on discovery in criminal court cases, *see* Legal Momentum Amicus Brief on VAWA Discovery and Confidentiality Issues, *available at*: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/vawa-confidentiality/AmicusinVAWADiscoveryCase%20DI-10-10-12.pdf/view>. The U visa rule states that the criminal court discovery if available at all would be limited to federal criminal cases 72 Fed. Reg. 53027.

A second reason for concern with this approach taken by the regulations is that it may have the unintended consequence of encouraging LSC attorneys to encourage victims to pursue T or U visas as opposed to other forms of immigration relief that are available to immigrant crime victims. This problem arose with trafficking funding from HHS in which programs were making recommendations about what legal options a victim should pursue because the program would only receive HHS payment if the victims pursued a T visa continued presence. This set up an ethical problem for attorneys because it created an incentive to recommend T visas and not other forms of immigration relief that might be safer or better for an immigrant crime victim to pursue based on the facts of the individual case. A client should be able to access legal services from an attorney and obtain representation regardless of whether they ever apply for a U visa including, for example, a work or student visa.

Here too, a program that is more wary about representing immigrant crime victims could interpret the proposed rule as encouraging them to be sure to take cases that would result in T or U visas so that they would have immigration case documentation for that case for recordkeeping purposes. The goal of these regulations and the VAWA 2005 amendments was to open up the full range of legal assistance offered by LSC funded programs to immigrant crime victims. This means doing all that is possible to offer high quality representation based on the client's best interests not reporting and recordkeeping requirements. These requirements are unnecessary, contrary to statutory requirements, and, if not removed from the rule, will create a disincentive to programs taking cases of immigrant crime victims.

Service providers should not be required to maintain records of T or U visa applications of clients that require legal services because it is a direct violation of VAWA Confidentiality. The language of this provision could push attorneys to require clients to pursue U or T visas in order to benefit under 1626.4, even if clients can apply for immigration relief through safer means that do not require them to confront their abuser or be involved in the investigation. Clients may be able to apply for Deferred Action for Childhood Arrivals, Special Immigration Juvenile Status, a work or student visa, or other immigration relief that would not require confrontation with the perpetrator. It is essential that the LSC regulations for this category to not include any incentives or requirements from a record keeping perspective that could potentially compromise an attorney's ethical obligation to provide a client with all legal options and help the client make the choice of which remedy to pursue.

Since eligibility under section 1626.4 is based on crime victimization the only recordkeeping that should be required are notations in the record about the credible evidence that the LSC program reviewed in making their determination that the immigrant was eligible for services as a crime victim. Any more onerous requirement is unnecessary and will have the effect of continuing to discourage programs from taking crime victim cases.

At the point in time when an immigrant crime victim becomes eligible to apply for lawful permanent residency, the client would then be eligible to move from 1646.4, which offers representation on matters related to the abuse, to representation under 1646.5, which allows for full representation, LSC should only then require immigrations status documentation. Such documentation should be in the form of a receipt notice from the lawful permanent residency

application. This approach will best comply with the spirit of VAWA confidentiality, federal and state laws, and grant obligations on violence against women matters. The LSC funded program could file the LPR application under 1626.4 and once the applicant gets the receipt notice (which will contain little if any VAWA confidentiality protected information) the immigrant victims will have documentation that will make them eligible for more extensive representation, if needed, under 1626.5.

5. Suggest LSC publish an interlineated statute

LSC should publish the inter-lineated statute. Since the law governing immigrant access to legal services has never been codified. We believe that understanding of the VAWA 2005 amendments and the changes they made in the law would be improved if programs had access through LSC to an interlineated statute that clearly sets out the law before and after the 2005 amendments. Such a version of the statute would help programs better understand the changes and these regulations and will improve compliance. Part of the confusion about this law exists because there is nowhere to look it up in a codebook. Therefore, we strongly suggest the LSC publish it. If the law is published, service providers will have an easy way to understand the requirements of the law. We suggest that as an addendum to these regulations or reference in the regulations that it will keep an interlineated statute that will help programs easily see and understand the current statute and its evolution on its website. This should be distributed to programs and updated each time it is amended. We have included this information in Appendix II.

6. A Victim Moving from Coverage under Anti- Abuse Provisions (1626.4) to Coverage under Immigration Eligibility (1626.5)

We appreciate the increased clarity in the differences between sections 1626.4 and 1626.5 in the most recent draft of the proposed rule.⁵⁴ In the interest of further clarification, we recommend that the preamble to the final rule include examples of the typical types of scenarios in which an applicant will move from eligibility in one section to eligibility in the other section. Because there is a distinction between the legal services provided under 1626.4 (must be related to abuse) and 1626.5 (any services that are offered by the LSC funded program can be provided whether there is any relationship to the abuse), it is important for recipient agencies to understand that there are circumstances in which a client being served by the agency might move from one category to the other. DHS has taken this approach in the preamble to its regulations regarding crime victims. The U visa discussion of indirect victims of criminal activity applying as principle petitioners provides a good example.⁵⁵ It is important that any list included be a non-

⁵⁴ See 78 Fed. Reg. 51698.

