

Identification and Legal Advocacy for Trafficking Survivors

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Preface

The NY Anti-Trafficking Network¹ is a coalition of diverse legal and social service providers in New York State and surrounding regions dedicated to ending human trafficking and coordinating resources to provide services to trafficked persons. The Network's Legal Subcommittee advocates on policy issues, advises on technical legal issues, and works toward educating the attorneys on the problem of human trafficking in its many manifestations. The Legal Subcommittee drafted this manual to provide guidance to lawyers on issues that arise in the context of representing trafficking survivors. The manual is designed for practitioners who are familiar with basic legal terms and concepts, to offer some insight into the process. It is not meant to be an exhaustive source of the law.²

This manual is focused on the T visa, which was established by the Trafficking Victims Protection Act of 2000 (TVPA) and put into effect by immigration regulations published in January 2002. The T visa provides immigration relief to foreign nationals trafficked into the United States. If favorably adjudicated, it grants the survivor permission to remain within the U.S. and to obtain employment authorization for three years. At the end of the three years, or when the investigation is complete, the survivor is eligible to petition for permanent residency. This manual discusses the background of the T visa, suggests points to consider in evaluating a client's eligibility for the T visa, evaluates the statute and the regulations, and offers step-by-step instruction on preparing a T application for consideration by the U.S. Citizenship & Immigration Service.

This manual is not meant to provide instruction on every aspect of representing survivors, or to take the place of direct legal advice, advocacy, and a practitioner's own research and evaluation of the survivor's case. Nor does this manual address in detail other avenues of immigration relief that may be available to trafficking survivors. These other avenues may include, *inter alia*: asylum, a petition under the Violence Against Women Act (VAWA), the U visa, and petitions for Special Immigrant Juvenile Status. We also encourage practitioners to be creative in exploring other possibilities for immigration relief on behalf of survivors.

Please access our website at www.ny-anti-trafficking.com for updates and research on trafficking related issues.

¹ The network was originally convened as the NYC Service Network for Trafficked Persons. The name of the network was changed to reflect the broad scope of work performed by the various members of the network.

² An excellent source of relevant legal documents is "Human Trafficking: A Resource Guide to U.S. Law," Legal Aid Foundation of Los Angeles, June 2004. (www.lafla.org/clientservices/specialprojects/traffic.asp).

Part A: Is The T Visa Appropriate For Your Client?

I. Introduction

Human trafficking is a contemporary manifestation of slavery and organized crime affecting men, women, and children worldwide.³ Violations of human rights are “both a cause and consequence of trafficking in persons.”⁴ The global problem of trafficking manifests itself in many forms as traffickers develop increasingly sophisticated methods to entrap individuals in modern-day slavery. To lure their victims, traffickers use false businesses and schemes, such as educational and work programs, matchmaking companies, mail-order bride companies, maid and domestic servant schemes, and illicit foreign adoptions. Often believing these opportunities to be legitimate, victims are then trafficked into sweatshops, agricultural labor, panhandling, the sex industry, and domestic servitude, to name a few.

Often trafficking crimes appear similar to alien smuggling and irregular migration, but are distinguishable by the nature of the associated human rights violations.⁵ Trafficking also encompasses labor law violations, gender-based crimes, and a myriad of other illegal activities. The Center for the Study of Intelligence characterized trafficking in persons generally as the use of force and deception to transfer the victim into circumstances of extreme exploitation.⁶ As defined by the Trafficking Victims Protection Act (TVPA) of 2000⁷ and the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003⁸ and 2005⁹ “trafficking” refers to “severe forms of trafficking in persons,” meaning:

³ Amy O’Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime*, Center for the Study of Intelligence (Nov. 1999), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf>.

⁴ Recommended Principles and Guidelines on Human Rights and Human Trafficking (United Nations Economic and Social Council, May 2002) E/2002/68Add.1, available at [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument).

⁵ O’Neill Richard, *supra* note 3, at v.

⁶ *Id.* More specifically, the President’s Interagency Counsel on Women (which was established to ensure the implementation of the Platform for Action of the 1995 UN Fourth World Conference on Women, and coordinates international and domestic policy to develop policies and programs for the advancement of women) formulated the following definition: “Trafficking is all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons; within national or across international borders; through force coercion, fraud deception; to place persons in situations of slavery or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage.”

⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 Division A, 114 Stat. 1464 (2000) (TVPA).

⁸ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193. [TVPRA 2003].

⁹ Trafficking Victims Protection Reauthorization Act of 2005. Pub. L. No. 109-164. [TVPRA 2005].

- 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
- the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁰

In January 2002, regulations were issued to elaborate on this statutory definition in order to provide law enforcement officials and immigration officers with a greater understanding of the new classification for victims of severe trafficking in persons and eligibility requirements for trafficking (T) visas. In December 2003, the TVPRA was signed into law. It was followed by the 2005 reauthorization in January 2006. Both reauthorizations provided broader protection to trafficking victims. For example, under these reauthorizations, statements of cooperation from state and local law enforcement should be considered for purposes of the Law Enforcement Agency¹¹ attestation,^{12,13} a “trauma” exception was made for the requirement to cooperate,¹⁴ and T status and benefits was extended from a total of three years to four years.¹⁵ As of the drafting of this manual, additional legislative changes are being considered by Congress in the form of the 2007 Reauthorization.¹⁶

As mentioned above, because of the range of crimes that trafficking encompasses, persons who are trafficked may come into contact with a number of different law enforcement agencies. For instance, if a child is trafficked into agricultural work, they may come to the attention of local law enforcement or social services, the Department of Labor, U.S. Citizenship & Immigration Services, Immigration and Customs Enforcement, or the Federal Bureau of Investigation.

¹⁰ In order to be eligible to apply for a T visa the primary applicant must meet this definition of “severe forms of trafficking in persons” trafficking. 8 CFR § 214.11(a).

¹¹ 8 C.F.R. § 214.11(a). ‘LEA’ refers to any federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons. Qualified LEAs include, but are not limited to the offices of the Department of Justice, the United States Attorneys, the Civil Rights and Criminal Divisions, the FBI, the USCIS, the ICE, the United States Marshals Service, and the Diplomatic Security Service of the Department State.

¹² Trafficking Victims Protection Reauthorization Act 2003. Pub. L. No. 108-193. 22 U.S.C.A. §7105(3)(iv).

¹³ This is the official “Law Enforcement Agency” attestation, also referred to as the “LEA” endorsement.

¹⁴ Trafficking Victims Protection Reauthorization Act 2005. Pub. L. No. 109-164. 8 U.S.C. § 1101 (a)(15)(T)(iii)(2006).

¹⁵ Trafficking Victims Protection Reauthorization Act 2005. Pub. L. No. 109-164. 8 U.S.C. § 1184 (o)(7) (2006).

¹⁶ Currently, Congress is engaged in the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007. The U.S. Senate is pending passage of Senate Bill S. 3061 that expands protections for trafficked persons. The U.S. House of Representatives has passed a slightly differing version as HR 3887. Once Congress agrees on one bill and it is passed in both Houses there will be additional protections for trafficked persons. Please consider these future additions when working with trafficked persons starting in 2009.

The agencies most likely to come into contact with trafficked persons on a regular basis are U.S. Citizenship and Immigration Services (USCIS) or Immigration and Customs Enforcement (ICE).¹⁷ ICE investigates trafficking cases and assists with trafficking victims, while USCIS in Vermont adjudicates T visa petitions.

