

# Advisory Opinion 2016-002 (Revised)

## QUESTION PRESENTED

May LSC funding recipients represent noncitizen parents or guardians of noncitizen children seeking Special Immigrant Juvenile Status (SIJS) as a result of battery, extreme cruelty, sexual assault, human trafficking, stalking or other U-visa-listed activities?

## BRIEF ANSWER

Yes. Recipients may represent noncitizen parents and, in some instances, noncitizen guardians of noncitizen children subjected to battery, extreme cruelty, sexual assault, human trafficking, stalking or other U-visa-listed activities, as long as the legal assistance is directly related to obtaining relief from the abuse for the child. Proceedings in which noncitizen parents or guardians petition for SIJS on behalf of their noncitizen children are proceedings directly related to obtaining relief from the abusive situation for the child.

## BACKGROUND

LSC's Office of Legal Affairs (OLA) received an inquiry from a law professor regarding the provision of LSC-funded legal assistance in SIJS proceedings. As a predicate to granting SIJS, a juvenile court must issue an order: 1) finding that the noncitizen child is dependent on a juvenile court or state agency or is legally committed to, or placed in the

custody of an agency, individual or entity appointed by the state; 2) declaring that the child cannot be reunified with one or both parents due to abuse, neglect, abandonment, or other similar basis under state law; and 3) finding that return to the child's home country is not in the child's best interests ("SIJ predicate order"). We understand that in some jurisdictions, courts require a parent or guardian, not the child, to file a case that would lead to an SIJ predicate order. We also understand that parents or guardians may seek an SIJ predicate order through a related proceeding, such as a child custody matter, paternity suit, or a child support case.

The professor sought guidance from OLA on whether LSC funding recipients may represent and provide legal assistance to noncitizen parents or guardians petitioning for SIJS on behalf of noncitizen children who have been subjected to battery, cruelty, sexual assault, or trafficking. Although we limit our analysis to legal assistance in proceedings that may lead to the issuance of an SIJ predicate order, we believe the analysis applies generally to instances in which a recipient seeks to provide legal assistance to a noncitizen parent who is eligible for legal assistance under 45 C.F.R. § 1626.4(a)(1)(ii).

In this opinion, we use the term "guardian" to refer to individuals who have custody of and responsibility for the child in question, regardless of whether that individual is the child's court-appointed guardian or custodian. Such individuals should have the same characteristics as those who, under the applicable state law, are deemed to be acting *in loco parentis* or have the necessary relationship to become the child's legal guardian. Under the various applicable state laws, these characteristics typically include factors such as (for reasons other than pecuniary gain) the assumption of primary responsibility for the care, health, safety, and control of the child in a manner that provides for the child's physical needs; providing a primary residence for the child or a residence that makes the child eligible for public education in the jurisdiction of the residence; or providing for and facilitating the child's development, mental health, and emotional health.[fn]See, e.g., Del. Code Ann. tit. 13, § 1101(10); D.C. Code §§ 16-831.01(1), 160831.02(a)(1); 53 Pa. Cons. Stat. § 5324 (2010).[/fn]

Additionally, we adopt the Department of Homeland Security's description of a "juvenile court" as "a court in the United States that has jurisdiction under state law to make judicial determinations about the custody and care of children." [fn]See U.S. Citizenship and Immigration Services, "Special Immigrant Juvenile Status: Information for Juvenile

Courts,” available at [www.uscis.gov](http://www.uscis.gov).<sup>[fn]</sup> Examples of juvenile courts include juvenile, family, orphans, dependency, guardianship, probate, and delinquency courts. *Id.*

## ANALYSIS

In § 504(a)(11) of LSC’s FY 1996 appropriation act, Congress prohibited LSC funding recipients from providing “legal assistance for or on behalf of any alien.” Pub. L. 104-134, tit. V, § 504(a)(11), 122 Stat. 1321-50, 1321-53 (1996); *see also* Pub. L. 105-119, tit. V, § 502(a)(2), 111 Stat. 2440, 2510 (1998) (incorporated by reference annually thereafter). LSC implemented this statutory restriction at 45 C.F.R. Part 1626. The general alienage restriction provides that “recipients may not provide legal assistance for or on behalf of an ineligible alien.” 45 C.F.R. § 1626.3. LSC defined “on behalf of” an ineligible alien to mean “render[ing] legal assistance to an eligible client that benefits an ineligible alien and does not affect a specific right or interest of the eligible client.” *Id.* § 1626.2(g).

