

# IMMIGRATION BRIEFINGS<sup>®</sup>

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## T NONIMMIGRANT VISAS AND ADJUSTMENT OF STATUS FOR VICTIMS OF HUMAN TRAFFICKING: A PRACTICAL GUIDE TO THE RELEVANT STATUTORY CHANGES AND UPDATED REGULATIONS

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### INTRODUCTION

In 2012, President Barack Obama gave the longest speech on slavery in America of any sitting president since Abraham Lincoln. He sought to raise awareness of the issue in calling communities to action:

It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking

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about the injustice, the outrage, of human trafficking, which must be called by its true name — modern slavery.<sup>1</sup>

Shortly after President Obama gave this speech, the U.S. government released the first “Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013–2017.”<sup>2</sup> The plan was designed to improve coordination across all federal agencies in the provision of victim services and support as mandated by the Trafficking Victims Protection Act of 2000 (TVPA),<sup>3</sup> which, in creating a comprehensive framework to combat modern slavery in the U.S., created specialized forms of immigration relief for victims. Despite some improvements under the plan, more than 15 years after passage of the TVPA, the immigration protections and other services outlined in the TVPA are still grossly underutilized by trafficking victims.<sup>4</sup> While the issue of modern-day slavery in our own backyards has received growing national and individual state<sup>5</sup> attention over the last five years, the federal government has lagged behind in updating regulations and providing other information essential for victim service providers and immigration practitioners to effectively assist their clients. Despite significant statutory changes resulting from reauthorizations of the TVPA in 2003, 2005, 2008, and 2013, amend-

ments to the Violence Against Women Act (VAWA)<sup>6</sup> in 2005 and 2013, and the passage of other human trafficking legislation, including the Justice for Victims of Trafficking Act of 2015 (JVTA),<sup>7</sup> U.S. Citizenship and Immigration Service (USCIS) has taken years to enact or revise the associated regulations. The initial regulations addressing T visa adjustment of status were not released until December of 2008, more than five years after the first T visa holders were eligible for adjustment.<sup>8</sup> Moreover, it was not until December 2016,<sup>9</sup> following four reauthorizations of the TVPA over a period of 14 years, that USCIS updated the T visa regulations first published in 2002.<sup>10</sup>

This *Briefing* serves as an update to the *Briefing* published in September 2006 entitled “T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner’s Guide.”<sup>11</sup> It discusses the statutory changes since publication of the 2006 *Briefing* affecting (1) T visa qualifications and procedures, (2) T visa adjustment of status provisions, and (3) continued presence (CP) and advanced parole (AP) determinations. It also provides guidance on the 2008 and 2016 regulations. The 2006 article should still serve as an initial reference for immigration practitioners in identifying human trafficking victims, understanding their specialized legal needs, and becoming familiar with the immigration relief and the services available to them.

## SPECIALIZED IMMIGRATION RELIEF: AN UNDER-UTILIZED RESOURCE FOR TRAFFICKING VICTIMS

There are no studies providing definitive information on the prevalence of human trafficking in the United States at any given time. In addition, 2004 is the most recent year for which the U.S. government provided any formal statistics estimating the number of individuals trafficked annually into the United States.<sup>12</sup> What is known, however, is that human trafficking has been identified and prosecuted in all 50 states as well as in all U.S. territories.<sup>13</sup>

It is also known that human trafficking is a multifaceted crime impacting individuals across age groups

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who are vulnerable to commercial exploitation in a variety of occupations for a myriad of reasons.<sup>14</sup> They are men, women, and children as young as two and as old as 78.<sup>15</sup> Some are college-educated, even holding PhDs, while others are illiterate in their native languages.<sup>16</sup> Freedom Network USA (FN) is a national alliance of over 50 experienced advocates advancing a human rights-based approach to human trafficking in the United States. FN's 2016 client profile is based on a survey of 2,332 clients served by FN members from 2012-2016. This report shows that:

- Type of trafficking: 52% labor trafficking, 33% sex trafficking, 9% sex trafficking of minors, 6% both sex and labor trafficking, and 3% unknown
- Gender of clients: 65% female, 34% male, and 1% transgender/unknown
- Age of clients: 17% minor (18 or younger), 39% ages 19–29, 23% ages 30–39, 21% ages 40 or older.<sup>17</sup>

In its “Topology of Modern Slavery,” the Polaris Project analyzed more than 32,000 cases of human trafficking documented through calls to its National Human Trafficking Hotline between December 2007 and December 2016.<sup>18</sup> From these cases, it found slavery existing in the following 25 industries:<sup>19</sup>

- (1); Escort Services
- (2) Illicit Massage, Health, & Beauty
- (3) Outdoor Solicitation
- (4) Residential
- (5) Domestic Work
- (6) Bars, Strip Clubs, & Cantinas
- (7) Pornography
- (8) Traveling Sales Crews
- (9) Restaurants & Food Service
- (10) Peddling & Begging
- (11) Agriculture & Animal Husbandry

- (12) Personal Sexual Servitude
- (13) Health & Beauty Services
- (14) Construction
- (15) Hotels & Hospitality
- (16) Landscaping
- (17) Illicit Activities
- (18) Arts & Entertainment
- (19) Commercial Cleaning Services
- (20) Factories & Manufacturing
- (21) Remote Interactive Sexual Acts
- (22) Carnivals
- (23) Forestry & Logging
- (24) Health Care
- (25) Recreational Facilities

The diversity of these industries shows that human trafficking is happening in everyone's backyard. This diversity also highlights that traffickers are experts in identifying and exploiting all forms of vulnerabilities. This same diversity makes it hard for immigration practitioners to fully understand this complex crime and assist trafficking victims in effectively accessing and applying for the specialized relief for which they have been eligible since the TVPA passed in 2000, a fact highlighted in recent governmental reports. For the year 2015, for example, the Department of Health and Human Services (DHHS) provided letters authorizing benefits for only 623 adult and 240 child foreign national trafficking victims.<sup>20</sup> In fact, in the 15 years that the DHHS has operated this program, it has issued a total of only 4,701 letters.<sup>21</sup> Although the TVPA of 2000 authorized the issuance of up to 5,000 T visas annually, it follows that the majority of T visas available for trafficking victims remain unclaimed each year.<sup>22</sup> The 2016 U.S. Department of State's “Trafficking in Persons” (TIP) report highlighted the continuing decline in these figures from previous years, revealing the unsettling fact that large numbers of trafficking

victims were not able to access the TVPA’s benefits.<sup>23</sup> Given the failure to identify and assist victims of modern slavery in the United States, all immigration practitioners must master the skills needed both to identify this population and to provide the most effective assistance possible.

## T VISA APPLICATIONS

### Benefits of Applying for a T Visa Versus a U Visa for Trafficking Victims

Perhaps because of the complexities of assessing whether an individual qualifies as a “victim of severe form of trafficking in persons” under 22 U.S.C.A. § 7102(9), immigration practitioners have been far more likely to file for U nonimmigrant status (U visa)

for trafficking survivors as opposed to the T nonimmigrant status. Every year since 2010, more than 10,000 U visa applications have been filed and approved.<sup>24</sup> In fact, after meeting the 10,000 cap annually, there are still tens of thousands of potentially eligible applicants waiting for an available U visa to obtain lawful status. The amount of U visa applicants continues to increase every year. Comparably, the T visa program has never come close to reaching its annual cap of 5,000 visas per year.<sup>25</sup> Given the U visa waitlist and limitations, the T visa provides more comprehensive benefits for trafficking survivors.

The following chart summarizes the reasons why the T visa is a better option than the U visa for use by human trafficking survivors.

	<b>T Visa</b>	<b>U Visa</b>
Qualifying Criminal Activity	“Severe forms of trafficking in persons” as defined in 22 U.S.C.A § 7102(9) <sup>26</sup> and 8 C.F.R. § 214.11 <sup>27</sup>	“Qualifying criminal activity” listed under 8 C.F.R. § 214.14 <sup>28</sup>
Law Enforcement Certification	<ul style="list-style-type: none"> <li>● Form I-914, Supplement B must be requested by victims but is <b>NOT</b> required<sup>29</sup></li> <li>● Law enforcement cooperation for children under 18 is <b>NOT</b> required or for survivors who cannot cooperate due to psychological or physical trauma<sup>30</sup></li> </ul>	<ul style="list-style-type: none"> <li>● Form I-918, Supplement B <b>MUST</b> be signed by “certifying official”<sup>31</sup> and included in the application</li> <li>● If under 18, parent guardian or next friend can cooperate on behalf of minor</li> </ul>
Public Benefits	<ul style="list-style-type: none"> <li>● Eligible for benefits to the same extent as refugees</li> <li>● Eligible for eight months of state benefits in California under SB1569 <i>before</i> T visa application is filed</li> <li>● Public benefits <b>NOT</b> ground of inadmissibility<sup>33</sup></li> </ul>	<ul style="list-style-type: none"> <li>● Not eligible for federal benefits</li> <li>● Eligible for benefits in California under SB 1569 <i>after</i> application filed for eight months</li> <li>● Public benefits are <b>NOT</b> ground of inadmissibility<sup>32</sup></li> </ul>
Numerical Limitations	<ul style="list-style-type: none"> <li>● Not to exceed 5,000 in any fiscal year</li> <li>* The numerical limitation does not apply to derivative spouses, children, parents, and unmarried siblings who are accompanying or following to join the principal alien</li> <li>● Numerical cap has never been reached</li> </ul>	<ul style="list-style-type: none"> <li>● Not to exceed 10,000 in any fiscal year</li> <li>* The numerical limitation does not apply to derivative spouses, children, parents, and unmarried siblings who are accompanying or following to join the principal alien</li> <li>● Numerical cap has been reached every year since 2010</li> </ul>
Time for Adjustment of Status	<ul style="list-style-type: none"> <li>● Can apply for adjustment of status when the criminal case is closed <b>OR</b> after three years continuous presence after T visa approval of the principal<sup>34</sup></li> <li>● Derivatives do not need to show continuous presences independently</li> </ul>	<ul style="list-style-type: none"> <li>● Can only apply for adjustment of status after three years of continuous presence after U visa approval<sup>35</sup></li> <li>● Principal and derivative applicants <b>each</b> must have three years of continuous presence</li> </ul>

## **Eligibility**

The basic eligibility requirements for a T visa have not changed since passage of the TVPA in 2000.

The four criteria for T visa eligibility are that the applicant:<sup>36</sup>

- (1) is or has been a victim of severe forms of trafficking in persons;
- (2) is physically present in the United States or at a port of entry on account of human trafficking;
- (3) has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons unless the victim has not attained 18 years of age or is unable to cooperate due to physical or psychological trauma; and
- (4) would suffer extreme hardship involving unusual and severe harm upon removal.

As is the case for all immigration petitions, the applicant must also demonstrate that he or she is not inadmissible under INA § 212 [8 U.S.C.A. § 1182].

## **A STEP-BY-STEP GUIDE TO THE SUBSEQUENT STATUTORY AMENDMENTS AND DECEMBER 2016 REGULATIONS ADDRESSING THE T VISA PROCESS ESTABLISHED IN THE TVPA OF 2000**

A unique legal framework for trafficking survivors was created by the TVPA of 2000 and clarified through subsequent legislative and regulatory updates. Immigration practitioners have had to overcome the challenge of not having updated regulations for the T visa over the last 15 years and have lacked guidance on how to interpret the numerous legislative changes to immigration procedures. This section details the changes to the TVPA of 2000 since its enactment, including clarifications of its terms through subsequent legislative efforts, as well as regulatory guidance most recently provided via the interim final regulations is-

sued in December 2016. The following discussion is meant to enrich practitioners' understanding of this framework so that they can more effectively utilize the T visa procedure on behalf of their future clients.

### **Clarifications of Provisions of the 2000 TVPA Provided by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008)**<sup>37</sup>

#### ***“Victim of Severe Form of Trafficking”***

For an immigration attorney assessing a client's potential status as a trafficking victim, the most important definition in the TVPA of 2000 is that delineating the parameters of a “victim of severe form of trafficking” (VSFT).<sup>38</sup> It is this concept, along with the three other eligibility criteria listed above, that must be assessed to determine if an individual is eligible for immigration relief benefits<sup>39</sup> available only to human trafficking survivors.

Under 22 U.S.C.A. § 7102(9), the definition of “severe form of trafficking in persons” is:

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

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

#### ***Clarification of the Definition of “Coercion”***

It is important for immigration practitioners who are working with trafficking survivors to understand the legal definition of “coercion” referenced in the definition of VSFT as opposed to the colloquial understanding.

To show that an applicant is a VSFT, they must show that they either were forced, defrauded, or *coerced* into their trafficking situation unless they are a minor victim of sex trafficking.<sup>40</sup>

“Coercion” is further defined in 22 U.S.C.A. § 7102(3) as:

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of the legal process.<sup>41</sup>

Significant clarification on the meaning and breadth of coercion were provided in the TVPRA of 2008, including clarification on the definition of “serious harm” and “abuse of the legal process.”<sup>42</sup> These explanations were not meant to be new legal definitions but clarifications of these complex crimes as initially contemplated in the TVPA of 2000.<sup>43</sup>

◆ **Practice Tip:** These statutory, clarifying definitions from the TVPRA of 2008 are only explicitly provided in the criminal definitions of U.S. Code Chapter 77, Crimes dealing with human trafficking. They are not included in the December 2016 interim T visa rules. Despite their absence from the new regulations, immigration practitioners should use the definitions included in the criminal statute for sex trafficking and forced labor to provide further guidance on who qualifies as a “victim of severe form of trafficking.”