The TVPA and the TVPRAs respond to the international problem through a multi-pronged approach:

- the apprehension and prosecutions of traffickers;
- increased sentencing for traffickers;
- protection and assistance for recognized victims of trafficking the same as those available to refugees through the Office of Refugee Resettlement (ORR); Department of Health and Human Services;¹⁸
- allowing victims assisting law enforcement to remain in the country during the course of the criminal investigation (“continued presence”); and
- providing victims with an opportunity to regularize their status in the U.S. to T nonimmigrant status, and later adjust their status to permanent residency (green card).

The purpose of this manual is to provide guidance on the last prong; namely, assisting victims with issues concerning their immigration status. While the most immediate form of immigration relief for a trafficking victim is the issuance of “continued presence,” the process for continued presence must be initiated by an LEA. T non-immigrant status, on the other hand, may be self-petitioned by the victim by filing Form I-914, Application for T non-immigrant status directly with the USCIS Vermont Service Center (VSC).

A. Initial Considerations in Case Evaluation

1. Immigration Status

Given the circumstances surrounding their entrance into the United States, victims of severe forms of trafficking usually have issues with the validity of their immigration status. The most common issues include the following:

¹⁷ As of March 1, 2003, the Immigration and Naturalization Service (“INS”) ceased to exist, and the functions previously assigned to INS became part of the Department of Homeland Security (DHS). Within DHS, the functions of INS were divided into three separate agencies (also known as ‘legacy INS’). USCIS provides services and benefits to individual foreign nationals and employers; Customs and Border Protection (CBP) polices the nation’s borders and inspects visitors to the United States; and ICE is responsible for investigation, detention, and removal of unlawfully present foreign nationals has been assigned to the Bureau of Immigration and Customs Enforcement (ICE).

¹⁸ In order to be eligible for benefits, trafficking victims 18 years of age and older must be certified by the Office of Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services (HHS). Children are not required to cooperate with law enforcement in order to receive benefits.

- entering the U.S. without passing through a border post or port of entry (known as “entry without inspection” or “EWI”). This may frequently be the case with individuals “smuggled in;”¹⁹
- entering on a tourist visa (B1/B2) and engaging in unauthorized employment. This is considered a violation of that particular status;
- entering on a tourist visa (B1/B2) but overstaying the authorized period of stay on the I-94 Departure Record. Once an individual overstays the I-94 card by even one day, they are considered “unlawfully present.” There are serious and permanent consequences associated with unlawful presence;²⁰
- entering on a fraudulent passport or using another’s passport. This constitutes visa fraud, and does not confer a valid non-immigrant status. However, if the individual did not overstay the I-94 (even though fraudulently issued) he or she is not considered to be unlawfully present.
- entering the U.S. in a status valid for employment (such as H-1B – temporary worker, A-3 - domestic employees of foreign government official, or G-5 - domestic employees for representatives to international organizations) or for family reunification (K, V visas).

The validity of a T applicant’s immigration status is important because if an applicant is not in valid status, and he or she is being brought to the attention of USCIS or ICE, the applicant could be issued a Notice to Appear (NTA), and removal (deportation) proceedings may be commenced.

Another important consideration with violations of status or unlawful presence is that it may interfere with the T application, or if not at the time of T processing, may even interfere with future immigrant benefits (such as obtaining legal permanent resident status, the “green card”). However, for T visa purposes, trafficking survivors are **not considered “unlawfully present”** if they demonstrate that the severe form of trafficking “*was at least one central reason for the alien's unlawful presence in the United States.*”²¹

A waiver of inadmissibility may remedy status violations and are granted at the discretion of the USCIS. To request a waiver of “inadmissibility” on the above grounds, form I-192 and

¹⁹ While being “smuggled” into the U.S. does not necessarily equate to being a victim of trafficking, it does not preclude it either.

²⁰ Once an individual is “unlawfully present” all valid visas in his/her passport are automatically cancelled. Any future visas can only be obtained in the home country. Individuals who are unlawfully present for 180 days and leave the U.S. are barred for three (3) years from any U.S. immigrant or non-immigrant benefit. Individuals who are unlawfully present for a year or more and leave the U.S. are barred for ten (10) years from any U.S. immigrant or non-immigrant benefit. Therefore, even if an individual is issued a T visa, travel outside the U.S. may not be advised.

²¹ 8 U.S.C. § 1182 (a)(9)(B)(iii)(V) (2006).

accompanying fee should be filed concurrently with the I-914.²² Note there is a separate filing fee for this application, and as of the drafting of this manual, there was no fee waiver available for the I-192.²³

2. *Liability for Criminal Behavior*

Another frequent issue that arises is the T applicant's participation in criminal activity, albeit usually involuntary. Traffickers exert extreme control over trafficking victims and often require them to commit criminal acts. While this is recognized as part of the phenomena of trafficking, it is critical that liability for such acts does not interfere with the relief available to trafficked persons under the TVPA. In protecting your client from criminal prosecution, consider the following:

- When approaching law enforcement to discuss cooperation, attorneys should ask prosecutors for limited use or proffer agreements. Such agreements protect your client against his or her own statements, except for perjured statements. The goal is to protect your client from criminal or removal proceedings. Be aware that investigative agents may not offer proffer agreements.
- Attorneys and advocates should be wary of any prior arrests or convictions that may come back and haunt your client. If a victim was arrested, especially for a prostitution-related offense, it is critical to engage in aggressive advocacy that avoids a conviction, even if it is a low-level offense. As noted above, a criminal conviction may impact the client's ability to stay in the United States and/or obtain legal permanent residency. PRACTICE POINT: ICE and USCIS will take into consideration if the conviction was caused by, or incident to, the victimization. However, it is better to advocate for an appropriate disposition.
- Another issue to consider with respect to the criminal justice process is the timing of a T visa application. The trafficker's defense attorney could subpoena a victim's application, claiming that it contains potentially exculpatory information or is inconsistent with other statements. Prosecutors are required to turn over potentially exculpatory evidence to the defense. In an effort to cooperate with law enforcement and the prosecution of the traffickers, it may be of assistance to wait until after a prosecution is complete before submitting a T visa application. Because this delay in filing the T application may delay your client's eligibility for ORR benefits, attorneys and advocates should request law enforcement to issue "continued presence," which would enable your client to obtain employment authorization and other ORR benefits. However, the decision to delay submission of the T application is in the best interest of your client, notwithstanding law enforcement's needs, should be made on a carefully considered case-by-case basis.

²² This is outlined in more detail in Part B.

²³ USCIS fee changes effective July 30, 2007 eliminated the I-192 from eligibility for a fee waiver.

3. *Privilege*²⁴

The attorney-client privilege is an established principle of law that protects communications between attorneys and their clients, when such communication is for the purpose of requesting or receiving legal advice. This privilege encourages openness and honesty between attorneys and their clients by prohibiting attorneys from revealing (and being forced to reveal) attorney/client communications. The privilege belongs to the client, meaning that only the client may waive the privilege to give consent to reveal the protected communications. However, certain situations may “break” the privilege, even if the client did not have the intention to reveal the communications. This includes the presence of a third party in attorney-client communication.