Congress enacted limited exceptions to this general restriction in Pub. L. 104-134, Pub. L. 105-119, and in subsequent legislation not focused solely on LSC. These and other relevant statutes are defined as “anti-abuse statutes” in section 1626.2(a). *See, e.g.*, Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7105(b)(1)(B) (“TVPA”); Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, § 104; 111 Stat. 2440, 2510 (2006) (“VAWA 2005”). LSC issued several guidance documents reflecting the statutory changes made to the anti-abuse statutes<sup>[fn]</sup> Program Letter 02-5 (May 15, 2002) (TVPA); Program Letter 05-2 (Oct. 6, 2005) (Trafficking Victims Protection Reauthorization Act of 2003); superseded Program Letter 02-5); and Program Letter 06-2 (Feb. 21, 2006) (VAWA 2005) were superseded by the 2014 revisions to 45 C.F.R. Part 1626.<sup>[fn]</sup> and subsequently amended Part 1626 in May 2014 to incorporate these changes into the regulation. In particular, section 1626.4 implements the statutory exceptions to the general prohibition on legal assistance to noncitizens and governs whether noncitizens are eligible for LSC-funded legal assistance under one of the anti-abuse statutes (e.g., VAWA 2005 and TVPA).

### **A. Providing legal assistance under section 1626.4(a)(1) to noncitizen parents of noncitizen children seeking Special Immigrant Juvenile Status (SIJS)**

Whether recipients can represent and provide legal assistance to noncitizen parents of noncitizen children seeking SIJS depends on two factors: (1) whether the parent qualifies under section 1626.4(a)(1), and (2) whether the legal assistance includes representation in matters that will assist a person eligible under section 1626.4(a)(1) to escape from, ameliorate the current effects of, or protect against the abusive situation. *Id.* at § 1626.4(b)(2).

Section 1626.4(a)(1) identifies two categories of noncitizen individuals eligible for related legal assistance: noncitizens who have been subjected to battery, cruelty, sexual assault, or trafficking, or any U-visa-qualifying activity<sup>[fn]</sup>Qualifying crimes for a U-visa under § 101(a)(15)(U) of the Immigration and Nationality Act are “one or more of the following or any similar activity in violation of Federal, State, or local criminal law: 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 (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C. § 1101(a)(15)(U)(iii).<sup>[fn]</sup> and noncitizen parents of children subjected to these activities. With respect to noncitizen parents, section 1626.4(a)(1)(ii) states that LSC recipients may provide *related legal assistance* to “*an alien whose child, without the active participation of the alien, has been battered or subjected to extreme cruelty, or has been a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the INA (8 U.S.C. § 1101(a)(15)(U)).*” 45 C.F.R. § 1626.4(a)(1)(ii) (emphasis added). Noncitizen parents of such children may also be eligible for the same “related legal assistance” if the parents have themselves been battered, subjected to extreme cruelty, sexual assault or trafficking, or any U-visa-qualifying activity. *Id.* at § 1626.4(a)(1)(i).

“Related legal assistance” means “legal assistance directly related . . . to the prevention of, or obtaining relief from, the battery, cruelty, sexual assault, or trafficking.” *Id.* at § 1626.4(b)(1)(i). “Such assistance includes representation in matters that will assist a person eligible for assistance under [Part 1626] to escape from the abusive situation,

ameliorate the current effects of the abuse, or protect against future abuse . . .” *Id.* at § 1626.4(b)(2).

“The key factor for recipients to consider in determining whether a requested service is ‘related legal assistance’ is the connection between the assistance and the purposes for which assistance can be given: escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.” 79 Fed. Reg. 21868 (Apr. 18, 2014). Although the SIJS provision in section 101(a)(27)(J) of the INA is not specifically referenced in Part 1626, recipients may nonetheless provide related legal assistance to a noncitizen seeking relief as an SIJ who falls under one of the exceptions to the general prohibition on legal assistance to noncitizens. See [Program Letter 14-3 \(Oct. 29, 2014\)](#).