### Serious Harm

As noted above, the definition of “coercion” is broken down into three subsections. Both subsections (A) and (B) deal with “serious harm.”<sup>44</sup> The TVPRA of 2008 clarifies that, to make a showing of “serious harm,”<sup>45</sup> the court can consider:

[A]ny harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, **under all the surrounding circumstances**, to compel a **reasonable person of the same background and in the same circumstances** to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>46</sup>

The definition of “serious harm” is not based on subjective severity but, instead, based on an objective determination that assesses seriousness based on all surrounding circumstances related to the victim. This means that an individualized, comprehensive assessment must be undertaken in each case to review the individual’s particular barriers and limitations that he or she may have faced in his or her trafficking situation.

◆ **Practice Tip:** Advocates assumed that “serious

harm” covered only physical or psychological harm. The 2008 clarifying definition explicitly states that both financial and reputational harm are included. Practitioners should thus ask explicit questions about multiple types of coercion, including reputational and financial harm. An example of reputational harm can include the trafficker threatening to tell family members about the victim’s engagement in commercial sex knowing that this is culturally shameful. A financial harm example could be that the victim was threatened with having his or her land confiscated if he or she failed to pay a debt owed to the trafficker.

### Abuse or Threatened Abuse of Legal Process

The TVPRA of 2008 further clarifies the phrase “abuse or threatened abuse of legal process” as:

The use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.<sup>47</sup>

To make the VSFT determination, a practitioner must further elicit information about threats and misuse of family court, social service eligibility and benefits, as well as the immigration process. This clarifying legal definition not only includes threats of deportation, being jailed or arrested, or having a police report made against the victim but also can include threats of filing a lawsuit, filing a restraining order, or threatening divorce against the victim.

Because the definition of “abuse of the legal process” is broader than most practitioners often think, practitioners should look at ways in which traffickers use the legal system in unintended ways. Other examples of abuse of the legal process can include manipulating the visa process or lying to the victim that the trafficker is the only one who can renew/grant immigration status. Practitioners just need to show that the abuse of the legal process is what caused the individual to provide labor or engage in commercial sex.

◆ **Practice Tip:** Since the definition of coercion is an *either/or* provision, threats alone can satisfy the VSFT definition as long as it was these actions or threats that caused the individual to engage in the labor or commercial sex act.

**Clarifications of Provisions of the 2000 TVPA Provided by the JVTA of 2015**

The JVTA made several changes to the definition of “sex trafficking” as originally defined in the TVPA of 2000. The JVTA further offered some clarifying language regarding the potential culpability of patrons of sex-trafficked individuals. JVTA amended 22 U.S.C.A. § 7102(10) of the definitions section of the TVPA of 2000 as well as 18 U.S.C.A. § 1591 addressing sex trafficking and sex trafficking of minors by specifically adding “patronizing, or soliciting” to the definition.<sup>48</sup> 18 U.S.C.A. § 1591 now reads:

- (a) Whoever knowingly—
  - (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, **patronizes, or solicits** by any means a person . . .<sup>49</sup>

The JVTA also emphasizes that it is the sense of Congress to make absolutely “clear for judges, juries, prosecutors, and law enforcements officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.”<sup>50</sup> Interestingly, although the changes made by the TVPRA of 2008 discussed above are *not* included in the December 2016 interim regulations, the JVTA changes resulting in the revised statutory definition of sex trafficking in § 103(10) of the TVPA are expressly captured in the new regulations.<sup>51</sup>

From a practical standpoint, this change solidifies the argument that a minor sex trafficking victim is still eligible for a T visa without a third-party exploiter since the minor need only prove that he or she was “induced” into a commercial sex act and not that he or

she was forced, defrauded, or coerced into the commercial sex act.<sup>52</sup> Adults engaged in commercial sex, on the other hand, must prove “force, fraud, or coercion” and cannot rely solely on the fact that there is a purchaser or solicitor of the commercial sex act. The JVTA clarifies that the purchaser or solicitor of the commercial sex act from a minor is a trafficker and could face criminal charges.

**Identifying Trafficking Survivors Based on Legislative Changes**

Given the previously described complexities of both the relevant criminal standards and the definition of “severe form of trafficking in persons,” immigration practitioners must perform an individualized, fact-specific assessment of a client who may be a trafficking victim. During the intake process, the practitioner must question the client in detail about any threats, behaviors, schemes, and other means used by the trafficker to induce the individual to perform any type of labor or engage in commercial sex acts. As victimization through trafficking often evolves over an extended period of time, sometimes involving seemingly unrelated facts, practitioners new to the field would be wise to consult their more experienced peers in difficult cases.<sup>53</sup>

The following chart lists common facts that for newer practitioners often trigger an assessment that an individual cannot qualify as a victim of severe form of human trafficking. However, although the factual circumstances on the list should be further explored if present in an individual’s case, they do not mean that the individual cannot be a victim of a severe form of trafficking. All of the facts and circumstances must be evaluated within the context of the particular individual’s experience.

Factors that do not rule out that someone is a victim of trafficking	Questions to ask potential victims*
Had cell phone access	<ul style="list-style-type: none"> <li>● Was access to the cell phone monitored?</li> <li>● Why did potential victim not call the police or call for help?</li> </ul>
Received some money even minimum wage from the trafficking experience	<ul style="list-style-type: none"> <li>● What would happen if they stopped doing the work?</li> <li>● How much access to the money they earned did they have?</li> </ul>

Factors that do not rule out that someone is a victim of trafficking	Questions to ask potential victims*
Expressed that they were doing this for family or a loved one	<ul style="list-style-type: none"> <li>● Who else received money the potential victim earned?</li> </ul>
Expressed that no one was making them do this	
Opened a bank account where money is deposited	<ul style="list-style-type: none"> <li>● How was the bank account set up?</li> <li>● Who controlled access to the account?</li> </ul>
Received pay stubs	<ul style="list-style-type: none"> <li>● Did the pay stubs accurately reflect how much money they actually received?</li> <li>● Were any deductions indicated on the pay stubs?</li> </ul>
Had access to a car	<ul style="list-style-type: none"> <li>● Who controlled access to the car?</li> <li>● What would happen if they had tried to drive the car to another state or to the police to seek help?</li> </ul>
Received some days off of work	<ul style="list-style-type: none"> <li>● How often did they have days off from work?</li> <li>● Were there restrictions on what they could do or where they could go or any other “rules”?</li> </ul>
Had some freedom of movement to visit places like school, worship, or other	<ul style="list-style-type: none"> <li>● When they went to school or other places, why did they not tell anyone what was happening to them or ask for help?</li> </ul>
Returned to work for the same employer	<ul style="list-style-type: none"> <li>● What promises were made by the employer?</li> <li>● Why did they return to the employer and not seek help or another job?</li> </ul>
Had stable independent housing/or lived at home with a family member	<ul style="list-style-type: none"> <li>● What would happen if they tried to leave their housing arrangement?</li> <li>● If trafficking is occurring outside the home, were they ever threatened that their family/roommates would be told about the kind of work that they were forced to do?</li> </ul>
Changed their story about what happened	<ul style="list-style-type: none"> <li>● What had they been told might happen if they told the truth about what happened?</li> <li>● Why did they feel like they could not tell everything at first?</li> <li>● Clarify any points that are inconsistent.</li> </ul>

\* Note this is a non-exhaustive list.

**The December 2016 Interim Regulations Regarding T Visa Applications**

**Clarification on Cases Involving Attempted Trafficking**

The December 2016 regulations provide an important clarification on cases where forced labor and sexual services were not actually performed. Specifically, the regulations clarify that a VSFT can include an individual who **has been approached but not yet performed** labor or services or a commercial sex act. The regulations specifically provide guidance in the preamble on how to analyze these factual situations. The preamble contains the following explanation:

If a victim has not performed labor or services, or a commercial sex act, the victim must establish that he or

she was recruited, transported, harbored, provided, or obtained **for the purpose** of subjection to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, or patronized or solicited for the purposes of subjection to sex trafficking.<sup>54</sup>

The phrase “for the purpose” of subjection to a severe form of human trafficking is the key to making the claim for attempted trafficking.<sup>55</sup> The new regulations provide clear guidance that a victim is **not** required to have actually performed labor, services, or a commercial sex act to be eligible for the T-visa.<sup>56</sup> The examples of “attempted trafficking” below demonstrate situations where the labor or commercial sex act was not performed but still fall within the definition of VSFT:



- Department of Homeland Security (DHS) encounters victims at a safe house in the United States before the victim is forced to engage in labor or commercial sex;
- U.S. Customs and Border Patrol stop a victim crossing the U.S. border who was forced to carry drugs before he or she is able to enter U.S. soil;
- Police raid a building in the United States where the victim is being held before the victim is forced to commit labor or commercial sex.

◆ **Practice Tip:** The T visa regulations have a liberal evidentiary standard of “any credible evidence.”<sup>57</sup> Any reliable source that shows the purpose for which the victim was recruited, transported, harbored, provided, or obtained will suffice. Examples of appropriate evidence can include: Correspondence with the trafficker, evidence from an LEA, trial transcripts, court documents, police reports, news articles, and affidavits.<sup>58</sup>

From a practical perspective, generally the only evidence that will be available to show attempted trafficking is the victim’s own observations that can be documented in his or her affidavit. The ability to secure a T visa even in an attempted trafficking case highlights the need for practitioners to ask detailed questions in every interview with a potential trafficking victim.

Additional questions to consider for attempted trafficking cases when the client has yet to perform any labor services or commercial sex acts can include:

- Did the potential client have any understanding/knowledge as part of the recruitment process that he or she would have to perform sex and/or labor to pay off a debt?
- Did others around the potential client tell him or her stories about the employer forcing other people to work or engage in commercial sex?
- Did the client see anything that made him or her believe that he or she would have to work for the trafficker and/or engage in commercial sex?
- What evidence does the client have that he or she knew that he or she was going to be forced to perform labor or commercial sex? (Were there threats made by trafficker, other people who were trafficked, etc.)

- Did the client see other people get sold? Or hear stories about it?
- Is the trafficker known to engage in human trafficking?
- Were there any threats about being sold in the U.S.?

### ***On Account of Standard Physical Presence Requirement***

DHS has historically interpreted the “physical presence” requirement for the T visa to mean that (1) the trafficking occurred in the United States<sup>59</sup> and (2) the victim has not left the U.S. since the trafficking occurred.<sup>60</sup> Physical presence does not necessarily mean that the victim was brought to the U.S. by a trafficker; rather, immigration practitioners must identify why the trafficking victim is in the United States *today*. Arguments that have been successfully made regarding physical presence include: fear of retaliation from trafficker in home country, need to access trafficking-specific services in the U.S., no resources to leave the U.S., the need to continue to cooperate with law enforcement, and the need to access available legal remedies including civil remedies.

DHS has also explained which circumstances do not meet the physical presence requirement. DHS has clearly stated that a nexus must exist between the trafficking and the United States to meet the physical presence requirement.<sup>61</sup> In cases where the victim is fleeing to the U.S. to escape trafficking abroad, these victims will not be able to establish this required nexus unless they can establish extraterritorial jurisdiction. Persons who are deported or removed from the U.S. after their trafficking situation are also not physically present on account of trafficking and cannot apply for a T visa from abroad.

If a victim has voluntarily left or has been deported from the U.S. any time after escaping the trafficking situation, the victim shall be deemed not to be present in the U.S. on account of trafficking unless the victim can demonstrate that his or her reentry into the U.S. was the result of the continued victimization or a new incident of trafficking. In other words, once the traf-

ficking victim has left the U.S. for any reason other than being directly related to the trafficking, he or she is no longer T visa eligible.<sup>62</sup>

Another common misconception is that victims who enter undocumented prior to their trafficking situation are not present on account of trafficking. However, if a person is ultimately trafficked in the U.S. after his or her unauthorized entry, he or she will still be able to meet the present on account of trafficking requirement so long as he or she has not departed the U.S. after the trafficking occurred.

Clarifications on Present on Account of Trafficking

The 2016 regulations make three significant clarifications with regard to the “physical presence” requirement to conform to updated legislation.

First, the regulations clarify that a trafficking victim who has left the U.S. but who a law enforcement agency (LEA) brings back into the country as part of an investigation or judicial process is eligible for a T visa if the victim can document entry through a legal means, such as parole, and further shows that his or her entry was for the purpose of participating in investigative or judicial processes.<sup>63</sup>

Second, the regulations clarify that a victim trafficked solely in another country but who is brought to

the United States for purposes of participating in an investigation or judicial process related to trafficking where the U.S. government has extraterritorial jurisdiction for the crime is also eligible for a T visa.<sup>64</sup> The most common example of this is a case being prosecuted under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) under 18 U.S.C.A. § 2423.<sup>65</sup> This criminal statute allows the U.S. government to prosecute U.S. citizens or residents who engage in sex tourism abroad. Victims, generally minors, brought to the U.S. to testify in these prosecutions have consistently received T visas despite the trafficking having only occurred outside of the United States. In the Coalition to Abolish Slavery and Trafficking’s (CAST’s) experience, this was true even prior to the clarification included in the December 2016 regulations.