In the T application context, the presence of a social worker in the interview process or throughout the representation may break privilege. Once privilege is broken, the communication may no longer be kept private, and defense attorneys or prosecutors may be able to access clients’ statements. Limited exceptions to this rule include where the social worker, or other assistant, is acting solely in the context of an interpreter or translator, or where the social worker is there solely to facilitate the provision of legal services.²⁵

Generally speaking, communications between a lawyer and her client made in the presence of a known third party are not privileged. The theory is that such communications could not have been intended to remain confidential.²⁶ Nevertheless, in circumstances where a client can demonstrate that she had a reasonable expectation of confidentiality and the communications were “made to [or in the presence of] agents of an attorney...hired to assist in the rendition of legal services,” the attorney-client privilege is not broken.²⁷ This holds even where such communications were made entirely outside the presence of the attorney so long as the communications were made to the third party in order to facilitate the attorney’s representation of her client.²⁸ The federal courts have applied the privilege to diverse professionals working with attorneys including “a psychiatrist assisting a lawyer in forming a defense.”²⁹ However, it is

²⁴ We are grateful to Dechert LLP for researching and evaluating this important, yet complex issue. This section provides only a cursory review of the memoranda provided to us by Dechert LLP. These memoranda are available for review at www.ny-anti-trafficking.com.

²⁵ See, e.g., *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976). Although such “exceptions” may not break the privilege, it is extremely important that where a social worker is playing such a role, his or her function is fully documented as limited to that role. Should the social worker’s role go beyond translating or facilitating the provision of legal services, it may blur the line, making the privilege easier to pierce. Moreover, such exceptions are not absolute, and both the attorney and social worker should ensure that any communications are made in a setting most conducive to protecting the communications.

²⁶ See *Weatherford v. Bursey*, 429 U.S. 545, 554 (1977).

²⁷ *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991).

²⁸ Note that this privilege applies to both the testimony and records of the third party. See e.g., *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C.Cir. 1980)(citing *United States v. Kovel*, 296 F.2d 918 (2d Cir.1961)) (Finding the reports prepared by a third party privileged where report prepared at request of attorney and “the purpose of the report was to put in usable form information obtained from the client.”).

²⁹ *Occidental Chemical Corp. v. OHM Remediation Services Corp.*, 175 F.R.D. 431, 437 (W.D.N.Y. 1997).

important to remember that this jurisprudence protects communications made to an attorney or on behalf of the services provided by an attorney, it does not extend beyond the scope of representation provided by an attorney.

A separate question is whether there is a privilege protecting communications between a social worker and a client made pursuant to providing other services, such as counseling, assisting with housing, medical assistance, *et cetera*. This is not as well established in the law. In very broad terms, the issue seems to turn on the professional level of the social worker, i.e. licensure or certification, the expectations of the client as to confidentiality of the communications, and the purpose of the communications. For example, the Supreme Court recognizes “the ability to communicate freely without the fear of public discourse [as] the key to successful treatment” in psychotherapy and clinical social workers.³⁰ However, it is not clear how far this privilege extends. Moreover, in state courts, privilege is adjudicated under state law, and each state has different rules regarding this matter.³¹ Therefore, social workers and social services organizations need to take every precaution to protect clients’ communications, and/or to advise clients that such communications may not be confidential.³²

4. “Smuggled In” Versus “Trafficked In”

Many victims of trafficking are brought into the United States without going through border points of inspection. Basically, they are “smuggled” into the U.S. However, there are individuals who are smuggled into the U.S. because they are fearful of crossing the border lawfully, or do not have a valid visa to enter the U.S. and they nevertheless want to enter the country, or need to enter to escape persecution. Their interaction with the smuggler is limited and usually involves a transaction of entry for payment.

While many seek better lives in the U.S., those who are smuggled in may not be encompassed in the definition of trafficking, which usually involves an on-going relationship with the facilitator or one of the facilitator’s networks. Therefore, being “smuggled” into the U.S. does not necessarily equate to being a victim of a severe form of trafficking for T visa purposes. However, it does not necessarily preclude it either, and advocates should explore whether the smugglers engaged in any behavior that would make them “traffickers” and whether your client meets any of the requirements for the T visa.

5. “Labor Exploitation” Versus “Trafficking”

While most trafficking cases do involve some form of labor exploitation, labor exploitation does not always rise to the level of trafficking. Labor exploitation involves extremely low wages,

³⁰ Jaffee v Redmond, 518 U.S. 1, 6, 15 (1996).

³¹ As of this writing, Dechert LLP has researched social worker privilege in New York, New Jersey, Florida, Texas, and Arizona, *available at* www.ny-anti-trafficking.com/publications.html.

³² Legal Aid Foundation of Los Angeles (LAFLA) has also done substantial research on the social worker privilege issue. Their website is www.lafla.org.

usually below minimum wage, long hours, poor working conditions, lack of avenues of redress, and may be linked to various forms of mistreatment of immigrants. A situation becomes “trafficking” when it involves the use of force, fraud or coercion that creates a climate of fear preventing the individual from leaving the situation. It is important to screen individuals presenting with labor exploitation claims for trafficking.

B. Continued Presence and Certification

Recognizing that trafficking cases require extensive, and often lengthy, investigation by multiple law enforcement agencies, the TVPA created two remedies for trafficking victims to ensure their well-being from the time of discovery through case resolution. This includes ‘continued presence’³³ and the ‘T’ non-immigrant status,³⁴ the latter of which will be discussed in more detail in the section below. Both of these remedies give the trafficked person access to services such as shelter and medical care, services that are absolutely necessary to their survival. However, continued presence is a more immediate form of relief, optimally taking only a few weeks to process.

Continued presence ensures law enforcement of the victim/witness’ availability to participate in the prosecution of the traffickers. If the witness is no longer in the country or is convicted of a crime, continued presence may be terminated. It is important to recognize that eligibility for continued presence does not require an imminent prosecution, nor that a victim *actually* rendered assistance to law enforcement. Rather, recognizing the immediacy of the victim’s needs and the stop-gap capability of continued presence, Congress worded the statute so that the victim may only be a *potential* witness:

Federal law enforcement officials may permit an alien individual’s continued presence in the United States, if, after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible...³⁵(emphasis added).

It is clear from the language of the regulations that any trafficking victim that was cooperative with law enforcement should be eligible for continued presence, even if they are not ultimately selected as a witness.

As stipulated by the regulation, only LEAs may initiate the process. However, state or local law enforcement can partner with a federal law enforcement agent in their investigation, requesting that the federal agent apply for continued presence on behalf of the victim. Continued presence

³³ TVPA §107(C)(3) “Federal law enforcement officials may permit an alien individual’s continued presence in the United States, if, after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible....”
See also 28 CFR 1100.35.

³⁴ 8 CFR §214.11.

³⁵ 28 CFR 1100.35.

does not require the victim to make a formal statement, and in fact, prosecutors often do not want victims to make such statements during an investigation if there is going to be a criminal trial. Also for this reason, law enforcement may be unwilling to provide the endorsement for the T status until the criminal trial is over or the investigation is concluded.