Special Immigrant Juvenile Status permits noncitizen children who are present in the United States to apply for lawful permanent residency. See 8 U.S.C. § 1101(a)(27)(J); see *also* 8 U.S.C. § 1255(h) (describing how special immigrants can become eligible to adjust their status). The essential elements for obtaining SIJS are that:

1. The child has been declared dependent on a juvenile court or has been legally committed to or placed in the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States;
2. Reunification with one or more of the child’s parents is not viable due to abuse, neglect, abandonment, or similar basis under state law;
3. The juvenile court determines that it is not in the best interest of the child to be returned to the parent’s previous country of nationality or country of last habitual residence; and
4. The Secretary of Homeland Security consents to the grant of Special Immigrant Juvenile Status.

See 8 U.S.C. § 1101(a)(27)(J)(i)-(iii). A court order making the findings required in items (1)-(3) is referred to as an “SIJ predicate order.”

Providing legal assistance in the proceedings leading up to the grant of SIJS is “related legal assistance” under section 1626.4(b)(2), because one of the key elements for SIJS is a juvenile court’s finding that reunification with one or more of the child’s parents is not

viable because of abuse, abandonment, neglect, or a similar state law basis. Because the juvenile court may declare the noncitizen child dependent or place the child in custody for the purpose of preventing or obtaining relief from battery, extreme cruelty, sexual assault, or trafficking, there is a strong connection between the legal assistance and the purpose of “escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.” 79 Fed. Reg. 21868 (Apr. 18, 2014); 45 C.F.R. § 1626.4(b)(2). Thus, if local court rules preclude noncitizen children from filing the initial court case in juvenile court and/or being listed as the party of record, recipients may represent the noncitizen parents of such children because the noncitizen parents are eligible under section 1626.4(a)(1)(ii) and such assistance constitutes related legal assistance as defined by section 1626.4(b)(2). This is also true if the noncitizen parent has been abused, because the noncitizen parent would then be eligible under section 1626.4(a)(1)(i), and therefore entitled to the same related legal assistance defined in section 1626.4(b)(2).

[fn]Recipients “may provide legal assistance to non-citizens who are eligible under one of the anti-abuse statutes if providing the assistance is among the recipient’s priorities, as determined under 45 C.F.R. Part 1620.” Program Letter 14-3 (Oct. 29, 2014).[/fn]

If a noncitizen child has been subjected to the activities listed in section 1626.4(a)(1)(ii), recipients may represent and provide related legal assistance to either the noncitizen child or the noncitizen parent, notwithstanding the fact that the legal assistance provided to the parent, who may not have a legally cognizable claim in his/her own right, could benefit the eligible noncitizen parent. The amended section 1626.4(a)(1)(ii), read together with the definition of related legal assistance in section 1626.4(b)(2), implements the VAWA provisions relating to LSC[fn]Pub. L. 109-162, 119 Stat. 2980 (amending § 502(a)(2)(c) of the Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, Pub. L. 105-119, 111 Stat. 2510).[/fn] and reflects the congressional intent to allow recipients to provide legal assistance to noncitizen parents when doing so necessarily results or could result in a benefit to a noncitizen child (i.e., escaping from, ameliorating the current effects of, or preventing future abuse through a grant of SIJS).

This conclusion does not conflict with [AO-2010-002](#), which addressed the question whether recipients could represent ineligible noncitizen parents of U.S. citizen children in cases where the parent had a legally cognizable right and the child did not, but the representation would benefit the child. [AO-2010-002 \(Apr. 14, 2010\)](#). In the

circumstances we are addressing here, the child has a legally cognizable right and is eligible for representation himself or herself.

## **B. Providing legal assistance under section 1626.4(a)(1) to noncitizen nonparent guardians of children seeking SIJS**

The exceptions in section 1626.4(a)(1)(i) and (ii) apply to permit recipients to represent noncitizen children subjected to the activities listed therein and the noncitizen *parents* of such children. See 45 C.F.R. § 1626.4(a)(1)(ii) (“an alien whose child . . .”). If the child is eligible under section 1626.4(a)(1)(i), however, and a noncitizen (nonparent) guardian of the child is also independently eligible under that provision, then a recipient may accept the noncitizen guardian as a client and provide related legal assistance pursuant to section 1626.4(b)(2) in SIJ proceedings that may ultimately benefit the child, because such assistance includes representation in matters that will assist eligible noncitizen children to escape from, ameliorate the current effects of, or protect against future abuse. See *id.* § 1626.4(b)(2).