Third, the new regulations remove the 2002 interim rule requirement that a trafficking victim who escapes from a trafficker before an LEA became involved has the affirmative burden of proof to show that he or she did not have a “clear chance to leave the United States, or an opportunity to depart.”<sup>66</sup> Applicants for a T visa no longer need to explain why they did not leave the U.S. after escaping their trafficker.

Common Scenarios Dealing with “Physical Presence on Account of Trafficking”

Scenario	Eligible Under “Physical Presence” Standard
Brought into U.S. to cooperate with law enforcement after being deported	Yes
Brought into U.S. by law enforcement for civil case	Yes
Trafficking occurs solely outside U.S. and victim flees to U.S. for safety	No
Trafficking occurs solely outside U.S. but brought to U.S. by law enforcement for investigation/judicial process	Yes
Trafficked in U.S. but deported	No unless can show return is because of original trafficking or new trafficking situation
Trafficked in U.S. but leaves U.S. after trafficking	No unless can show return is because of original trafficking or new trafficking situation
Escapes trafficking and does not have contact with law enforcement for years	Yes; does not need to show clear opportunity to depart
Trafficked in U.S., returns home, trafficked by another back to U.S.	Yes, but only T visa eligible for second trafficking situation
Enters U.S. legally or unauthorized, meets trafficker several years after entry, and is trafficked in U.S.	Yes

### ***Reasonable Requests from Law Enforcement Standard***

One of the eligibility requirements for a T visa is to demonstrate that the applicant has complied with the reasonable requests for assistance in an investigation or prosecution from a law enforcement agency. Although under 8 C.F.R. § 214.11(b)(3) and (d)(3) applicants for a T visa are not required to have a certification from a law enforcement officer for T visa purposes, the applicant must show that good-faith efforts to report the trafficking crime and obtain the law enforcement certification were made.

### **Minor Exemption to Cooperation with Law Enforcement**

Two statutory changes are incorporated in the new regulations regarding the requirement that T visa applicants comply with “reasonable requests for assistance from LEA.” In 2003, the TVPRA raised the age at which a victim need comply with LEA’s reasonable request for assistance from 15 to 18 years.<sup>67</sup> The new regulations mirror this update.<sup>68</sup> An official copy of the alien’s birth certificate, a passport, or a certified medical opinion is a sufficient evidentiary showing of age.<sup>69</sup> To their credit, the regulations recognize that some human trafficking victims may not have access to the above-listed documents and provide needed flexibility by allowing “other evidence.”<sup>70</sup> While this standard seems simple on its face, the issue for immigration practitioners is actually more complicated as the regulations provide no clear guidance as to whether the under 18 years of age cooperation requirement applies at the **time of the trafficking** or at the **time of the application for the T visa**.

The statute clearly outlines the standard for cooperating with law enforcement and includes the exception that a victim of trafficking who has not attained 18 years is not required to cooperate with law enforcement;<sup>71</sup> however, there is no explicit language in the new regulations providing concrete guidance to practitioners to the question asked above.

The lack of consistency in the minor exception guidance is notable in the preamble of the regulations and

the USCIS website. The preamble implies that the applicant needs to be under 18 years at the time of victimization.<sup>72</sup> However, the USCIS website states that, “[i]f under the age of 18 at the time of the victimization . . . [the applicant] may qualify for the T nonimmigrant visa without having to assist in investigation or prosecution” (emphasis added).<sup>73</sup>

Further, adjudicators from the Vermont Service Center (the USCIS office that adjudicates T visa applications) have reiterated at several Freedom Network conferences, most recently in April 2016,<sup>74</sup> that the minor exemption is broadly interpreted to apply to applicants who were *victimised prior to turning 18 years old*, not for victims who are under 18 years old at the time of filing their T visa application. For these reasons, this guide recommends that, if an applicant for a T visa wishes not to cooperate with law enforcement and the trafficking occurred while the victim was under age 18, the applicant can apply without showing the cooperation requirement even after he or she has turned 18 years old.

### **Physical and Psychological Trauma Exemption to Cooperation with Law Enforcement**

The second statutory change updated in the new regulations provides additional guidance on the exception created by § 201 of the TVPRA of 2008. This provision specifically exempts an applicant from cooperating with law enforcement due to “physical or psychological trauma.”<sup>75</sup> This change allows an applicant either (1) to initially assert that he or she is unable to report to law enforcement because of physical or psychological hardship or (2) to stop cooperating with law enforcement because of physical or psychological hardship, making the request “unreasonable.”

In 2010, USCIS issued a policy memorandum reflecting changes in the TVPRA of 2008 that provided some guidance for implementing this exemption. The memorandum indicates that an applicant’s statement alone may be sufficient to establish physical or psychological trauma, but it does “encourage applicants to submit other evidence.”<sup>76</sup>

The new interim regulations offer similar guidance

as the 2010 memo but also include in the preamble a statement that, to show evidence of this trauma, an applicant must submit a statement describing the trauma supported by other credible evidence.<sup>77</sup> It reiterates that the statement of the applicant alone can be sufficient, but encourages submission of additional evidence.<sup>78</sup> Examples of acceptable evidence include a signed attestation as to the victim's physical and/or psychological trauma provided by a professional who is qualified to make this determination in the course of his or her job.<sup>79</sup> The preamble further makes clear that, for victims who have never reported the trafficking to law enforcement, DHS will not contact law enforcement. For those cases in which an LEA is already involved, DHS will consult with the Department of Justice (DOJ) as "appropriate."<sup>80</sup>

In 2015, Polaris Project created a comprehensive resource tool entitled the "T Visa and the Trauma Exception," which is an excellent starting place for practitioners unfamiliar with best practices in asserting this exception.<sup>81</sup>

◆ **Practice Tip:** In practice, practitioners in this field are cautioned against assuming that most trafficking survivors will qualify for this exception. The majority of trafficking victims face physical or psychological harm when cooperating with law enforcement. Do not assume that because an applicant qualifies for an exemption that the applicant will want to utilize it or that it is strategically wise. Although minor and trauma exemptions can be made, this *Briefing* encourages that the use of these exemptions be made sparingly as the use of exemptions limit the available benefits provided under a T visa:

- An applicant cannot obtain certification from the Department of Justice that the criminal case is closed to allow the principal to adjust status earlier than three years.
- They may potentially cut-off the ability to apply for family members who are eligible based on "present danger of retaliation," including the newer T-6 derivative status, which is the adult or minor child of a T visa derivative beneficiary (e.g., grandchildren or adult children of a derivative-parent). This is a relatively new derivative status, and there are not a lot of case examples in obtaining the T-6 derivative status. The guidance from USCIS has been that evidence of law enforcement cooperation is needed to demonstrate a present danger of retaliation to the T-6 derivative as a result of the principal's escape from the severe form of trafficking in persons.
- It is not necessarily an easier process for the

client to use an exemption because he or she may need a psychological evaluation from a licensed psychologist to be included in the T visa application in lieu of evidence of reasonable cooperation with law enforcement. Generally, these psychological evaluations can be very intrusive and extensive. Remember that all that is required under the T visa is for the client to report the crime and that, in the experience of many practitioners, law enforcement chooses not to interview many reported cases.

### Law Enforcement Certification

The December 2016 regulations reflect an addition made by the VAWA of 2005 that expands which law enforcement agencies qualify as certifying agencies.<sup>82</sup> The preamble makes clear that USCIS must consider statements from law enforcement, but also asserts that victims must comply with reasonable requests for assistance from these agencies to be T visa eligible.<sup>83</sup> The list of eligible certifying agencies includes federal, state, or local law enforcement agencies, prosecutors, judges, labor agencies, or other authorities that have responsibility for the detection, investigation, and/or prosecution of severe forms of trafficking in persons.<sup>84</sup>

For immigration practitioners, it is helpful to recognize that the federal Department of Labor (DOL) as well as many state and local labor agencies have drafted protocols for certifying T visas.<sup>85</sup> Given the expansion clarified in the new regulations regarding state and local law enforcement, best practice for immigration practitioners is to develop relationships with both state and federal law enforcement and other certifying agencies to help clients determine the best and safest source to report their cases.

In addition to the statutory changes referenced in the new regulations, DHS has provided additional guidance and updates on the requirements for LEA certification. While understanding the new options for obtaining LEA certification is important, practitioners applying for T visas on behalf of their clients must remember that, unlike the U visa, the T visa *does not require a law enforcement certification*. In fact, practitioner experience shows that the majority of T visa cases are filed without LEA certification and are approved.

Even though the TVPA of 2000 does not require law

enforcement certification for T visa eligibility, the 2002 interim rules gave greater weight to T visa applications with LEA certifications by creating a “primary evidence” standard for law enforcement certifications.<sup>86</sup> In response to comments on the 2002 regulations that concluded that this showing in fact established a “mandatory standard” that created an “imbalance between the needs of law enforcement and the rights of victims,”<sup>87</sup> the 2016 regulations clarify that “no special weight” will be given to an LEA endorsement.<sup>88</sup> Under the new regulations, all submitted evidence is considered equally under the “any credible evidence standard,” including law enforcement certifications.<sup>89</sup> The regulations explicitly state that evidence from a law enforcement agency is “optional” and not required.<sup>90</sup>

USCIS hopes that eliminating this distinction will alleviate any misconceptions that law enforcement officers might have regarding the weight of T visa certification (Form I-914, Supplement B) and encourage more law enforcement officers to certify on behalf of trafficking victims.<sup>91</sup> Hopefully, it will also eliminate the misconception among immigration practitioners that the law enforcement certification is required or carries more evidentiary weight than other evidence submitted with the application.<sup>92</sup> Many attorneys have expressed reluctance to file T visa applications without the law enforcement certification. This clarifying language should encourage applicants and attorneys to file more T visa applications even in the absence of a law enforcement certification.

### Reasonable Request Standard

Despite the more relaxed standard around weight given to the law enforcement certification by USCIS, practitioners’ experiences are that to comply with the “reasonable request” standard an applicant must at a minimum (1) report the case to an LEA,<sup>93</sup> (2) request a certification from law enforcement, (3) provide documentation to USCIS of these requests, or (4) request an exemption from cooperation.

Clarifications in the new regulations provide greater guidance on the standards that DHS will apply when determining “reasonableness.”<sup>94</sup> Three specific

changes are discussed in the preamble. First, DHS provides an expanded list of examples and factors that it will consider when determining the “reasonableness” of the request.<sup>95</sup> This list came from examples provided by commenters to the 2002 interim rules but is also considered nonexhaustive.<sup>96</sup> Second, DHS clarifies that the proper standard to determine reasonableness is whether the law enforcement request is reasonable rather than if the victim’s refusal was unreasonable.<sup>97</sup> Third, DHS affirms that it will use a “comparably situated crime victim standard,” not a subjective standard, believing that the former is of broader scope.<sup>98</sup>

### ***Extreme Hardship Involving Unusual and Severe Harm Standard***

Trafficking survivors are required to show that they would suffer “extreme hardship involving unusual and severe harm” if removed from the U.S. This standard considers traditional hardship factors as well as ones related to the trafficking. “Extreme hardship involving unusual and severe harm” for the T visa is a higher standard than set forth in other parts of the Immigration and Nationality Act. The factors determining extreme hardship are laid out in the regulations under 8 C.F.R. § 214.11(i). It is important to note that financial and economic hardship alone do not rise to the level of “extreme hardship involving severe and unusual harm.”

The extreme hardship standard of the 2000 TVPA required that eligible family members (“derivatives”) of a trafficking victim had to show extreme hardship if (1) the family member had not already been admitted into the U.S. or (2) the family member was removed from the U.S. In 2005, the VAWA reauthorization removed this requirement and the standard subsequently echoed in the December 2016 regulations.<sup>99</sup> The latest regulations clarify that *only* a principal applicant (the trafficking victim) must meet the extreme hardship standard.<sup>100</sup>

Removing the extreme hardship requirements for derivative applicants makes the derivative application process much easier. Now, in order for a family member of a trafficking victim to be eligible for a derivative T visa, they must only show (1) proof of relation-

ship to the principal applicant and (2) that they are admissible into the U.S. or eligible for a waiver of inadmissibility.

◆ **Practice Tip:** As long as the principal has not adjusted his or her status, family member applications can be filed (1) at the same time as the principal applicant, (2) any time while the T visa is pending, or (3) after the principal’s T visa is granted.

The principal’s adjustment of status application terminates eligibility for family members who have yet to apply for derivative status or yet to enter the U.S. Once a principal adjusts his or her status to legal permanent residency, any derivatives abroad will not be eligible for admission into the U.S. on a T visa nor would any family member who has yet to apply for T visa status be eligible.<sup>101</sup> Therefore, prior to adjustment, all family members must have their T visas approved and have consular processed into the U.S.