In practice, a grant of continued presence is issued for up to a one year increment, and may be extended. Continued presence in and of itself does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted. Such forms may include parole, deferred action, voluntary departure or stay of a final removal order. However, “*documentation from the Service granting continued presence... will be considered as primary evidence that the applicant has been the victim of a severe form of trafficking in persons*” unless such status has been revoked.³⁶

Once continued presence has been granted, ORR generates a letter for adults “certifying” that the individual is recognized as a victim of a severe form of trafficking, or for children that they are eligible for services as victims of a severe form of human trafficking.³⁷ At this point, victims are eligible for an Employment Authorization Document (EAD). The EAD is usually issued shortly after grant of continued presence, at which point a Social Security card can be obtained.³⁸

In addition to an EAD, victims may choose between public benefits or a Match-Grant program. A refugee resettlement agency can assist with both. For those who do not have the language or other skills to obtain immediate employment, or for those who are still traumatized from their experience, public benefits that include food stamps, cash assistance, Medicaid, and SSI may also be selected. These are the same benefits offered to those who enter the U.S. as refugees or who are granted asylum. Under federal rules, benefits are generally available for nine months, but various state implementation of these benefits by various agencies may allow for a longer period.

In the alternative, victims may instead elect to enter into a Match-Grant program. A Match-Grant program is a three-month intensive program that may include English as a Second Language (ESL), job training and skills, computer training, or other benefits. Either Match-Grant or refugee benefits must be elected within 30 days of issuance of the ORR certification letter. If benefits are not elected during this period, they are not allowed to reapply. However, other public benefits may still be an option at any time depending on the victim meeting eligibility standards, which may vary state by state.

³⁶ 8 CFR § 214.11(f)(2).

³⁷ This certification does not guarantee approval of a T non-immigrant status, as such status also requires evidence of cooperation with reasonable requests from law enforcement.

³⁸ Employment may begin immediately upon receipt of the EAD, it is not necessary to receive the Social Security number. As a practice point, it may be difficult to obtain the card with just the EAD. Advocates may want to pursue obtaining a passport or copy of a birth certificate from the consulate of the client’s country of origin.

II. Qualifying for T Visa Status: Regulatory Elements

It is difficult both to identify a trafficked person, and to determine when such a person qualifies for the T visa. As discussed in the section on smuggling, advocates must be attuned to the particulars of their client's situation as most do not self-identify as trafficked persons. Often, it is helpful to determine why they originally came to this country, how they got here, and what has happened to them since. Many trafficking cases may initially present as domestic violence, sexual abuse, or labor law violations. If an advocate is aware of the client's legal remedies, however, they may be able to more fully assess the client's situation. The annexed suggested questions at the end of Part B may be of assistance in an initial evaluation.³⁹

Particularly challenging are cases that involve child victims. By definition, a trafficked child has already undergone an incredible trauma, repeatedly recognized in the various examples cited in the Conference Report.⁴⁰ As with other child victims of trauma, coming forward to law enforcement about their situation is complex and emotionally difficult if not handled in a sensitive manner. Often, the child victim was trafficked by a relative or trusted adult and may not want to get this person "in trouble" despite the abuse that the child has suffered. The TVPRA recognized this in the providing that children under 18 years old need not demonstrate that they have been willing to comply with any reasonable request for assistance in the investigation or prosecution of trafficking.⁴¹

Since trafficked persons suffer such extreme types of abuse, it might seem that they would be open to discussing their experiences in order to receive help. In fact, the opposite is true—trafficked persons are often reticent about discussing their situation or admitting to having been victims of coercion. It can take multiple meetings with a client over a period of months to obtain information that clarifies the situation to determine if he or she is a candidate for a T visa.

Practice Points for interviewing a potential T visa applicant:

- **Body language is key:** Especially in an initial meeting, a client may be telling you far more with his or her body language (looking down, not engaging in eye contact, lack of affect/disengaged demeanor, or fidgeting with hair or jewelry) than through verbal communication. It is important to observe the client's body language as a way to build communication. *For more guidance on this issue, please see the SWP/NYANA screening tool in the resources section of this manual.*

³⁹ Prepared by Christa Stewart, Esq., formerly Director of Legal Services, The Door.

⁴⁰ Conference Recommendations: Pathbreaking Strategies in the Global Fight Against Sex Trafficking (February 23-26, 2003)(released by the Department of State, May 29, 2003), *available at* www.state.gov/g/tip/rls/rpt/20834.htm.

⁴¹ New Classification for Victims of Severe Forms of Trafficking in Persons, 67 Fed. Reg. 4784, 4785 (Jan. 31, 2002) (codified at 8 C.F.R. Parts 103, et al.). "Children who have not yet attained the age of 15 at the time of application are exempt from the requirement to comply with law enforcement requests for assistance in order to establish eligibility." This was changed to include all children under the age of 18. TVPRA § 4(b)(1)(a).

- **Do not overwhelm the client:** Trafficking cases are complex and they often involve numerous law enforcement and non-governmental agencies. It is helpful to keep an initial meeting to less than one hour, and if necessary to facilitate the provision of legal services, have a case manager or social worker accompany the client to the meeting.⁴²
- During this initial meeting, review:
 - why the client has been referred to you for representation;
 - the definition of trafficking, under the TVPRA; and
 - the different individuals and agencies that may be involved in the client's case.

It may be helpful to show the client the *SWP Diagram of a Trafficking Case*, attached in Resources.

For guidance on subsequent meetings please see *SWP Human Trafficking Intake Guide* attached at Resources.

A. T Visa Eligibility

Upon identifying an individual as a possible victim of trafficking, the practitioner should evaluate the individual's eligibility for the T visa. All T visa applications are currently adjudicated within the VAWA/T/U Visa Unit at the VSC. Over the years, VSC has provided insight into the adjudication process and guidance on the types of documentation they look for in adjudicating petitions. This guidance has been incorporated into the practice points noted in the sections below.⁴³

In order to be eligible for the T visa, each applicant must demonstrate that he or she:

- is or has been a victim of a severe form of trafficking in person;
- is physically present in the United States due to trafficking;⁴⁴
- has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons (if they are over 18); and
- would suffer extreme hardship involving unusual and severe harm if removed from the United States.⁴⁵

⁴² Refer to section on privilege.

⁴³ VSC Hotline for VAWA/T/U petitions is (802) 527-4888.

⁴⁴ This includes American Samoa and the Commonwealth of the Northern Mariana Islands.

⁴⁵ TVPA § 107(C), 8 CFR 214.11(b).

Additionally, the applicant must also demonstrate that he or she

- has not committed a severe form of trafficking in persons offense; and
- is not inadmissible under INA § 212.⁴⁶

Upon a finding by USCIS that the applicant has made a *bona fide* application for a T visa, ORR will issue a certification or eligibility letter as it does when continued presence is granted. However, an applicant is only entitled to obtain such certification and benefits once. If applicant received such benefits pursuant to a grant of continued presence, he or she will not later be eligible for such benefits even if USCIS issues a notice confirming that the petition is *bona fide*. In this situation, applicants will only receive additional benefits should the T visa petition be approved.

If USCIS does not issue a *bona fide* notice, applicant will only be able to obtain benefits upon approval of T status. This will most likely occur when adjudication of the *bona fide* standard is concurrent with the adjudication of the T visa.

B. Definition: Victim of a Severe Form of Trafficking

Under the TVPRA, victims of both sex trafficking and labor trafficking may be eligible for relief. According to the TVPA, victims of “severe forms of trafficking in persons” include:

- **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**
- 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.⁴⁷

The component terms are defined by the regulations as follows:

- *Sex trafficking*: the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act;⁴⁸
- *Coercion*: threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an

⁴⁶ Waivers of certain inadmissibility grounds are available for T visa applicants. A request for a waiver can be made by filing form I-192. However, as of the drafting of the manual, there was a non-waivable filing fee of \$545.