We understand that there may be situations in which one or both parents of a noncitizen child subjected to the activities listed in section 1626.4(a)(1)(ii) are unavailable (or even deceased), and the noncitizen child is in the custody of a noncitizen who is not independently eligible for legal assistance from an LSC-funded organization. In jurisdictions where local court rules preclude noncitizen children from filing a case that will lead to an SIJ predicate order, the phrase in section 1626.4(a)(1)(ii) that limits eligibility to “an alien whose child” has been subject to extreme cruelty, battery, sexual assault, or trafficking in the United States could be read to have the unintended consequence of depriving an otherwise eligible noncitizen child of the benefit of legal services provided by LSC recipients if it is interpreted to mean only the parent of such a child. This result is not consistent with Congress’ intent to expand legal assistance to immigrant victims of violence through VAWA 2005. See 151 Cong. Rec. H12124 (Dec. 17, 2005) (“This provision also includes an amendment to ensure that all legal services organizations can assist any victim of domestic violence, sexual assault and trafficking without regard to the victim's immigration status.”) (Statement of Sen. Sheila Jackson-Lee, D-TX). There is no indication that Congress intended a child who has been subject to extreme cruelty, battery, sexual assault, or trafficking in the United States to be deprived of legal services solely because the child is in the custody of a noncitizen guardian

instead of a noncitizen parent. Indeed, such an interpretation would lead to the anomalous result that children subject to violence or trafficking would lose their access to legal services if their parents were deceased or not present in the United States. To implement Congress' intent in these types of cases, LSC interprets the phrase "an alien whose child" in its own regulation to include noncitizens with custody or responsibility for a noncitizen child subjected to the activities listed in section 1626.4(a)(1)(ii).

LSC believes this interpretation is consistent with the congressional intent of the VAWA 2005 provisions relating to LSC. Although the recipient's client may, in these limited circumstances, be a noncitizen who is not otherwise eligible for LSC-funded legal assistance, the sole beneficiary of the representation is the intended beneficiary of the VAWA provisions implemented by section 1626.4(a)(1)(ii): the noncitizen child subjected to battery, extreme cruelty, sexual assault, or trafficking. The recipient's representation in these cases must be limited to proceedings related to helping the child "escape from the abusive situation, ameliorate the effects of current abuse, or protect against future abuse." 45 C.F.R. § 1626.4(b)(2). Such assistance may include seeking an SIJ predicate order. LSC believes the unrelated procedural barrier imposed by local court rules that preclude the noncitizen child who has been subjected to battery, extremely cruelty, sexual assault, or trafficking from petitioning for an SIJ predicate order should not prohibit recipients from representing noncitizen guardians of noncitizen children otherwise entitled to the protections afforded by VAWA, as long as the representation is limited to proceedings related to preventing or obtaining relief from the qualifying abuse.

## **C. Providing legal assistance under sections 1626.4(a)(2) and 1626.5 to noncitizen parents and noncitizen guardians of children seeking SIJS**

In addition to VAWA, the Trafficking Victims Protection Act of 2000 and section 504(a)(11) of LSC's fiscal year 1996 appropriations act authorize LSC recipients to provide legal assistance to certain noncitizens. Individuals who are eligible for legal assistance as victims of severe forms of trafficking, derivative T-visa holders, or through one of the section 504(a)(11) exceptions to the general bar on legal assistance to noncitizens may receive any permissible legal assistance from an LSC recipient. Such assistance may



include filing a case on behalf of a child that would lead to a juvenile court making the findings required to file a petition for SIJS.

## CONCLUSION

Pursuant to section 1626.4(a)(i) and (ii), LSC funding recipients may represent and provide legal assistance in SIJS proceedings to noncitizen parents of children who have been subjected to battery, cruelty, sexual assault, or trafficking, provided that such legal assistance is directly related to preventing or obtaining relief from the battery, cruelty, sexual assault or trafficking. 45 C.F.R. § 1626.4(b)(1). Such assistance includes representation in matters that will assist an eligible noncitizen child to escape from, ameliorate the effects of, or protect against future abuse, such as proceedings leading to an SIJ predicate order. *Id.* § 1626.4(b)(2). If local court rules preclude noncitizen children from initially filing cases in juvenile court that would lead to an SIJ predicate order, recipients may represent noncitizen parents or noncitizen guardians of such children and provide related legal assistance in such proceedings. Recipients may also provide any permissible legal assistance, including assistance with obtaining the orders needed to file an SIJS petition, to a noncitizen parent or noncitizen guardian who is eligible under the TVPA or section 504(a)(11) of LSC's fiscal year 1996 appropriation act.

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