**Updates for Family Members and Other Derivative Applications for T Visas**

“Present Danger of Retaliation”

Several statutory changes address who qualifies as a

“derivative” for purposes of T visa applications. The TVPRA of 2008 expanded the derivative category to include “family members facing present danger of retaliation” based on the principal’s escape from severe form of trafficking in persons or cooperation with law enforcement regardless of the age of the trafficking victim.<sup>102</sup> Expanded categories of eligibility were also included in the Violence Against Women Reauthorization Act of 2013 (VAWA of 2013).<sup>103</sup>

Those eligible for derivative status as explained in the new interim rule are summarized in the chart below.

Age of Principal Applicant	Eligible Derivatives <sup>102</sup>
Under age 21	<ul style="list-style-type: none"> <li>● Spouse</li> <li>● Children</li> <li>● Unmarried siblings under 18</li> <li>● Parents</li> </ul> <p><u>If in present danger of retaliation:</u></p> <ul style="list-style-type: none"> <li>● Siblings regardless of age and marital status</li> <li>● Grandchildren</li> <li>● Niece or nephew (child of sibling regardless of age)</li> </ul>
Age 21 and older	<ul style="list-style-type: none"> <li>● Spouse</li> <li>● Children (under 18)</li> </ul> <p><u>If in present danger of retaliation:</u></p> <ul style="list-style-type: none"> <li>● Parents</li> <li>● Siblings regardless of age and marital status</li> <li>● Adult or minor children of a derivative beneficiary<sup>103</sup> <ul style="list-style-type: none"> <li>● Children or stepchildren of the principal’s derivative spouse<sup>104</sup></li> <li>● Child of a derivative child (grandchildren of principal)</li> <li>● Child of the derivative sibling (niece or nephew)<sup>105</sup></li> </ul> </li> </ul>

To qualify under the new derivative status category, evidence must be presented about the danger of retaliation resulting from either (1) escape from a severe form of trafficking or (2) cooperation with law enforcement.<sup>108</sup> Although the 2016 T visa regulations indicate that an applicant’s statement about the present danger of retaliation can be considered sufficient evi-

dence, DHS expressly notes that “the applicant’s statement alone generally is not enough.”<sup>109</sup> The other evidence that it will consider can come from signed statements from law enforcement, court documents, police reports, affidavits from other witnesses, or any other credible evidence.<sup>110</sup>

◆ **Practice Tip:** Although the enumerated example of evidence of present danger of retaliation describes numerous official court or LEA documentation, practitioners should be aware that applicants without LEA or court support have received T visa derivative status. If there is a present danger of retaliation to a family member, a practitioner should consider immediately filing a report with local police and securing a copy of this report. If the family is worried about local police bias or inaction, the U.S. Consular Office can be contacted to determine the best agency to which the family should report.

### Age-Out Protections

The new regulations clarify the “age-out” protections governing T visa applications.<sup>111</sup> The principal’s initial T visa filing date locks in the ages of all derivatives.<sup>112</sup> Neither a derivative’s date of admission into the United States nor the date of T visa approval impacts eligibility for derivative status.<sup>113</sup>

The age-out protection, however, does not extend to a child or sibling derivative where the regulations specifically require the derivative applicant to remain unmarried.<sup>114</sup> Children and siblings of T principals are required to be unmarried for eligibility as a T visa derivative.<sup>115</sup> Once the eligible family member marries, he or she will be considered ineligible for T visa status. Therefore, these derivatives must remain unmarried until granted T nonimmigrant status and admitted to the United States.<sup>116</sup>

### Marriage of Principal Applicant after T Visa Is Granted

It is important to note that, unlike the U visa, which offers the option for an after-acquired spouse to gain U status, the T visa does not offer the same benefit. In fact, the new regulations explicitly state that, if a T principal marries after the T visa grant, the new spouse will *not* be eligible for T status.<sup>117</sup>

This author believes that DHS is unnecessarily narrowing the interpretation of INA § 101(a)(15)(T)(ii) [8 U.S.C.A. § 1101(a)(15)(T)(ii)] in requiring that the spousal relationship exist at the time of filing. The only explicit timing requirement included in that section regards unmarried siblings under 18 years of age. Many trafficking survivors are forcibly brought or defrauded into coming to the U.S. while maintaining the intention of returning home. Due to the trauma that

they have suffered or threats from their trafficker, trafficking victims are often unable to return to their home country. Additionally, T visa applicants are unable to depart the U.S. any time after their escape from the trafficking situation because the departure from the U.S. would prevent the applicant from being able to meet the “physical presence” requirement to be eligible for a T visa. Some trafficking survivors have had to make the difficult decision to not return to home country to establish the necessary spousal relationship and leave their intimate partners or fiancé(e)s behind.

As mentioned above, unlike the U visa procedure which has a carve-out provision for remedying problems with qualifying family members at the time of the adjustment filing, the T visa does not.<sup>118</sup> In some cases, law enforcement has been willing to parole in family members of trafficking survivors who are in danger in their home country, but those circumstances are rare, leaving many victims without opportunities to remedy the lack of legally recognized relationships, including common-law marriages. Further troubling is the fact that, if a trafficking victim marries an undocumented person in the United States after the filing or the grant of the T visa but prior to adjustment, his or her spouse is excluded from eligibility. Practitioners should be pushing back on DHS for this narrow interpretation embraced in the new interim regulations.

◆ **Practice Tip:** Advise clients to marry their significant other prior to filing the T visa. If the intimate partner or fiancé(e) is outside the U.S., be sure to research home country laws for to see if the home country may recognize the relationship as a legal marriage in their home country (e.g., religious or common-law marriages). Some consulates in the U.S. are willing to help secure marriage documents for trafficking survivors.

Advise child and sibling derivative applicants to remain unmarried until they have entered the United States with T visa status.

### ***T Visa: Application Standards/Forms/ Duration of Status***

#### Referral for Removal Proceedings

In the preamble to the December 2016 regulations, DHS confirms that USCIS does *not* have a policy of referring applicants for T nonimmigrant status for removal proceedings “absent serious aggravating circumstances, such as the existence of an egregious

criminal history, a threat to national security or where the applicant is implicit in the trafficking.”<sup>119</sup>

As with almost all other immigration applications, the T visa application includes a standard warning that “information within the application could lead to removal.”<sup>120</sup> As this warning often incites fear in an applicant, immigration practitioners should explicitly reassure their clients of USCIS’ stated policy. This does not apply to applicants who are already in removal proceedings.

### Elimination of Certain Fees, Requirements, and Deadlines

The 2016 December regulations made a few helpful changes to the application procedure to simplify and make the procedure more efficient for trafficking survivors. These changes include (1) eliminating the requirement that an applicant provide three passport-style photographs<sup>121</sup> and (2) as of 2007, eliminating the filing fee for both a principal and derivative T visa applications, including biometrics fees.<sup>122</sup> Request for fee waivers for T visa applications are only required when applicants or their family members need to apply for waivers of inadmissibility.<sup>123</sup>

Finally, of particular importance is USCIS’ decision to remove the filing deadline language for applicants whose victimization occurred prior to October 28, 2000.<sup>124</sup> Under the old rules, DHS required applicants

whose exploitation occurred prior to October 28, 2000, to file no later than January 31, 2003, to be eligible for T nonimmigrant status or be able to show “exceptional circumstances” about why they missed the deadline.<sup>125</sup> Although USCIS has had a practice of considering and approving applicants who have been victimized prior to 2000, the old regulations created a lot of confusion. Many practitioners thought that, if the victimization happened prior to October 2000, an individual was not eligible. The TVPA never had a statutory filing deadline, and DHS properly removed this limitation in the new rules.

◆ **Practice Tip:** T visas can be filed for victims five, 10, 20, or even 30 years after the actual victimization. There is no filing deadline for the T visa. However, practitioners should be aware that filing for older cases may require stronger arguments for the “physical presence” to show that current presence in the U.S. is connected to the trafficking and that the trafficking survivor would still face “extreme hardship” if he or she were to be removed. One way to strengthen these arguments is to make sure that the client is connected to social services geared towards trafficking survivors. If a referral for services is needed, contact the National Human Trafficking Resource Center (888-373-7888).

### T Visa Checklist

Before filing for the T visa, be sure to review the T visa regulations (8 C.F.R. § 214.11) and the T visa waiver regulations (8 C.F.R. § 212.16). For further guidance from DHS on the T visa, see the DHS’ Preamble to the release of the 2016 T visa regulations.

### Principal

#### USCIS Forms (download most recent forms on [www.USCIS.gov](http://www.USCIS.gov))

- G-28, Notice of Entry of Appearance as Attorney or Accredited Representative
- I-912, Request for Fee Waiver, if applying for waiver of inadmissibility using Form I-192
  - Derivatives should be included in one fee waiver for derivative Form I-192 and derivative Form I-765
- I-914, Application for T Nonimmigrant Status (review instructions for Application for T Nonimmigrant Status)
- Proof of cooperation with law enforcement (one of the following):
  - Attorney declaration documenting reporting and request for I-914 Supplement B
  - I-914, Supplement B law enforcement declaration (not required)
  - Continued presence (not required)
- I-192, Application for Advance Permission to Enter as a Nonimmigrant, for individuals who may be inadmissible (waiver of inadmissibility pursuant to INA § 212(d)(13) and (d)(3) [8 U.S.C.A. § 1182(d)(13) and (d)(3)])
  - I-192 attachment (if needed)
  - See T nonimmigrant status waiver regulations at 8 C.F.R. § 212.16



**Supporting Documentation**

- Cover letter establishing the criteria for T status:
  - The applicant is a victim of severe form of trafficking in persons
  - The applicant is physically present in the US on account of trafficking
  - The applicant would suffer extreme hardship involving unusual and severe harm if he or she were removed from the U.S.
    - Address at least three factors listed at 8 C.F.R. § 214.11(i)(2)
- Declaration of applicant
- Passport (if none, request for waiver in Form I-192)

 **Optional Evidence\***

- Supporting declaration from case manager
- Trafficking in persons country reports (Department of State)
- Human rights reports (Department of State)

**Derivatives** **USCIS Forms**

- G-28 for each derivative
- I-914 Supplement A, Application for Family Member of T-1 Recipient
  - Relationship (select one box in either Part A or Part B)
- I-765 employment authorization (if derivative is currently present in the U.S.)
  - File under category (c)(25)
  - Note: Derivatives outside the country must wait until they have been admitted into the U.S. before filing for their employment authorization.
- I-192, Application for Advance Permission to Enter as a Nonimmigrant, for individuals who may be inadmissible (waiver of inadmissibility pursuant to INA § 212(d)(3) [8 U.S.C.A. § 1182(d)(3)], if needed)

 **Supporting Documentation**

- Evidence of relationship of each family member to the principal applicant (one of the following):
  - Birth certificate
    - Translated into English and accompanied by translator's certification
  - Marriage certificate
    - Translated into English and accompanied by translator's certification

**Confidentiality Provisions**

Another area important for immigration practitioners relating to the filing of T visa applications is understanding the confidentiality protections for T visa applicants. The new rules do not explicitly cover these provisions as they are included in the 2005 VAWA.<sup>126</sup> These confidentiality provisions protect the applicant in two ways. First, the denial of a T visa cannot be made based on information solely furnished by the trafficker.<sup>127</sup> Second, the applicant can be assured that USCIS may only release information on pending or approved applications to a sworn officer or employee of DHS, the DOJ, and the Department of State for legitimate law enforcement purposes.<sup>128</sup>

**Bona Fide Application Determination**

The 2002 interim T visa regulations explicitly

provided that, once an application for T-1 nonimmigrant status was filed, the "service would conduct an initial review to determine if the application is a 'bona fide' " application. If USCIS made a positive determination for bona fide status, the service would issue written confirmation.<sup>129</sup> Bona fide status is an important designation for trafficking victims as it entitles them to receive deferred action, employment authorization,<sup>130</sup> and certification for federal public benefits.<sup>131</sup>

Despite this express language, USCIS has a long-standing policy of not issuing bona fide determinations for T visa applicants. In a May 22, 2009, USCIS memorandum, Acting Deputy Director Michael Aytes wrote:

USCIS does not currently have a backlog of I-914 cases; therefore, focusing on issuing interim EADs is

not necessary. USCIS believes it is more efficient to adjudicate the entire I-914 and grant the T status, which produces work authorization for the applicant, rather than to touch the application twice in order to make a bona fide determination. However, in the event that processing times should exceed 90 days, USCIS will conduct bona fide determinations for the purpose of issuing employment authorization.<sup>132</sup>

Practitioner experience belies that argument as most T visa applications take six months to over one year to process. As recently as June 23, 2017, the Vermont Service Center (VSC), the USCIS office that makes T visa determinations, acknowledged that the processing times for T visa applications are taking almost eight months from the date of filing to process.<sup>133</sup> While eight months is generally much faster processing than other forms of immigration relief, this is a substantial amount of time for a survivor to go without crucial benefits.

Unfortunately, the 2016 T visa regulations do not address this long-standing issue. DHS continues to argue that it can process applications faster if it does not have to issue a bona fide determination. Because only USCIS can make this determination and refuses to do so, survivors of trafficking are being forced to remain in removal proceedings, in detention, and unable to access crucial federal public benefits. This is another area that practitioners should question and push back on USCIS' policy as being inconsistent with the statutory requirements.