⁴⁷ TVPA § 103(8), 8 CFR § 213.11(a) (emphasis added). In order to be eligible to apply for a T visa the primary applicant must meet this definition of trafficking.

⁴⁸ 8 CFR § 214.11(a). Where as a “commercial sex act” is any sex on account of which anything of value is given to or received by any person.

act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process;⁴⁹

- *Debt bondage*: the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or the services of a person under the debtor's control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not appropriately limited and defined;⁵⁰
- *Involuntary servitude*: a condition of servitude induced by means of any scheme, plan or pattern intended to cause a person to believe that, if the person did not enter into or continue in such a condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of legal process;⁵¹ and
- *Peonage*: status or condition of involuntary servitude based upon real or alleged indebtedness.⁵²

In order to establish that your client is a victim of a severe form of trafficking in persons, he or she must either submit⁵³ an *endorsement from a law enforcement agency* on Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victims of Trafficking in Persons,⁵⁴ or *sufficient credible secondary evidence*, describing efforts to cooperate with law enforcement, as well as the nature and scope of any force, fraud, or coercion used against the victim.⁵⁵ This may include, *inter alia*, evidence that *the USCIS has granted the alien's continued presence in the United States as a victim of trafficking.*⁵⁶

T visa determinations will be made under the "all credible and relevant evidence" standard.⁵⁷ Therefore, your client should first attempt to obtain an LEA endorsement or ICE evidence of

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* This definition adopts the holding in United States v. Kozminski, 487 U.S. 931, 952 (1988).

⁵² *Id.*

⁵³ See Catholic Legal Immigration Network, Inc. and the Immigrant Legal Resource Center (CLINIC), *VAWA Manual: Immigration Relief for Abused Immigrants*, at ch. UT, 5 (2002) [hereinafter *VAWA Manual*].

⁵⁴ 8 CFR § 214.11 (f)(1).

⁵⁵ 8 CFR § 214.11 (f)(3).

⁵⁶ 8 CFR § 214.11 (f)(2).

⁵⁷ 8 CFR § 214.11(f)(3).

status as a trafficking victim. This evidence carries significant weight in T visa determinations as agency endorsements are considered “primary evidence” and are strongly encouraged.⁵⁸

In compelling cases, however, secondary evidence may be sufficient. Secondary evidence may be presented in the form of a personal statement and supporting documents. This evidence should demonstrate that applicant fits the TVPA definition of a victim of a severe form of trafficking in persons. Any credible evidence of victimization and cooperation should be included. Such evidence may include, but is not limited to:

- a grant of continued presence or ORR certification;
- a description of what the person has done to report the crime to an LEA;
- a statement indicating whether similar records for the time and place of the crime are available; and
- any evidence that the applicant made “good faith attempts” to obtain the LEA endorsement and a description of those efforts.⁵⁹

A detailed affidavit from the applicant must be included with the petition, and must describe in depth the circumstances of the trafficking. Suggested issues that should be addressed in the affidavit are outlined in Part B.

In addition to the applicant’s affidavit, a psychological evaluation is often helpful to clarify underlying issues regarding the client’s motivation for either taking or failing to take certain actions. Psychological evaluators may unearth critical information that a client neglects to tell his or her attorney. This is because frequently a client is too ashamed to disclose such information to the attorney, but which comes out in the safer space created with a counselor.

Finally, note that a minor involved in prostitution or commercial sex act who is under the age of 18 at the *time of filing* the T visa application is considered a victim of a severe form of trafficking. This means that the applicant does not need to identify a trafficker in his or her affidavit, and is not required to cooperate with law enforcement.

⁵⁸ 8 CFR § 214.11 (f)(2).

⁵⁹ 8 CFR § 214.11(f)(3). *See also VAWA Manual, supra* note 47, at 5. Fax a request for an investigation to the U.S. Department of Justice Civil Right’s Division Criminal Section Trafficking Unit at (202) 401-5487 and retain a copy of the fax confirmation sheet for the T visa application.

C. Physically Present

Your client must demonstrate physical presence in the U.S., American Samoa, or Northern Mariana Islands on account of trafficking.⁶⁰ As an emerging area of law, there is no clear guidance on what it means to be present “on account of trafficking.” The current understanding is that an applicant is considered present on account of trafficking if he or she is currently held or recently liberated from trafficking situations. An applicant does not need to be *trafficked to* the U.S. in order to meet this requirement. Physical presence may include situations in which the applicant has been in the U.S. for a period of time and then subsequently trafficked in the U.S.

If a victim has fled or been liberated from a trafficking situation, he or she must establish that there was no “clear chance to leave” the United States in the interim, in light of individual circumstances such as trauma, injury, fear, lack of monetary resources or documentation, *et cetera*. A victim may also be permitted to remain for purposes of assisting law enforcement. If a victim leaves and returns to the United States, he or she may no longer be eligible unless they can establish that the return was the result of continued victimization by traffickers or a new incident of trafficking.⁶¹

Applicant must be physically present in the U.S. “on account of” trafficking. If the applicant has made trips abroad, including a brief visit home for family/safety reasons, he or she will need to document that their return to the U.S. is related to the trafficking. Any departures from the US should be addressed in the affidavit. Once again, a psychological evaluation may be useful to uncover and explain the client’s underlying reasons for leaving the country and then returning, as well as the client’s state of mind and level of fear while he or she was outside the U.S.

D. Complied With Any Reasonable Request To Assist Law Enforcement and the Trauma Exception

Adult applicants must cooperate with any reasonable requests for assistance from LEAs and prosecutors in actions against human traffickers.⁶² LEA refers to any federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons. Qualified LEAs include, but are not limited to, the offices of the Department of Justice, the United States Attorneys, the Civil Rights and Criminal Divisions, the FBI, USCIS, ICE, United States Marshals Service, and the Diplomatic Security Service of the Department of State.⁶³

⁶⁰ 8 CFR § 214.11(g).

⁶¹ 8 CFR § 214.11(g)(3).

⁶² Victims of trafficking under the age of 18 do not have to meet this requirement.

⁶³ 8 CFR § 214.11(a).

State and local law enforcement agencies are not currently included within the regulatory definition of an LEA for purposes of T visas.⁶⁴ However, statements from state or local law enforcement documenting the applicant's compliance with reasonable requests for assistance are considered valid secondary evidence.⁶⁵ In some cases, states that have passed anti-trafficking legislation mandate state and local law enforcement agencies to provide such statements to support the client's application for a T visa.⁶⁶

It is usually best to wait until a criminal case is complete before filing a T visa application. The filing or approval of a T visa application may be a factor that the defense uses against a client/witness, or they may use the victim's statements from the T visa application. If the client must have an application filed before the criminal case is over (because of age or derivative issues), the T application may be filed without an LEA, but secondary evidence of cooperation must be included.

If the client has cooperated with ICE, and especially if he or she has Continued Presence, the ICE Agent involved in the client's case will have created an "A file" on the client. When the VSC adjudicates the client's application, they will need the "A file." In the application's cover letter, include the name, jurisdiction and telephone numbers for the ICE Agent (in bold format.) In addition, call the ICE Agent to have him or her send the A file to VSC.