⁵⁵ Department of Homeland Security, *New Classifications for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule*, 72 Fed. Reg. 53,014, 53,017 (“For example,...a mother who is murdered and leaves behind a husband and minor children, the husband and minor children could each apply as principal petitioners. In the alternative, the husband could file as principal petitioner and the children could be included as family members on his petition....Likewise, the children potentially could be principal petitioners and their father

exclusive list of examples. The following provides examples of scenarios in which an applicant may move from section to section, that include but are not limited to the following

(1) Examples of a battered immigrant client receiving services under 1626.4 to becoming eligible under 1626.5:

- a. a battered immigrant who received services under 1626.4 has her self-petition approved and files an application for adjustment of status to lawful permanent residency. Once her lawful permanent residency application is filed, the client becomes eligible for a broader range of services under 1626.5
- b. a sexual assault victim who is receiving legal services who applies for and is granted a U visa. After being in U visa status for three years, when the U-visa recipient applies for lawful permanent residency, she becomes eligible for services under 1626.5.
- c. a child of a U visa victim included in their parent's U visa application. If the child becomes eligible for adjustment of status to lawful permanent residency based on the U visa, a special immigrant juvenile application that is approved, or a family visa petition once the adjustment of status application is filed, they become eligible for services under 1626.5.

(2) Examples of a battered immigrant client receiving services under 1626.5 to becoming eligible under 1626.4

- a. Spouse withdraws: the immigrant becomes a client of the LSC funded program as the spouse of a U.S. citizen who has filed a family-based visa petition for her. If the spouse withdraws the visa application, the client loses eligibility under 1626.5 unless the client can show she is a victim of sexual assault, domestic violence, human trafficking, or other criminal activity in which case the client is eligible to continue receiving services under 1626.4.
- b. Stepparent: immigrant mother with an immigrant child by another relationship marries a U.S. citizen. The U.S. citizen husband files a family-based visa petition for his immigrant spouse and stepchild. If the citizen father and the immigrant mother divorce before the mother and child are granted lawful permanent residency, the mother, unless she is abused, loses eligibility under 1626.5. The child loses eligibility under 1626.5 upon divorce and is only eligible under 1626.4.
- c. A lawful permanent resident abusive spouse has filed and received approval of a family-based visa petition for her, so she has filed an application for adjustment of status. If the lawful permanent resident spouse loses lawful permanent resident status because of drug dealing, her application ends. If she is a victim of domestic violence, she is still eligible under 1626.4 (if the perpetrator lost his status because of domestic violence, she would continue to be eligible under 1626.5 because her lawful permanent residency application can continue).

(the husband of the deceased) could be included as a family member on one of the children's petitions. Family members who are recognized as indirect victims and, therefore, eligible to apply for U nonimmigrant status as principal petitioners must meet all of the eligibility requirements that the direct victim would have had to meet in order to be accorded U nonimmigrant status.")

- d. Over 21 before 25: an abusive U.S. citizen parent files a family-based visa petition and adjustment of status for his under 21-year-old immigrant child. If the child turns 21 before she or he is granted lawful permanent residency, she or he ages out of eligibility for adjustment of status and would, as a result, lose the eligibility to be represented under 1626.5. However, if the child has been a victim of battery or extreme cruelty perpetrated by the U.S. citizen parent, she or he remains eligible for services under 1626.4 and, under immigration law, has until the age of 25 to file a VAWA self-petition.

Should LSC decide not to include the examples suggested above in the preamble to the final regulation, LSC may wish to develop a program letter that contains attachments that provides programs additional details on these scenarios. These attachments can serve to provide programs greater detail that will assist in proper implementation of these regulations

7. Implementation Requirements for Programs 1626.12 Must Include an Affirmative Report to LSC That Changes Have Been Implemented and Should Include a Requirement of Consultation With State and Local Domestic Violence, Sexual Assault and Victim Services Programs

The proposed regulation and VAWA 2005 have created significant change in access to legal assistance from LSC programs for immigrant crime victims. We are concerned that the implementation language in the regulation is too weak. Historically, VAWA laws have required implementation within a specified time frame for both agencies receiving funding under VAWA and DHS issuance of regulations. We suggest that 1626.12 be amended to require the following:

- That programs applying for LSC funding or submitting renewal applications be required to include as part of their next application or renewal request a copy of their written plan implementing the changes called for in this regulation;
- That programs be required to identify, and consult with, domestic violence, sexual assault and victim services program working to serve immigrant crime victims in the jurisdictions that the LSC program serves;⁵⁶ and
- With each future application a copy of the agency's plan implementing 1626.4 should be required to be included along with a statement of the work the agency has done to conduct outreach to, consultation and collaboration with "victim service providers"⁵⁷ with expertise providing assistance to "underserved populations."⁵⁸

The preamble to the final regulations should inform programs that LSC expects that part of their implementation plan will include reforms to the program's intake process. Currently, LSC

⁵⁶ For a list of programs with expertise serving immigrant victims developed for the Office on Violence Against Women, DOJ, please visit <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>

⁵⁷ As defined in VAWA 2013 42 U.S.C. 13925(a)(43).

⁵⁸ As defined in VAWA 2013 42 U.S.C. 13925(a)(39).

regulation requires service providers to verify the immigration status of the immigrant victim seeking assistance.⁵⁹ The regulation also includes a list of documents that are acceptable to verify immigration status and ranges from a Memorandum of Creation of Record of Lawful Permanent Residence with an approval stamp (I-551 or I-151 or I-191), a passport bearing immigrant visa or stamp that indicates admission for lawful permanent residence, to a marriage certificate with proof of spouse's citizenship.⁶⁰ Examples of acceptable documents are categorized based on eight different alien categories: Lawful Permanent Resident; alien who is married to U.S. citizen, or parent of U.S. citizen or unmarried child under 21 of U.S. citizen, and has filed an application for adjustment of status to permanent residency; refugee; asylee; granted withholding or deferral of deportation or removal; conditional entrant; H-2A agricultural worker; and special agricultural worker temporary resident. This regulation forces the intake process to focus primarily on the immigration status of the immigrant victim seeking legal services that VAWA 2006 guarantees. Although the 2006 Program Letter 06-2 attempted to rectify this problem, updating the regulations would be extremely helpful for immigrant crime victims.

The revised regulation should include language that shifts the focus from intake procedures to a primary focus on determining victimization. In order to be effective and efficient, service providers should have a screening process that verifies victimization, i.e., battery and extreme cruelty, sexual assault, human trafficking, or other U visa criminal activities. This intake process should adopt the "any credible evidence standard" that is used by DHS, DOJ, and HHS in cases of immigrant crime victims protected by VAWA and the Trafficking Victims Protection Act.⁶¹ LSC programs should avoid requiring particular documents to prove abuse and, for applicants who prove abuse or crime victimization, the program should not require collection or review of the victim's immigration documentation, if any exists.

We commend LSC for revising the regulations in a manner that will shift the focus of intake procedures to primarily focus on determining whether the applicant for legal services is a crime victim. The proposed rule will require that LSC grantee organizations change their intake procedures to screen for victimization first and only screen for immigration status in cases of applicants who are not crime victims. Identifying abuse and immigration status as equally important grounds for eligibility for representation will vastly improve access to critical legal services and access to justice for immigrants who are victims of battery, extreme cruelty, abuse, trafficking, and other criminal activity.

⁵⁹ 45 C.F.R. § 1626.6 (verification of citizenship) & § 1626.7 (verification of eligible alien status).

⁶⁰ See Appendix to Part 1626- Alien Eligibility for Representation by LSC Programs 456, available at: <http://www.gpo.gov/fdsys/pkg/CFR-2012-title45-vol4/pdf/CFR-2012-title45-vol4-part1626.pdf>

⁶¹ For a complete legislative history of the VAWA any credible evidence standards, see Leslye E. Orloff, Kathryn C. Isom, and Edmundo Saballos, *Mandatory U Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and Its "Any Credible Evidence" Rules- A Call for Consistency*, 10 GEO. J. GENDER & L. 619 (2010).

8. Interim Rule

Finally, we wish to note that it would have been possible for LSC to follow the lead DHS and INS have taken in issuing all regulations related to VAWA, U, and T visa relief. All of DHS regulations were issued as interim final rules that went into effect immediately while notice and comment were solicited. If LSC had issued these rules as interim final rules, the VAWA 2005 implementing regulations would be in effect immediately. Notice and comment could have gone forward, but the help offered by the proposed regulations would have become immediately available to immigrant crime victims statutorily eligible for representation by LSC programs. This is the approach DHS has taken each time it has issued regulations under VAWA and TVPA.⁶²

⁶² See attached memorandum on the good cause exception to the Administrative Procedure Act that was submitted to OMB when it was considering the DHS rule for adjustment of status in T and U visa cases and the U visa rule. In both instances, OMB and DHS agreed that the rule issued should be interim final taking effect immediately. A memo submitted to OMB supporting the good cause exception applying to rules implementing protections created in VAWA and the TVPA is included as Appendix V.