### ***Waiver of Inadmissibility for T Visa Applications***

As with all immigration applications, a T visa applicant must be admissible to the United States or otherwise obtain a "waiver of inadmissibility."<sup>134</sup> The 2016 interim rules include two significant changes in this area.

The first change is that the TVPRA of 2008 ensured that the inadmissibility ground of "public charge" would not apply to T visa applicants.<sup>135</sup> The removal of this inadmissibility ground allows applicants to access public benefits without fear of repercussions on their long-term immigration status.

The second change is more complex, and, accord-

ingly, it is more difficult to determine its ultimate impact. In general, under the current statutory language and in practitioner experience in the T visa context, an inadmissibility waiver request is broadly construed. It is subject to a two-part analysis on the following grounds:

- First, USCIS will determine whether there is a connection between the inadmissibility to trafficking victimization under INA § 212(d)(13) [8 U.S.C.A. § 1182(d)(13)].
- Second, USCIS determines whether a discretionary waiver of the inadmissibility should be granted in the national interest determined under INA § 212(d)(3) [8 U.S.C.A. § 1182(d)(3)].

In the preamble to the new regulations, USCIS acknowledges its discretion in exercising its waiver authority with respect to criminal grounds of inadmissibility unrelated to the trafficking.<sup>136</sup> Under the prior regulations, a waiver would be provided in "exceptional cases."<sup>137</sup> In the 2016 rules, this standard is changed to one of "extraordinary circumstances" and requires explicit consideration of the nature and seriousness of the crime(s) as well as the number of convictions, all in accordance with INA § 212(a)(2) [8 U.S.C.A. § 1182(a)(2)]. For violent or dangerous crimes, USCIS will only exercise favorable discretion if the "extraordinary circumstances" standard is satisfied unless the criminal activities were caused by, or were incident to, the victimization described under INA § 101(a)(15)(T)(i)(I) [8 U.S.C.A. § 1101(a)(15)(T)(i)(I)].

This increased scrutiny around waivers of inadmissibility in the criminal content is worrisome for trafficking survivors as they routinely have unfavorable criminal histories that may not be incident to the trafficking but are often part of the scheme that makes them vulnerable to exploitation.<sup>138</sup> Past practitioner experience has shown that it has been safe for survivors with complex criminal histories to apply for the T visa without fear of referral to removal proceedings. However, the updated 2016 regulations could have a chilling effect for potential T visa applicants with lengthy criminal history because of the elevated "extraordinary

circumstances” standard. This concern is underlined by the January 2017 Presidential executive order requiring the Secretary of Homeland Security to prioritize deportation of anyone who has been “convicted of any criminal offense,” “charged with any criminal offense,” or has “committed acts that constitute a chargeable criminal offense.”<sup>139</sup> Recent presidential directives urging all federal prosecutors to enhance criminal immigration enforcement further exacerbates uncertainty in this area.<sup>140</sup> To combat this climate of fear, advocates should be using the INA § 212(d)(13) waiver that has been strengthened through the clarifications of the 2016 regulations and consulting with national experts in cases with complex criminal issues.<sup>141</sup>

◆ **Practice Tip:** Attorneys should always try to connect inadmissibilities to the trafficking victimization to qualify for the INA § 212(d)(13) waiver if possible. Sometimes inadmissibilities that happened prior to the trafficking victimization are what allowed a victim to become vulnerable in the first place. Likewise, inadmissibilities that arise after the trafficking situation may be a direct result of the trauma from the trafficking situation.

Additionally, since trafficking survivors often have complex criminal histories that they cannot fully recount, it is important to always conduct a background check to get a complete picture of the client’s criminal history and request waivers of inadmissibilities for all potential issues. When requesting the background check, the attorney should always use his or her office address instead of the client’s. After having identified all potential criminal inadmissibilities, immigration practitioners should consult with national trafficking experts in particular cases of applicants with complex criminal histories.

Lastly, it is also important to note that the interim rule’s preamble explicitly states that an inadmissibility waiver granted for purposes of the T visa application will be carried over and applicable to the adjustment of status application so as not to require a new waiver.<sup>142</sup> Only new grounds of inadmissibility arising after the grant of a T visa require a new waiver of inadmissibility application.<sup>143</sup> Therefore practitioners should strive to identify and have waived all grounds of inadmissibility at the T visa stage.

## STATUTORY CHANGES AFFECTING CONTINUED PRESENCE/ADVANCED PAROLE DETERMINATIONS

### Continued Presence Generally

Although not covered in the December 2016 T visa regulations, another significant benefit only available to potential victims of a severe form of trafficking in persons who are cooperating with law enforcement is continued presence (CP). Continued presence is an interim status that allows potential victim-witnesses of trafficking to have temporary status and employment authorization for two years.

For immigration practitioners, what is most important to understand is that CP can be requested by *either* federal, state, or local law enforcement.<sup>144</sup> State and local law enforcement must request federal Homeland Security investigation agents apply for CP on behalf of their victim-witness. In 2010, DHS issued explicit guidance to encourage more federal and local law enforcement to grant CP. The DHS pamphlet is a good resource both for practitioners familiarizing themselves with CP and for law enforcement to learn about this unique form of temporary relief available only to potential trafficking victims.<sup>145</sup> Practitioners have long noted that very few trafficking victims received CP, and clients should therefore be warned in advance of this national trend to not create unreasonable expectation for a survivor in receiving this benefit. In fact, the State Department’s 2016 TIP report notes that in 2015, fewer than 200 victims across the United States received this benefit.<sup>146</sup>

◆ **Practice Tip:** CP should be requested immediately after a trafficking victim has been interviewed by federal or state law enforcement. Be sure to collect the business card of the agents interviewing the victim and follow up with all requests.

### Continued Presence for A-3 and G-5 Visa Holders

The TVPRA of 2008 extended CP and advanced parole (AP) in three ways. First, if a domestic servant of a diplomat working in the United States under an A-3 or G-5 visa files a civil action under 18 U.S.C.A. § 1595, he or she can receive CP without relying on

federal law enforcement to make this request.<sup>147</sup> In March 2011, USCIS released guidance on how victims and their legal counsel can apply for this relief.<sup>148</sup> An A-3 or G-5 visa holder must submit to the Vermont Service Center the following documentation:<sup>149</sup>

- a cover letter requesting deferred action and outlining the violation of the terms of the visa holder’s employment contract or conditions and the ongoing civil action;
- Form I-765, Application for Employment Authorization;
- proof of legal entry into the U.S. in A-3 or G-5 nonimmigrant status; and
- a copy of the civil complaint filed in court as supporting documentation.

Second, the TVPRA of 2008 authorized CP for any

individual who files a civil action under 18 U.S.C.A. 1595.<sup>150</sup> Until recently, however, the only guidance issued for seeking this relief addressed individuals holding A-3 or G-5 visas. Only in October 2016 did DHS issue a new internal directive outlining how practitioners could request CP based on a civil filing.<sup>151</sup> Victims or their attorneys are instructed to contact the nearest Homeland Security (HSI) Victims Services Coordinator to request CP based on a pending civil action. This same memorandum also indicates that CP should be granted for a two-year period, replacing the prior one-year grant.<sup>152</sup>

**Advance Parole for Family Members of Continued Presence Holders**

The TVPRA of 2008 explicitly allows for AP for family members of anyone granted CP. Eligible family members are those eligible for T-visa derivative status as demonstrated in the chart below.

<b>Under Age 21</b>	<b>Age 21 or Older</b>
Spouse Child Parent Unmarried sibling under 18 years of age	Spouse Child Parent or sibling in present danger of retaliation as a result of CP holder’s escape from severe form of trafficking or retaliation for cooperation with law enforcement

Federal law enforcement has always had the power to parole individuals into the U.S. for “urgent humanitarian reasons” or “significant public benefit.”<sup>153</sup> Accordingly, an advocate has always been able to seek parole for anyone connected to a cooperating trafficking victim for a variety of reasons. The explicit language of the TVPRA of 2008 only reaffirms law enforcement’s ability to seek AP for human trafficking victims, providing practitioners an additional point of leverage in making this request for an eligible family member in danger of retaliation. This new language may make the law enforcement agent more likely to support such requests but does not change the fact that it is a discretionary benefit that law enforcement controls. This provision is also included in the 2016 HSI Directive on Continued Presence, providing additional guidance and support for law enforcement addressing AP petitions.<sup>154</sup>

**REGULATIONS ADDRESSING ADJUSTMENT OF STATUS**

**General Requirements**

Adjustment of status for trafficking victims is provided under INA § 245(1) [8 U.S.C.A. § 1255(1)]. It sets forth the requirements and procedures for a T visa holder to convert his or her status to that of a lawful permanent resident (LPR). The regulations implementing this provision were not released until 2008 even though the TVPA of 2000 specifically authorized this procedure.<sup>155</sup>

Eligibility to adjust to LPR status requires the principal applicant to:<sup>156</sup>

- (1) currently hold a T visa or have applied for an extension of T visa status;
- (2) have been present in the US for a continuous

period of at least three years since T status approval **or** a continuous period during an investigation and/or prosecution and the investigation and/or prosecution is closed as determined by the Attorney General of the United States;

- (3) have been a person of good moral character;
- (4) have complied with any ongoing reasonable request for assistance in the investigation or prosecution of acts of trafficking **or** would suffer extreme hardship involving unusual and severe harm upon removal from the U.S.; and
- (5) have no new ground of inadmissibility not waived at the time of the T visa application or request a new waiver.

To adjust to LPR status, *derivative* applicants must:<sup>157</sup>

- (1) have entered the U.S. prior to the principal's adjudication for LPR status; and
- (2) have no new ground of inadmissibility not waived at the T visa application stage.

◆ **Practice Tip:** For most trafficking victims, the two most coveted LPR benefits are the ability to apply for citizenship after five years and, even more importantly, the ability to travel freely without first asking for permission. Many trafficking survivors express a feeling of increased safety once they have obtained LPR status. Accordingly, to help mitigate trauma from the trafficking experience, immigration practitioners should file for LPR status for their clients as soon as possible after the T visa has been granted. As most criminal cases are closed prior to the T visa even being granted or have no active criminal investigations, the majority of trafficking victims are actually immediately eligible for adjustment of status.

### **Timely Filing or Extension of T Visa Status**

First, and most important, the adjustment of status regulations are clear that an applicant for LPR status “must have been lawfully admitted to the United States as a T nonimmigrant and must continue to **hold such status at the time of application.**”<sup>158</sup> A T visa holder is initially granted legal status for a period of four years.<sup>159</sup> The preamble to the adjustment regulations makes clear that individuals will lose status at the end of four years and will not be able to seek adjustment of status thereafter unless that status has been extended.<sup>160</sup>

As trafficking victims often have shifting residences and may lose contact with their immigration attorney, it is important for practitioners to emphasize these risks to trafficking victims when the T visa is granted and to seek status adjustment at the earliest possible date. It is also important for practitioners to be aware of the standard allowing for T visa extension as follows:

- (i) a federal, state, or local law enforcement official, prosecutor, judge, etc. certifies that the presence is necessary to assist in the investigation or prosecution;
- (ii) the alien is eligible for relief for adjustment of status and is unable to obtain such relief because regulations have not been issued to implement such section;<sup>161</sup> OR
- (iii) the Secretary of Homeland Security determines that an extension of the period of such nonimmigrant status is warranted due to exceptional circumstances.<sup>162</sup>

In general, as the requirement of subparagraph (i) is under law enforcement's control and subparagraph (ii) is moot because adjustment of status regulations have been established, the key question for practitioners is what constitutes “exceptional circumstances”? DHS has provided no formal guidance on this subject with the exception of a USCIS policy memorandum issued in December 2014 wherein DHS encourages those individuals with family members still outside the United States to file for an extension of status based on exceptional circumstances.<sup>163</sup>

The USCIS policy memorandum provides important practical guidance on the scenarios that justify an extension of the T visa status and should be reviewed by an immigration practitioner dealing with this issue for trafficking survivors or their family members. Most important, the same memorandum highlights that extension of status can be applied for those **currently in T visa status as well as those with expired status.**<sup>164</sup> In addition, if an applicant files for adjustment of status prior to the T visa expiring, the status is automatically extended during the pendency of the adjustment of status application.<sup>165</sup> Finally, derivative T visa applicants do not lose their T visa status if the principal adjusts first without the derivatives. However, that derivative must have been admitted to the United States prior to the principal adjusting his or her status.<sup>166</sup>

The December 2016 regulations reaffirm the standards articulated in the 2014 memorandum.<sup>167</sup> They further provide that an applicant may submit his or her statement, or other credible evidence, to meet the “exceptional circumstances” requirement. Finally, although they do not provide a lot of additional information on what circumstances qualify as exceptional circumstances, they do clarify that, if an applicant is applying for the exception because a family member has not entered the U.S., the applicant must document the reasons “exceptional circumstances prevented the family member(s) from applying for admission to the U.S.”<sup>168</sup>

◆ **Practice Tip:** In the new interim T visa regulations, DHS also confirms a narrow reading of the law that law enforcement support for an extension must come directly from an LEA and no other source. In the preamble, DHS interprets the term “certifies” as “not allowing for substitution of evidence that does not come directly from LEA . . . .” However, applicants are not required to provide this information in any specialized form. This narrow interpretation confirms that, if applying for an extension of the T visa, most practitioners will need to rely on the “exceptional circumstances” standard.