To qualify for a T visa, the applicant must either report the crime or have responded to inquiries from an LEA. The only exception to this is if the applicant qualifies under the trauma exception.⁶⁷ In fact, the TVPRA of 2005 made it **unreasonable for law enforcement to request** a trafficking survivor to assist in the investigation or prosecution of a trafficking crime if the Secretary of Homeland Security determines he or she is unable to cooperate "**due to psychological or physical trauma**." An applicant who is unable to cooperate with law enforcement because of psychological or physical trauma is exempt from the LEA endorsement

⁶⁴ VAWA Manual, *supra* note 47. As note above, while the TVPRA expanded the definition of qualified LEAs to include state and local law enforcement, USCIS is not currently implementing this section of the law.

⁶⁵ While the TVPRA of 2003 permits LEA endorsement to come from state or local law enforcement officials, current policy as announced by U.S. Citizenship & Immigration Services Associate Director of Operations William Yates in an April 15, 2004 memorandum is that this provision must wait for further guidance to be in effect. TVPRA of 2003 § 4(b)(2).

⁶⁶ New York's anti-trafficking law, for instance, states: "Upon the request of a human trafficking victim or a representative of a human trafficking victim, the state or local law enforcement agency or district attorney's office shall provide the victim with the United States Citizenship and Immigration Service (USCIS) Form I-914 Supplement B Declaration of Law Enforcement Officer for Victim of Trafficking in Persons." N.Y. Soc. Serv. Law § 483-dd (2008). Meanwhile, California's anti-trafficking law states: "Within 15 business days of the first encounter of a victim of human trafficking, victim pursuant to Section 236.1, law enforcement agencies shall provide brief letters that satisfy the following Law Enforcement Agency Endorsement (LEA) regulations as found in Section 214.11 (f)(1) of Chapter 8 of the Code of Federal Regulations," Cal. Penal Code § 236.2 (a) (2008), or state law enforcement agencies must "provide the victim with a letter explaining the grounds of the denial of the LEA." Cal. Penal Code § 236.2 (c).

⁶⁷ 8 U.S.C. § 1101 (a)(15)(T)(iii) (2006).

requirement.⁶⁸ Evidence from mental health and medical professionals should be submitted to support a claim of psychological or physical trauma. There is, however, no set standard. Absent exceptional circumstances, it is reasonable for an LEA to ask of a victim of a severe form of trafficking in persons similar things it asks of other comparably situated crime victims. The legislative goals of prevention, prosecution, and the protection of other potential victims may outweigh your individual client's concerns.

If the applicant has not had contact with an LEA regarding the trafficking situation, he or she is required to do so promptly under the regulations. However, prior to contacting law enforcement, applicants need to be made aware of possible ramifications, such as issuance of a Notice to Appear (NTA) before an immigration judge, and appropriate strategies to deal with such ramifications should be discussed. The applicant may contact the Department of Justice, Civil Rights Division, Trafficking in Persons and Worker Exploitation Task Force complaint hotline, at (888) 428-7581, and fax a request for an investigation to the Department of Justice Civil Rights Division Trafficking Unit, at (202) 401-5487, to file a complaint and be referred to an LEA, or contact a local federal LEA directly.⁶⁹ Unfortunately, since the Department of Justice is not responsive to every call, advocates should document every attempt and every effort to contact law enforcement.

If law enforcement does not respond to the client's report of the crime, does not follow through with a client's efforts to cooperate, or simply will not provide the I-914B, it is imperative to document the client's efforts to cooperate. This is considered "secondary evidence" of cooperation, and **must** include:

- detailed statements in the applicant's affidavit explaining each and every attempt to cooperate, including dates, places, and names/positions of law enforcement contacted. It should also note why I-914B is unavailable; and
- good faith attempts to obtain the I-914B, including what efforts the applicant undertook to accomplish these attempts. Evidence of efforts to obtain the I-914B should be attested to by the client, not by the attorney.

Other evidence may include:

- a copy of attorney's log of telephone calls, faxes, and emails to law enforcement (including time/date stamp) or memoranda to the file documenting meetings or conversations with law enforcement;
- affirmation by attorney of efforts to cooperate; and
- if cooperation was with state or local law enforcement, provide a detailed letter describing contact with client, the conversations, *et cetera*.

⁶⁸ 8 U.S.C. § 1101(a)(15)(T)(iii). *See also* 8 CFR § 214.11(a).

⁶⁹ 8 CFR § 214.11(f)(4).

*NOTE: General assertions from an attorney are not considered to be evidence for law enforcement purposes. Therefore, relevant copies of letters, e-mail, or any other documentation of the attempted communication with the law enforcement agency, as well as responses from law enforcement, should accompany the statement from the attorney. It is important to note that photocopies of an email submitted **generically** to law enforcement would not be sufficient.*

Ultimately it is the USCIS, not the LEA, that determines whether or not a request for assistance is reasonable for the T visa determination purposes. In making such a determination, the Service takes into account the “totality of the circumstances” including, but not limited to

- general law enforcement, prosecutorial, and judicial practices;
- the nature of the victimization;
- the specific circumstances of the victim;
- including fear, severe trauma (both mental and physical); and
- the age and maturity of young victims.⁷⁰

In light of these requirements, on behalf of your client, you should contact law enforcement if it appears that they will be eligible for the T visa, and to determine how your client can assist law enforcement in anyway that does not put them in direct danger, or that will not result in severe emotional trauma.

E. Suffer Extreme Hardship Upon Removal Involving Unusual and Severe Harm

Unlike other types of immigration relief, a T visa applicant must establish “extreme hardship involving unusual and severe harm upon removal,” as opposed to “extreme hardship.” This elevated standard requires the consideration of an aggregate of factors, which are defined by the regulations. These include, but are not limited to

- the applicant’s age and personal circumstances;
- serious physical or mental illness of the applicant that requires medical or psychological attention not reasonably available in the foreign country;
- the physical and psychological consequences of the trafficking activity;
- the impact on the applicant of loss of access to U.S. courts and criminal justice system for purposes such as protection of the applicant and criminal and civil redress for the acts of trafficking;

⁷⁰ 8 CFR § 214.11(a).

- the reasonable expectation that laws, social practices, or customs in the applicant's country would penalize the applicant severely for having been the victim of trafficking;
- the likelihood of re-victimization and foreign authorities' ability and willingness to protect the applicant;
- the likelihood that the trafficker or others acting on his or her behalf would severely harm the applicant; and
- the likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict, as demonstrated by a designation of, Temporary Protected Status under INA § 244 or the granting of other relevant protections.⁷¹

Factors relating to extreme hardship need not be related to the trafficking experience. Therefore, if a client has medical or other issues that cannot properly be addressed in his or her country of origin, such issues should be made clear in the application. While economic need is not considered relevant for extreme hardship consideration, if economic issues are likely to lead to a client being re-trafficked upon his or her return to the country of origin, that is a relevant concern.⁷²

The T visa application requires evidence of these factors. Examples of evidence which may be used to demonstrate hardship include:

- a detailed declaration from the victim, declarations or statements from witnesses;
- law enforcement reports, including the LEA endorsement, photographs, medical records, reports and records from counselors or therapists; and
- reports from Non-Governmental Organizations (NGO), government and international agencies, and individuals regarding the current conditions in the home country⁷³ and the protection or lack of protection likely to be afforded the applicant in the home country.⁷⁴

⁷¹ 8 CFR § 214.11(i).