### Physical Presence Requirement

Most important for immigration practitioners to understand is that, unlike the U visa situation wherein applicants must have held U status for three years before applying, T visa principals can apply for status adjustment either as soon as the Attorney General determines that the related criminal investigation is complete or the applicant has established three years of continuous presence, whichever is less.<sup>169</sup> The vast majority of T visa holders are able to take advantage of the first option.

DOJ Civil Rights will review on a case-by-case basis the DOJ’s ability to provide a letter indicating that the criminal case is closed and that the victim has been helpful. To make a request for this letter, provide the following information:

1. Client name
2. Client alien number
3. Date T Visa granted
4. Location of trafficking

5. Approximate dates of trafficking
6. Law enforcement contact where case was reported
7. Information about prosecution (if any)
8. Other additional information [if a letter/email has been received from a law enforcement agent or attorney, it should be included as an attached PDF]

The above information should be E-MAILED to the following address: T-Adjustment.Cert@usdoj.gov.<sup>170</sup>

Regarding the three-year physical presence test, it is important for a practitioner to advise a client that he or she cannot travel outside the U.S. without prior approval through advance parole. Also, as a T visa holder, any travel outside of the U.S. for 90 days in a single trip or 180 days in the aggregate will disqualify him or her from adjustment.<sup>171</sup> The applicant must submit a copy of his or her passport and any documentation regarding departure and reentry to the U.S. along with the adjustment application to make the necessary evidentiary showing.<sup>172</sup>

◆ **Practice Tip:** Applicants must also present concrete evidence of their continuous presence in the U.S. from the time when they receive approval of the T visa to the month of their application for status adjustment. The general rule is to present at least one document bearing the name of the applicant and the date and time when it was issued from a nongovernmental or a governmental authority for each month of T visa status. For example, if a trafficking survivor is applying after three months of holding the T visa, the applicant will only need to submit three documents. If applying after three years of receiving the T visa, the applicant should likely provide 36 separate documents. Evidence of continuous presence suggested by the adjustment of status regulations include college transcripts, employment records, tax statements, receipts for rent, and utilities among others.

The adjustment of status regulations also provided that, in general, the statement of the applicant alone will not be sufficient to establish continuous presence. In some cases, trafficking victims do not have any documentation in their name. In those cases, an affidavit from the victim as well as from his or her attorney, case manager, or anyone else assisting him or her is needed detailing why this particular applicant does not have the requisite documentation.<sup>173</sup>

◆ **Practice Tip:** Only principal applicants must establish continuous presence in the United States. Derivative applicants, even those applying separately from the principal, NEVER need establish continuous presence in the United States.

Finally, the new T visa regulations created a technical fix enacted by VAWA of 2013 to clarify that presence in the Commonwealth of the Northern Mariana Islands after being granted T nonimmigrant status qualifies toward the requisite physical presence requirement for adjustment of status.<sup>174</sup>

### **Good Moral Character Requirement**

An applicant for adjustment of status must further establish “good moral character” beginning with receipt of the T visa and continuing until USCIS completes adjudication of the adjustment application.<sup>175</sup> INA § 101(f) [8 U.S.C.A. § 1101(f)] enumerates a nonexhaustive list of the activities that preclude a finding of good moral character. These include habitual drunkenness, prostitution, drug use/possession, illegal gambling, providing false testimony, being confined in jail 180 days or more, conviction of aggravated felonies, or other serious criminal offenses.<sup>176</sup>

Of particular importance in the preamble to the adjustment regulations is the statement that prostitution **prior** to the grant of the T visa will not be a bar to a USCIS determination of good moral character, but prostitution **after** being granted a T Visa will be a bar to establishing good moral character.<sup>177</sup> The preamble also seems to indicate that prior prostitution unrelated to trafficking is not considered a bar.

◆ **Practice Tip:** All sex trafficking survivors should repeatedly be warned of this explicit bar during the course of representation as often lack of employment or other factors may drive victims back to engaging in prostitution.

To show evidence of good moral character, DHS further requires the applicant to submit an affidavit attesting to his or her good moral character as well as a background check from each locality where the applicant has resided for six months or more.<sup>178</sup> The background check is required to be submitted with the application despite the fact that USCIS requires an applicant to be fingerprinted as part of the applications for both the T visa and adjustment of status.

◆ **Practice Tip:** Applicants under the age of 14 are considered to be of good moral character and do not have to submit any supporting evidence. Additionally, as with the continuous presence requirement, the good moral character requirement applies only to the principal applicant and never to any derivative applicants.

### **Extreme Hardship Standard or Law Enforcement Cooperation**

Another reason to apply for adjustment of status as early as possible for T visa holders is that the sooner an applicant files for adjustment of status, the easier it will be for an applicant to demonstrate his or her continuous “extreme hardship” that he or she would suffer if removed from the U.S. While the extreme hardship arguments are not the same as in the T visa application, adjustment applications can argue that extreme hardship is still ongoing from the initial T visa application.<sup>179</sup> The argument that the extreme hardship is ongoing becomes attenuated the longer the client waits before applying for adjustment.<sup>180</sup>

As previously discussed, to apply early for adjustment, an applicant must have a letter from the U.S. Attorney General stating that the criminal case is closed. Usually, in addition to stating that the trafficking case is closed, the letter will also attest to the ongoing cooperation of the trafficking survivor with law enforcement. This letter is therefore evidentiary support for both the continuous presence and the ongoing law enforcement cooperation requirements. Since an applicant in general must only prove either law enforcement cooperation or extreme hardship, if there is not a signed letter from the U.S. Attorney General or his or her designee, the applicant must generally prove “continuing extreme hardship.”<sup>181</sup>

### **Admissibility Requirement**

A final reason to apply for adjustment of status as soon as a trafficking victim is eligible is to reduce the chances of the applicant acquiring an additional inadmissibility that he or she may have to waive at the adjustment phase. The adjustment regulations are clear that if the applicant was previously granted a waiver for the T visa for any ground of inadmissibility, that waiver remains in effect. Only *new* grounds of inadmissibility occurring after the T visa is granted that would require an individual to file an additional waiver

application.<sup>182</sup> Fee waivers may also be submitted in conjunction with a new inadmissibility waiver application.<sup>183</sup> New grounds of inadmissibility are waivable under similar standards as the initial waiver request. A waiver will be granted if it is in the national interest or the activities were caused by, or incident to, the trafficking and the waiver is warranted as a matter of USCIS discretion.<sup>184</sup>

Unlike in the T visa context, where likelihood of becoming a “public charge” has been eliminated from the inadmissibility category, such a showing can technically support an inadmissibility finding at the adjustment stage of proceedings. The preamble to the adjustment regulations specifically recognizes this possibility. However, the preamble further clarifies that receipt of benefits are not “considered evidence of the likelihood . . . [of becoming a] public charge.”<sup>185</sup>

◆ **Practice Tip:** In the author’s experience, an exemption based on a public charge allegation has never needed to be requested at the adjustment phase.

### **Derivatives**

The application for adjustment of status for derivatives cannot be submitted prior to the principal’s application. They can be submitted simultaneously or after the principal’s application has been filed. Waiv-

ers for derivatives based on new grounds of inadmissibility arising since granting of the T visa must be submitted. Otherwise, documents required for all derivative applicants are extremely straight-forward and include:

- marriage certificate and copies showing legal termination of all other marriages
- birth certificate for eligible children and spouse
- passport (or waiver for passport)

Importantly, the new T visa regulations clarify that all new categories of derivative T nonimmigrants are eligible for adjustment of status. In the past, there had been some concern that these individuals would not be eligible to apply as the VAWA of 2013 changes to the statute did not specifically allow for adjustment of status for these categories of derivatives.

The following checklist is a comprehensive resource for practitioners to use when applying for adjustment of status for principals and derivative family members.

### **Adjustment of Status Checklist**

Before filing for T visa adjustment of status, review 8 C.F.R. § 245.23; 8 C.F.R. § 212.18.

### **Principal**

#### **USCIS Forms (download most recent forms on [www.uscis.gov](http://www.uscis.gov))**

- G-28, Notice of Entry of Appearance as Attorney or Accredited Representative
- I-912, Request for Fee Waiver
  - Derivatives should be included in one fee waiver
- I-485, Application to Register Permanent Residence or Adjust Status (review Form I-485, Supplement E for additional instructions for T visa applicants)
  - Current USCIS status for principal: T-1 nonimmigrant
  - Application type: Other — I was granted a T Visa and am eligible for adjustment
- G-325A, biographical data form
- I-601 waiver (if new inadmissibilities acquired after T visa)
- I-693 medical exam (list of civil surgeons)
  - Up to date vaccinations are required, including HPV for women ages 14–26
- I-765 employment authorization (if less than a year left on EAD)
  - File under category (c)(9)

#### **Supporting Documentation**

- Two passport photos of applicant
- Copy of passport (all pages)
- Birth certificate
- T visa approval notice



- Declaration of applicant
- Evidence of continuous presence**
  - If placed under one exhibit sheet, use continuous presence table
  - Suggested documents:
    - College transcript, employment records, tax statements, rent receipts, utilities, etc.
    - Any documents in the possession of DHS that supports applicant in the U.S.
    - Note: Signed statement alone is not sufficient
    - If documentation not available, must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge
  - If applying for early adjustment, DOJ letter required** (how to request DOJ letter)
- Evidence of good moral character**
  - Affidavit to attest to applicant's good moral character
  - Local police clearance or state issued criminal background check for each locality or state in the U.S. where applicant has resided for six months or more during the T status
  - If under 14 years old, do not need to submit evidence, but USCIS may require anyway
- Not required but recommended**
  - Copy of certification letter
  - Copy of social security card
  - Copy of EAD card

### Derivatives

- USCIS Forms**
  - G-28 for each derivative
  - I-485, Application to Register Permanent Residence or Adjust Status
    - Current immigration status:
      - Spouse: T-2 nonimmigrant
      - Children: T-3 nonimmigrant
      - Parent: T-4 nonimmigrant
      - Siblings: T-5 nonimmigrant
      - Adult or minor child of derivative: T-6 nonimmigrant
    - Application type: Other — I was granted a T Visa and am eligible for adjustment
  - G-325A, biographical data form
  - I-601 waiver (if new inadmissibilities acquired after T visa)
  - I-693 medical exam (list of civil surgeons)
    - Up to date vaccinations are required, including HPV for women ages 14–26
  - I-765 employment authorization (if less than a year left on EAD)
    - File under category (c)(9)
- Supporting Documentation**
  - Birth certificate
  - Passport (copy all pages)
  - Spouses:
    - Marriage certificate
    - Documentation showing legal termination of previous marriages

## CONCLUSION

This *Briefing*, in conjunction with the 2006 *Briefing*, should serve as an initial reference for immigration practitioners working with trafficking victims. It should not, under any circumstances, serve as a replacement for reading the relevant statutes, the related

regulations, and actual immigration application instructions as well as keeping abreast of statutory changes in this new and evolving field of practice. Immigration practitioners should also remember that trafficking survivors often have complex legal issues involving criminal and civil issues and therefore

should develop referrals to other attorneys with the relevant expertise. Providing immigration services in coordination with other practitioners so that survivors have access to all the legal remedies and protections potentially available to them is especially important in the complex field of human trafficking.

#### ENDNOTES:

<sup>1</sup>Barack Obama, President of the United States, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012).

<sup>2</sup>Department of Justice, Department of Health and Human Services, and Department of Homeland Security, Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017, Office of Victims of Crime (Jan. 2014), <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>.

<sup>3</sup>Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000), as amended, codified at 22 U.S.C.A. §§ 7101 to 7110.

<sup>4</sup>Of the 5,000 T visas available annually for trafficking survivors, the most T visa applications that USCIS has received in a fiscal year since 2008 was 1,062 applications, meaning that 3,938 eligible visas were unused in that fiscal year. Further, the most T visas that have been approved in a fiscal year since 2008 is 848 T visas. U.S. Citizenship and Immigration Services (USCIS), Number of Form I-914, Application for T Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2008-2017 (June 8, 2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t\\_visastatistics\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2017_qtr2.pdf) (hereinafter USCIS, Number of Form I-914).

<sup>5</sup>As of 2013, all 50 states have passed criminal anti-trafficking laws, the last state being Wyoming in February 2012. Press Release, Polaris Project, Wyoming Becomes 50th State to Outlaw Human Trafficking (Feb. 27, 2013), <https://polarisproject.org/news/press-releases/wyoming-becomes-50th-state-outlaw-human-trafficking>.

<sup>6</sup>Violence Against Women Act (VAWA), Pub. L. No. 106-386, Div. B, 114 Stat. 1491 (Oct. 28, 2000).

<sup>7</sup>Justice for Victims of Trafficking Act of 2015 (JVTA), Pub. L. No. 114-22, 129 Stat. 227 (May 29, 2015).

<sup>8</sup>8 C.F.R. § 245.23 (2017).

<sup>9</sup>Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92266 (Dec. 19, 2016) (to be codified at 8 C.F.R. §§ 212, 214, 245, 274(a)). These regulations went into effect on January 18, 2017.

<sup>10</sup>On January 31, 2002, the former Immigration and Naturalization Service (INS) published an interim final rule in the Federal Register titled “New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ‘T’ Nonimmigrant Status” implementing the T nonimmigrant status provisions of the TVPA. 67 Fed. Reg. 4784 (Jan. 31, 2002) (codified at 8 C.F.R. §§ 103, 212, 214, 274a, 299). The initial regulations outlined the eligibility criteria, application process, evidentiary standards, and benefits associated with the T nonimmigrant status. *Id.*

<sup>11</sup>Kaufka, T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner’s Guide, 09-06 Immigration Briefings 1 (Sept. 2006).

<sup>12</sup>U.S. Department of State, Trafficking in Persons Report (June 2004) at 23. This statistic does not include the number of people who were trafficked within the United States.

<sup>13</sup>Polaris Project, More Assistance More Action: 2016 Statistics from the National Human Trafficking Hotline and BeFree Textline (Jan. 2017), <https://polarisproject.org/sites/default/files/2016-Statistics.pdf>.

<sup>14</sup>Polaris Project, The Victims and Traffickers, <https://polarisproject.org/victims-traffickers> (last visited July 2, 2017).

<sup>15</sup>Richard, Practical Guidance for Asserting Crime Victims Rights for Survivors of Human Trafficking (2013), <https://victimsofcrime.org/docs/default-source/Training%20Institute/nti2015/practical-guidance-for-asserting-crime-victims-rights-for-survivors-of-human-trafficking.pdf?sfvrsn=2> (last visited July 17, 2017).

<sup>16</sup>*Id.*

<sup>17</sup>Freedom Network USA, 2016 Freedom Network Member Report (2016), <https://freedomnetworkusa.org/app/uploads/2016/12/Member-Report-2015-Electronic-Version.pdf>.

<sup>18</sup>Polaris Project, The Typology of Modern Day Slavery, <https://polarisproject.org/typology> (last visited July 17, 2017).

<sup>19</sup>*Id.*

<sup>20</sup>Department of Justice, Attorney General Loretta

E. Lynch, Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2015, at 27, <https://www.justice.gov/archives/page/file/870826/download>.

<sup>21</sup>The top countries of origin were the Philippines, Mexico, Honduras, Guatemala, El Salvador, and South Korea. *Id.* at 27-28.

<sup>22</sup>USCIS, Number of Form I-914, *supra* note 4.

<sup>23</sup>“DHS [Department of Homeland Security] granted T nonimmigrant status to only 610 victims and 694 eligible family members of victims in FY 2015, compared to a respective 613 and 788 in FY 2014.” U.S. Department of State, Trafficking in Persons Report (June 2016) at 391, <https://www.state.gov/documents/organization/258876.pdf>.

<sup>24</sup>USCIS, Number of Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2009-2017 (June 8, 2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr2.pdf).

<sup>25</sup>See USCIS, USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year (Dec. 11, 2014), <https://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year>.

<sup>26</sup>22 U.S.C.A. § 7102(9) (2012).

<sup>27</sup>8 C.F.R. § 214.11(a) (2017).

<sup>28</sup>8 C.F.R. § 214.14(a)(9) (2017).

<sup>29</sup>8 C.F.R. § 214.11(d)(3) (2017).

<sup>30</sup>See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006), § 801(b). See also 8 C.F.R. § 214.11(b)(3) (2017).

<sup>31</sup>8 C.F.R. § 214.14(a)(3) (2017).

<sup>33</sup>Violence Against Women Reauthorization Act of 2005, Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013) (amending INA § 214(o)(7) [8 U.S.C.A. § 1184(o)(7)]) (hereinafter VAWA 2013).

<sup>32</sup>8 C.F.R. § 212.16(b) (2017).

<sup>34</sup>See INA § 245(l) [8 U.S.C.A. § 1255(l)] (2013). See also 8 C.F.R. §§ 245.23(a)(3), 245.23(e)(2) (2017).

<sup>35</sup>See INA § 245(m) [8 U.S.C.A. § 1255(m)] (2013). See also 8 C.F.R. §§ 245.24(a)(1), 245.24(b)(3) (2017).

<sup>36</sup>INA § 101(a)(15)(T)(i) [8 U.S.C.A. § 1101(a)(15)(T)(i)].

<sup>37</sup>Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008).

<sup>38</sup>22 U.S.C.A. § 7102(9)(A) to (B) (2012). The definition that the T visa regulations rely on stem from the definitions listed in this statute.

<sup>39</sup>Related benefits are often in granted in conjunction with T visa approval, including federal refugee public benefits.

<sup>40</sup>Force, fraud, or coercion is required for all VSFT with the exception of minors engaged in commercial sex. The federal definition contemplates the notion that all minors engaged in commercial sex are victims of trafficking and only need to show inducement into the commercial sex act. This means that even child victims of labor trafficking must show force, fraud, or coercion.

<sup>41</sup>See also 8 C.F.R. § 214.11(a) (2013) (definitions).

<sup>42</sup>See 18 U.S.C.A. §§ 1589, 1591 (2012). TVPRA 2008, Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008) § 222(b)(3).

<sup>43</sup>See generally *id.*

<sup>44</sup>22 U.S.C.A. § 7102(3) (2012).

<sup>45</sup>This definitional update was provided in both the criminal standard for sex and labor trafficking at 18 U.S.C.A. § 1589 (2012) (forced labor) and 18 U.S.C.A. § 1591 (2012) (sex trafficking).

<sup>46</sup>18 U.S.C.A. §§ 1589(c)(2), 1591(e)(4) (2012) (emphasis added).

<sup>47</sup>18 U.S.C.A. §§ 1589(c)(1), 1591(e)(1) (2012).

<sup>48</sup>JVTA, Pub. L. No. 114-22, 129 Stat. 227 (May 29, 2015). 22 U.S.C.A. § 7102(10) (2012) (emphasis added).

<sup>49</sup>18 U.S.C.A. § 1591(a)(1) (2012).

<sup>50</sup>JVTA, Pub. L. No. 114-22, 129 Stat. 227 (May 29, 2015), at § 109(4).

<sup>51</sup>8 C.F.R. § 214.11(a) (2017).

<sup>52</sup>8 C.F.R. § 214.11(a) (2017).

<sup>53</sup>The Coalition to Abolish Slavery and Trafficking provides individualized technical consult for human trafficking cases nationwide funded by a grant from the Department of Justice and can help with assessing an individual trafficking case. For more information, visit <http://www.castla.org/services>.

<sup>54</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92308 (emphasis added).

<sup>55</sup>8 C.F.R. § 214.11(f)(1) (2017).

<sup>56</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92270. See 8 C.F.R. § 214.11(f)(1) (2017).

<sup>57</sup>See 8 C.F.R. § 214.11(d)(5).

<sup>58</sup>See 8 C.F.R. § 214.11(f)(1).

<sup>59</sup>In the comments to the new regulations, DHS specifically notes, “If a victim of trafficking abroad made his or her way to the United States and the reason is not related to or on account of the trafficking and the victim was not allowed valid entry to participate in an investigative or judicial process related to trafficking or the trafficker, this victim cannot meet the physical presence requirement and would not be eligible for T nonimmigrant status . . .” 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92273.

<sup>60</sup>8 C.F.R. § 214.11(g)(3) (2017).

<sup>61</sup>See 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92273.

<sup>62</sup>For example, a victim who is brought back and forth by the trafficker and enters the United States multiple times because of his or her trafficker is eligible for a T visa if he or she escapes from that trafficker in the United States. However, if a victim escapes from that trafficker while abroad with the trafficker, he or she would not be eligible for the T visa.

<sup>63</sup>8 C.F.R. § 214.11(g)(3) (2017).

<sup>64</sup>8 C.F.R. § 214.11(b)(2), (g)(1)(v) (2017).

<sup>65</sup>Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003).

<sup>66</sup>8 C.F.R. § 214.11(g)(2) (2010) (current version at 8 C.F.R. § 214.11(G)(2) (2017)). Compare with 8 C.F.R. § 214.11(g)(2) (2017).

<sup>67</sup>INA § 101(a)(15)(T)(i)(III)(cc) [8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(cc)] (2012).

<sup>68</sup>8 C.F.R. § 214.11(h)(4)(ii) (2017).

<sup>69</sup>8 C.F.R. § 214.11(h)(4)(ii) (2017).

<sup>70</sup>8 C.F.R. § 214.11(h)(4)(ii) (2017).

<sup>71</sup>8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(aa) to (cc) (2012).

<sup>72</sup>See 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92289 (Discussing how DHS is conforming its T nonimmigrant regulations to merely restate the statute that they implement. “Exemption for victims under 18 years old from compliance with any reasonable request for evidence. INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 USC 1101(a)(15)(T)(i)(III)(bb) and (cc); new 8 CFR 214.11(b)(3)(i),(ii).” (Emphasis added.)).

<sup>73</sup>USCIS, Questions and Answers Victims of Human Trafficking, T Nonimmigrant Status, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status> (last visited July 28, 2017).

<sup>74</sup>Notes on file with CAST.

<sup>75</sup>See INA § 101(a)(15)(T)(i)(III)(bb) [8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(bb)] (2012). See also 8 C.F.R. § 214.11(b)(3)(ii) (2017).

<sup>76</sup>TVPRA 2008, Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008). See also USCIS, Adjudicator’s Field Manual, Chapters 23.5 and 39, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15.html> (July 21, 2010).

<sup>77</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92277.

<sup>78</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92277.

<sup>79</sup>Examples of qualified professionals include medical professionals, social workers, or victim advocates who attest to the victim’s mental state and medical, psychological, or other records which are relevant to the trauma. 8 C.F.R. § 214.11(h)(4)(i) (2017).

<sup>80</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92277. See also 8 C.F.R. § 214.11(h)(i) (2017).

<sup>81</sup>National Human Trafficking Resource Center, T Nonimmigrant Status and the Trauma Exception (May 2015), [https://humantraffickinghotline.org/sites/default/files/The%20Trauma%20Exception%20To%20The%20T%20Nonimmigrant%20Visa%20-%20Fact%20Sheet\\_1.pdf](https://humantraffickinghotline.org/sites/default/files/The%20Trauma%20Exception%20To%20The%20T%20Nonimmigrant%20Visa%20-%20Fact%20Sheet_1.pdf).

<sup>82</sup>See INA § 101(a)(15)(T)(i)(III)(aa) [8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(aa)] (2012); see also 8 C.F.R. § 214.11(a) (2017).

<sup>83</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92276.

<sup>84</sup>8 C.F.R. § 214.11(d)(2) (2017).

<sup>85</sup>See Department of Labor, Department of Labor U and T Visa Process and Protocols, <https://www.dol.gov/whd/immigration/utvisa-faq.htm>. See also N.Y. State Department of Labor, Help for Immigrant Crime Victims, <https://labor.ny.gov/immigrants/immigrant-crime-victims.shtm>.

<sup>86</sup>67 Fed. Reg. 4784 (Jan. 31, 2002) at 4795.

<sup>87</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92276.

<sup>88</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92274.

<sup>89</sup>8 C.F.R. § 214.11(h)(3) (2017).

<sup>90</sup>8 C.F.R. § 214.11(d)(3)(i) (2017).

<sup>91</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92266.

<sup>92</sup>The practice of weighing evidence as primary and secondary was discontinued in favor of an “any credible evidence” standard. 8 C.F.R. §§ 214.11(f), 214.11(d)(2)(ii), 214.11(d)(3) (2017).

<sup>93</sup>8 C.F.R. § 214.11(h)(1) (2017) (“An applicant must have had, at a minimum, contact with an LEA regarding the acts of a severe form of trafficking in persons. An applicant who has never had contact with an LEA regarding the acts of a severe form of trafficking in persons will not be eligible for T-1 nonimmigrant status, unless he or she meets an exemption described in paragraph (h)(4) of this section.”).

<sup>94</sup>8 C.F.R. § 214.11(h) (2017).

<sup>95</sup>8 C.F.R. § 214.11(h)(2) (2017).

<sup>96</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92275.

<sup>97</sup>8 C.F.R. § 214.11(m)(2)(ii) (2017).

<sup>98</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92275 section (b).

<sup>99</sup>VAWA 2005, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006) at § 801(a)(2).

<sup>100</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92277 section (4) (in the preamble, despite supportive comments from the public, DHS refuses to exempt minors from this standard as Congress did not explicitly exempt them).

<sup>101</sup>See USCIS policy memorandum PM-602-0032.2 (Dec. 19, 2014), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/2016-1004-T-U-Extension-PM-602-0032-2.pdf>.

<sup>102</sup>See TVPRA 2008, Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008) at § 201(a)(2)(D). See also INA § 101(a)(15)(T)(ii)(III) [8 U.S.C.A. § 1101(a)(5)(T)(ii)(III)] (2012). See also 8 C.F.R. § 214.11(k)(iii) (2017).