⁷² *Id.*

⁷³ The most persuasive report on country conditions are those prepared by the United States government, specifically the Victims of Trafficking and Violence Protection Act 2000: Trafficking In Persons Annual Report, prepared by the Department of State, *available at* www.state.gov/g/tip/rls/tiprpt/. Other sources include: www.amnesty.org, www.antislavery.org, www.asylumlaw.org, www.childtrafficking.com, www.hrw.org, and www.protectionproject.org.

⁷⁴ VAWA *Manual*, *supra* note 44.

III. Special Considerations

A. If Your Client is a Child

If your client is a child, he or she may not be required to establish all of the aforementioned factors in order to be eligible for the T visa.

1. *Establishing Coercion*

Children under the age of 18 trafficked for commercial sex purposes do not have as high of an evidentiary burden. As previously mentioned, victims of “severe forms of trafficking in persons” include:

- 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
- 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.⁷⁵

Accordingly, a child under the age of 18 who has been a victim of sex trafficking is not required to show evidence that he or she was induced by force, fraud, or coercion.⁷⁶ However, a child under the age of 18 who is recruited for labor trafficking or other services is required to show inducement through force, fraud, or coercion as indicated earlier in this document.

2. *Reasonable Request to Assist LEAs*

Another T visa eligibility factor affected by age is the requirement to assist law enforcement and in the prosecution of traffickers. Children under 18 are not required to assist law enforcement.⁷⁷ Regardless of the purpose for which the victim was recruited, a child age 18 and older can be required to comply with all reasonable requests. The age, maturity, and individual circumstances of each victim may be considered to determine the reasonableness in “the totality of the circumstances.”⁷⁸

⁷⁵ TVPA § 103(8).

⁷⁶ 8 CFR § 214.11(f).

⁷⁷ 8 CFR § 214.11(d)(vi).

⁷⁸ 67 Fed. Reg. 4783, 4788 (2002).

3. *Hardship Upon Removal*

The age of a child may be taken into account when making determinations of hardship.⁷⁹ Again, children are recognized as being in a special circumstance since it is understood that they are not in control of their situation, nor are they legally recognized as being able to consent to a contractual relationship. The trauma faced by children can be exacerbated if appropriate interventions are not available in the home country, or if the family played a part in their trafficking. ORR has a mandate to provide care and appropriate placement, including shelter, for trafficked children.

Children's advocates have also urged that three fundamental principles should guide agency decision-making involving victims of trafficking:

1. The best interest of the child standard;
2. The placement of the child in the least restrictive setting; and
3. The child's need for permanence.⁸⁰

Evidence offered to establish "severe hardship involving unusual and severe harm" upon removal for children should incorporate these principles. Special attention should be given to the treatment of, and benefits available to, victimized children in the country of origin. Country specific stigmatization of street children, orphans, and sexually abused children also may be compelling factors to consider.

4. *Benefits*

In order to receive humanitarian benefits, similar to those available to refugees, victims age 18 and older must be certified by ORR. As noted above, this letter is issued either pursuant to a grant of continued presence, recognition by USCIS that a T application is *bona fide*, or approval of the T visa. If a child has not applied for the T visa, he or she must obtain a letter from an LEA confirming that he or she is a victim of a severe form of trafficking. Children under 18 are then issued eligibility letters.⁸¹ This present system seems unduly burdensome, particularly as

⁷⁹ 8 CFR § 214.11(i)(1)(i).

⁸⁰ See Letter to Anne Veysey, Recommendation for T Implementation in Relation To Children, Lutheran Immigration and Refugee Service, September 7, 2001; Also based on conversation between Christa Stewart, Director of Legal Services, The Door, and Antoinette Aqui, Program Analyst - Trafficking, ORR, November 19, 2004.

⁸¹ TVPA § 107(b)(1)(E). See also, ORR State Letter #O-13, Issued by Acting Director, Carmel Clay Thompson, May 3, 2001 available in Human Trafficking: A Resource Guide to U.S. Law, Legal Aid Foundation of Los Angeles, June 2004. (www.lafla.org/clientservices/specialprojects/traffic.asp)

children are not required to be certified as victims, nor do they have to cooperate with law enforcement.⁸²

B. Derivative Family Members

1. General Application

A T visa applicant over 21 can include as derivative applicants his or her spouse and unmarried children under the age of 21.⁸³ A T visa applicant under 21 at the time of filing may include the spouse, children, parents, and unmarried siblings under the age of 18.⁸⁴ An I-914, Supplement A, must be included for each derivative family member, and included with the Supplement A should be documentation of the derivative's relationship to the principal applicant, including birth and/or marriage certificates. If represented by counsel, a separate G-28 should also be included.

A T visa applicant or holder may chose to apply for derivative family members later. If they do not include the derivatives in their initial application, they must refile the I-914 form along with an I-914A for each family member. It is not necessary to include all of the attachments. You should include a copy of the T approval notice and explain in a cover letter that they are now applying for derivative family members. T visa holders can apply for their derivatives at any time during the duration of their status. However, once they adjust their status to permanent resident, they must follow the regular family petitioning process.

There are currently no filing fees for derivatives who apply in the United States. However, derivatives that live abroad may need to pay a biometric fee at the consular post.⁸⁵ Derivatives presently in the U.S. are eligible to apply for employment authorization, while derivatives abroad may apply for employment authorization after they enter the U.S. in derivative T status. Derivatives do not need to establish extreme hardship.⁸⁶

Family members implicated in the trafficking scheme may not apply for derivative status.⁸⁷ If there are concerns of such involvement, the derivative application must demonstrate that he or she did not commit the trafficking against the applicant which forms the basis of the applicant's T visa application.⁸⁸ In addition, as with the applicant, advocates should examine whether

⁸² *Id.*

⁸³ 8 CFR § 214.11(o)(1).

⁸⁴ The ability of unmarried siblings under 18 years of age to apply was added by TVPRA of 2003 § 4(b), which has not yet been codified.

⁸⁵ Please check www.uscis.gov for the most up-to-date filing fees. Biometrics fees may vary by country or consular post, and may be waived in certain circumstances.

⁸⁶ TVPRA of 2005 § 801(a)(2). *See also* 8 U.S.C. § 1101(a)(15)(T)(ii). For a more detailed description of "extreme hardship" please review the section on "extreme hardship" in Part A.

⁸⁷ 8 U.S.C. § 1154 (a)(1)(L) (2006).

⁸⁸ TVPRA of 2005 § 106(e). *See also* 8 U.S.C. § 1154(a)(1)(L).

derivative applicants face inadmissibility issues, such as unlawful presence, issues around unlawful entry, or prior criminal convictions. If such is the case, it may be necessary to file form I-192 and relevant fees to request a waiver of inadmissibility.

2. *Consular Processing of the T Visa*

Derivatives living abroad will need a valid passport or a waiver of the passport requirement in order to enter the U.S. in T status. Such applicants will undergo a detailed interview at the appropriate consular post. The derivative should not be asked about the underlying trafficking of their family member and is not required to know the details of their relative's experience. The only relevant questions should be to confirm the relationship with the principal applicant. If there are questions about the veracity of a derivative blood relationship to the principal applicant, the consular post may require a DNA test.