<sup>103</sup>Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013).

<sup>102</sup>8 C.F.R. § 214.11(k)(1) (2017).

<sup>103</sup>This is the adult or minor child of someone who has been granted a T derivative visa through the principal. This is essentially the derivative of a derivative.

<sup>104</sup>An adult child (over the age of 21) is not eligible for this category unless the other parent has applied and been approved as a derivative. If the adult child is directly related to the principal and the adult child’s other parent never applies for T derivative status, then

the adult child who is facing present danger of retaliation is not eligible for their own derivative status. *See* 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92280. DHS has commented that this decision was based on statutory interpretation and does not believe it has the authority to assume legislative intent to make the exception to allow the adult child of the principal eligible for T nonimmigrant status without admission of the other parent as a derivative. *See* policy memorandum, USCIS, New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Marian Islands (Apr. 15, 2015), available at <https://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0415-TNonimmigrant-TVPRA.pdf> (hereinafter Yates Memo).

<sup>105</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92280 nn. 11–14 (provides a detailed assessment of these categories which is synthesized in this chart for simplicity for practitioners).

<sup>108</sup>8 C.F.R. § 214.11(k)(6) (2017).

<sup>109</sup>8 C.F.R. § 214.11(k)(6)(iii) (2017).

<sup>110</sup>8 C.F.R. §§ 214.11(k)(6)(ii), 214.11(k)(6)(iv) (2017).

<sup>111</sup>8 C.F.R. § 214.11(k)(5)(ii) (2017).

<sup>112</sup>See 8 U.S.C.A. § 1101(a)(15)(T)(ii)(I) (2012); see also Yates Memo, *supra* note 106, at 6.

<sup>113</sup>8 C.F.R. § 214.11(k)(5)(ii) to (iii) (2017).

<sup>114</sup>INA § 101(b)(1) [8 U.S.C.A. § 1101(b)(1)] (2013) (defining “child” as an unmarried person under 21 years of age; once a child marries they are no longer considered a “child” for purposes of immigration relief).

<sup>115</sup>INA § 101(b)(1) [8 U.S.C.A. § 1101(b)(1)]. See also 8 C.F.R. § 214.11(k)(1)(ii) (2017) (specifying the T5 category is for “unmarried siblings under the age of 18”).

<sup>116</sup>8 C.F.R. § 214.11(k)(iv) (2017).

<sup>117</sup>8 C.F.R. § 214.11(k)(iv) (2017).

<sup>118</sup>8 C.F.R. § 245.24(g) (2017).

<sup>119</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92283, section (C).

<sup>120</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92283, section (C).

<sup>121</sup>8 C.F.R. § 214.11(d)(4) (2017); see also 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92298.

<sup>122</sup>See Adjustment of the Immigration and Natural-

ization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851, 29865 (May 30, 2007) (to be codified at 8 C.F.R. § 103); U.S. Citizenship and Immigration Services Fee Schedule, Final Rule, 75 Fed. Reg. 58962, 58967, 58986, 58991 (Sept. 24, 2010) (to be codified at 8 C.F.R. §§ 103, 204, 244). See also 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92288.

<sup>123</sup>Filed under Form I-192, Application for Advance Permission to Enter as Nonimmigrant. See TVPRA 2008, Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008), at § 201(d)(3); INA § 245(l)(7) [8 U.S.C.A. § 1255(l)(7)].

<sup>124</sup>Classification for Victims of Severe Forms of Trafficking in Persons, 81 Fed. Reg. 92266 (Dec. 19, 2016), at 92277-78.

<sup>125</sup>8 C.F.R. § 214.11(d)(4) (2017).

\*Not necessary to include additional evidence, but if included make sure all evidence is relevant and consistent with applicant's declaration.

<sup>126</sup>See VAWA 2005, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006), at § 817, 8 U.S.C.A. § 1397 (2006); see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-563 (Sept. 30, 1996) (codified at 8 U.S.C.A. § 1367).

<sup>127</sup>IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-563 (Sept. 30, 1996), at § 384(a)(1)(F); 8 U.S.C.A. § 1367(a)(1)(F) (2012).

<sup>128</sup>8 U.S.C.A. §§ 1367(a)(2), 1367(b) (2012).

<sup>129</sup>8 C.F.R. § 214.11(k)(2) to (3) (2017).

<sup>130</sup>See Memorandum from Stuart Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS, Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status (May 8, 2002) (hereinafter Anderson Memo).

<sup>131</sup>The intent of Congress in creating a bona fide determination standard was to ensure that victims can have access to a streamlined process for securing access to benefits and employment. See 22 U.S.C.A. § 7105(b)(1)(E)(II)(aa) (2012) (indicating that certification for federal benefits can be granted if an applicant has made a bona fide application for a visa under INA § 101(a)(15)(T) [8 U.S.C.A. § 1101(a)(15)(T)]).

<sup>132</sup>See Anderson Memo, *supra* note 130.

<sup>133</sup>See USCIS, USCIS Processing Time Information for the Vermont Service Center, <https://egov.uscis.gov/cris/processingTimesDisplay.do> (last updated

May 31, 2017).

<sup>134</sup>INA §§ 212(d)(3), 212(d)(13) [8 U.S.C.A. §§ 1182(d)(3), 1182(d)(13)] (2013).

<sup>135</sup>See INA § 212(d)(13)(A) [8 U.S.C.A. § 1182(d)(13)(A)] (2012); 8 C.F.R. § 212.16(b) (2017). See also INA § 212(a)(4) [8 U.S.C.A. § 1182(a)(4)] (2013).

<sup>136</sup>67 Fed. Reg. 4784 (Jan. 31, 2002) at 4789; 8 C.F.R. § 212.16(b)(3) (2017).

<sup>137</sup>67 Fed. Reg. 4784 (Jan. 31, 2002) at 4789; 8 C.F.R. § 212.16(b)(3) (2017).

<sup>138</sup>See Richard, Victims of Human Trafficking Should Not Be Arrested for Crimes Their Traffickers Force Them To Commit, Coalition to Abolish Slavery and Trafficking (January 2016), [http://www.castla.org/assets/files/arrest\\_is\\_not\\_the\\_answer.pdf](http://www.castla.org/assets/files/arrest_is_not_the_answer.pdf).

<sup>139</sup>Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

<sup>140</sup>Department of Justice, memorandum from the Attorney General to all federal prosecutors, Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) (on file with Department of Justice). See also Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 01, 2017).

<sup>141</sup>8 C.F.R. § 212.16(b)(2) (2017).

<sup>142</sup>81 Fed. Reg. 92266 (Dec. 19, 2016) at 92284.

<sup>143</sup>See 8 C.F.R. § 212.18 (2017) (the waiver of inadmissibility for adjustment phase is applied for on Form I-601).

<sup>144</sup>TVPRA 2008, Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008), at § 205, 22 U.S.C.A. § 7105(c)(3) (2012).

<sup>145</sup>USCIS, Continued Presence: Temporary Immigration Status for Victims of Human Trafficking (July 2010), [https://www.dhs.gov/sites/default/files/publications/blue-campaign/BC\\_Continued\\_Presence.pdf](https://www.dhs.gov/sites/default/files/publications/blue-campaign/BC_Continued_Presence.pdf). See also U.S. Department of State, Trafficking in Persons Report (June 2016) at 391. See also Freedom Network USA, Continued Presence Implementation Challenges and Recommendations (April 2016), [http://freedomnetworkusa.org/app/uploads/2017/06/CPC\\_hallengesApril2016FNUSA.pdf](http://freedomnetworkusa.org/app/uploads/2017/06/CPC_hallengesApril2016FNUSA.pdf).

<sup>146</sup>*Id.*

<sup>147</sup>8 U.S.C.A. § 1375c(c)(1)(A) (2012).

<sup>148</sup>USCIS, USCIS Will Offer Protection for Victims of Human Trafficking and Other Violations (Mar.

11, 2011), <https://www.uscis.gov/archive/archive-new-s/uscis-will-offer-protection-victims-human-trafficking-and-other-violations>.

<sup>149</sup>Id.

<sup>150</sup>8 U.S.C.A. § 1375c(c)(1)(a) (2012).

<sup>151</sup>Continued Presence, HSI Directive 10075.2 (Oct. 6, 2016) (superseded by Continued Presence, HSI Directive 10075.1 (Apr. 6, 2011)) at 6 (on file at CAST, available upon request). Federal Enterprise Architecture Number: 306-112-002b at p. 6.

<sup>152</sup>Id. at 2.

<sup>153</sup>“The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.” INA § 212(d)(5) (2013) [8 U.S.C.A. § 1182(d)(5)(A)] (2012).

<sup>154</sup>Continued Presence, *supra* note 151, at 9.

<sup>155</sup>8 C.F.R. § 245.23(b)(2) (2017).

<sup>156</sup>Instructions for the adjustment application for T visa holders are provided at the USCIS website under Immigration Forms/Instructions for I-485, Supplement E. USCIS, Green Card for a Victim of Human Trafficking (T Nonimmigrant), <https://www.uscis.gov/greencard/trafficking-victim-t-nonimmigrant> (last visited July 19, 2017).

<sup>157</sup>INA § 245(l) [8 U.S.C.A. § 1255(l)] (2012). See also 8 C.F.R. § 245.23(b)(2) (2017).

<sup>158</sup>8 C.F.R. §§ 245.23(a)(2), 245.23(b)(2) (2017) (emphasis added).

<sup>159</sup>In 2006, the duration of the T visa was extended from three to four years. See VAWA 2013, Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013).

<sup>160</sup>Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75540, 75543 (Dec. 12, 2008) (to be codified at 8 C.F.R. §§ 103, 212, 214, 245, 299).

<sup>161</sup>See VAWA 2005, Pub. L. No. 109-162, 119 Stat.

2960 (Jan. 5, 2006) at § 821(a). See also INA § 214(o)(7)(B)(i) [8 U.S.C.A. § 1184(o)(7)(B)(i)] (2012).

<sup>162</sup>TVPPRA 2008, Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008) at § 201, 8 U.S.C.A. § 1184(o)(7) (2012) (extending the T visa).

<sup>163</sup>USCIS policy memorandum, Extension of Status for T and U Nonimmigrants (Corrected and Reissued), PM-602-0032.2 (Oct. 4, 2016) at 8, available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/2016-1004-T-U-Extension-PM-602-0032-2.pdf> (hereinafter Extension Memo).

<sup>164</sup>Id. at 5. The memo indicates that Form I-539 should be filed to extend T nonimmigrant status, and it should be filed before this status expires. However, it maintains USCIS discretion to grant the extension if the applicant describes in writing why he or she is “filing the form I-539 after the T nonimmigrant status expired.” Id.

<sup>165</sup>Id. at 5.

<sup>166</sup>Id. at 1.

<sup>167</sup>See 8 C.F.R. § 214.11(l)(3) (2017) (applicant should describe in writing why apply for extension after T nonimmigrant status expired); 8 C.F.R. § 214(l)(1)(7) (2017) (indicating that no separate application is necessary to extend application while the adjustment application is pending); 8 C.F.R. § 214.11(l)(6) (2017) (stating an exceptional circumstance could exist if family had not entered the U.S.).

<sup>168</sup>8 C.F.R. § 214.11(l)(3) (2017). See also 81 Fed. Reg. 92266 (Dec. 19, 2016) at 92286(b).

<sup>169</sup>8 C.F.R. § 245.23(a)(3) (2017). See also INA § 245(l)(1)(A) [8 U.S.C.A. § 1255(l)(1)(A)] (2012).

<sup>170</sup>Note that the Attorney General’s office has not issued formal or informal guidance on how to receive a certification letter. This information was received through informal consultation with staff from the Attorney General’s office by CAST over the course of several years. We expect information on this process to be available on DOJ’s website by the end of 2017.

<sup>171</sup>8 C.F.R. § 245.23(a)(A)(3) (2017).

<sup>172</sup>8 C.F.R. § 245.23(e)(2)(i) (2017).

<sup>173</sup>8 C.F.R. § 245.23(e)(i) (2017).

<sup>174</sup>See VAWA 2013, Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754 (May 8, 2008), § 705(c). See also 8 C.F.R. § 245.23(a)(3)(ii) (2017).

<sup>175</sup>8 C.F.R. § 245.23(a)(5) (2017). See also INA

§ 245(l)(1)(B) [8 U.S.C.A. § 1255(l)(1)(B)] (2012).

<sup>1768</sup> U.S.C.A. § 1101(f) (2012).

<sup>17773</sup> Fed. Reg. 75540, 75543 (Dec. 12, 2008) at 75542.

<sup>1788</sup> C.F.R. § 245.23(g) (2017).

<sup>1798</sup> C.F.R. § 245.23(f)(2) (2017).

<sup>1808</sup> C.F.R. § 245.23(f)(2) (2017).

<sup>1818</sup> C.F.R. §§ 245.23(d), 245(f)(l) (2017).

<sup>1828</sup> C.F.R. § 212.18(a) (2017).

<sup>1838</sup> C.F.R. § 103.7(b)(1) (2017).

<sup>1848</sup> C.F.R. § 212.18 (2017)

<sup>18573</sup> Fed. Reg. 75540, 75543 (Dec. 12, 2008) at 75544.

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