Practice point: When the derivative application is approved, email a copy to the U.S. Embassy or consulate that has jurisdiction. Include the approval notice, G-28, current address and telephone number for the derivatives. Request the scheduling of an appointment to process the derivative's visa. Consular email addresses can be found at www.usembassy.gov.

In addition, the International Organization for Migration (IOM) may be able to assist with the travel logistics to bring derivatives to the U.S.

3. *Derivative Children*

Derivative children may need the consent of *both* parents in order to obtain a valid passport in their home country. Obtaining passports for children of trafficked persons can pose a number of obstacles. This is particularly the case when the trafficked person is not in contact with the child's second parent, or if the second parent is abusive. Many times, the second parent is the trafficker, and this may necessitate legal proceedings in the home country to obtain a passport for the child. In addition, custody of derivative children may need to be addressed before the child can lawfully be brought to the U.S. If the second parent has parental rights over the child, then his or her parental rights might have to be severed through the courts in the home country before the child can be brought to the U.S.

Issues relating to passports and custody may significantly delay, or in some cases preclude, issuance of a T visa to the derivative child. This is because the consulate will not issue the visa once the principal applicant's period of T status has expired. The maximum amount of time an individual can be in T status is four years. If custody or other proceedings take longer, the child may have to wait for the principal applicant to become a permanent resident before they can enter the U.S.

C. Representing Trafficking Victims in Immigration Court

An applicant in removal or deportation proceedings poses special challenges. The applicant must inform USCIS if he or she intends to apply for a T visa.⁸⁹ The Immigration Judge (IJ) must agree to stay the court's master calendar to allow sufficient time for the adjudication of the T visa. This may necessitate educating both the IJ and the trial attorney about the T visa and convincing them that the applicant is eligible. If they agree, both the IJ and the trial attorney should be provided with copies of the T visa application and all supporting documentation.

If the application is approved, the IJ may terminate the proceedings or alternatively, administratively close the proceedings. This would allow the applicant to apply for adjustment of status with USCIS.⁹⁰ If the applicant had a final order of removal or deportation from the past, an approved T visa will cancel the final order by operation of law as of the date of the approval.⁹¹ If, however, the T visa application is denied, the stay of the final order is deemed lifted as of the date of the denial, without regard to whether the applicant appeals the decision.⁹²

Practice Point: The length of time it takes to adjudicate a T visa should be a factor in discussing an application with a detained client. He or she can continue to be detained for a period of months or even years with this process.

IV. After Issuance of T Status

A. Employment Authorization

The Employment Authorization Document (EAD) issued to the T recipient should be for the full three year period, allowing for a one year extensions.⁹³ If the EAD is not granted for the full period, an extension can be filed along with Forms I-765 and G-28 (if represented by counsel), two passport photos, and appropriate filing fee (or fee waiver). Eligibility classification for the T status holder should be indicated under (a)(16).

Derivatives of T status holders can also obtain work authorization. Form I-765 should be submitted with the I-914 Supplement A. Also included should be Form G-28 (if represented by counsel), two passport photos, and appropriate filing fee (or fee waiver) should be submitted. Eligibility classification for the derivatives of T status holders should indicate I(25).

⁸⁹ 8 CFR § 214.11(d)(8).

⁹⁰ *Id.*

⁹¹ 8 CFR § 214.11(d)(9).

⁹² *Id.*

⁹³ 8 CFR § 214.11(l)(4) noting that "the Service will provide the alien with an Employment Authorization Document incident to that status, which shall extend concurrently with the duration of the alien's T-1 non-immigrant status." (emphasis added).

B. Travel Overseas⁹⁴

T status holders can only travel using Advanced Parole. Advanced Parole is a travel document that eliminates the need for a visa stamp in the passport. Instructions for submitting the advance parole application are included within the text of the T approval notice. These instructions note that all T status based advanced parole petitions should be filed at the VSC. An application for advanced parole is made by submitting form I-131 accompanied by form G-28, if represented by counsel, two passport photos, and appropriate filing fee (or fee waiver).

Overseas travel raises a number of concerns, and advocates may want to err on the side of caution given the serious consequences at issue, and consider advising clients against overseas travel:

- If the T holder accrued “unlawful presence,”⁹⁵ departure from the U.S. may trigger a three or ten year bar to future immigration benefits in the U.S.⁹⁶ Note that a T holder’s prior unlawful presence will not preclude him or her from receiving advance parole, nor will it impede his or her re-entry into the U.S. However, when the T holder applies for adjustment of status, the adjustment may be denied, the T holder issued an NTA, and possibly removed from the U.S.
- In order to be eligible to “adjust status to a permanent resident” following three years in T status, the T holder must demonstrate continuous physical presence in the U.S.⁹⁷ According to the TVPA, “an alien shall be considered to have maintained continuous physical presence...if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days.”⁹⁸
- If the T holder returns to the country from which they were trafficked, it may undermine the hardship concerns that will be revisited when the adjustment of status is adjudicated.

C. Adjustment of Status to Permanent Residency

Those approved for T-1 can adjust their status to that of permanent resident (“LPR” or “green card”) by filing Form I-485, Form G-325, with all supporting documents to the T Visa Unit at the VSC.⁹⁹ As long as the applicant applies, those in derivative T status may also apply to adjust their status. Up to 5,000 principal T visa holders may be adjusted to permanent residents each year.¹⁰⁰ However, to date, USCIS has not promulgated regulations implementing the adjustment

⁹⁴ This section is based on a series of emails between Mie Lewis, attorney, Asian Pacific Islander Legal Outreach, and Rebecca Story, associate general counsel, Department of Justice dated July 30, 2004 and August 2, 2004.

⁹⁵ Discussed at length in Part A, section I.b.1 “Immigration Status.”

⁹⁶ INA § 212(a)(9)(B).

⁹⁷ TVPA § 107(4)(f)(1)(A).

⁹⁸ TVPA § 107(4)(f)(2)(B)(2).

⁹⁹ INA § 245(l).

¹⁰⁰ INA § 245(l)(4).

of status provisions, and as a result, none of the adjustment of status petitions on behalf of T holders have been adjudicated.

The statutory provisions for a T visa holder to adjust status are if he or she

- was physically present in the United States in T status or physically present in the U.S. during the investigation and prosecution of the trafficking case and the Attorney General indicates that the processes is complete;
- is of good moral character; and
- has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or would suffer extreme hardship involving unusual and severe harm if removed.¹⁰¹

According to INA § 245(l)(3), an alien shall be considered to have failed to maintain continuous physical presence if he or she has departed the U.S. for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

Please note that there is a very small window for filing for adjustment of status. Although T status can be extended for up to four years, applications for adjustment of status must be submitted within the 90 day period **immediately preceding the third anniversary** of the T visa approval or **when the investigation is complete**, whichever is earlier.¹⁰² USCIS may notify T visa holders that they are eligible for adjustment of status, but this has not actually occurred. The burden is on the applicant to apply for adjustment in a timely fashion.

Regardless of whether the notice is issued, if T holders do not file for the adjustment of status during that window, their status will be terminated.¹⁰³ As such, it is imperative that advocates and T holders do not rely solely on USCIS' issuance of such notice, but carefully track these dates as well.¹⁰⁴

Once the adjustment of status is properly filed, the T holder will be considered as continuing in T status, including continuing eligibility for employment authorization.¹⁰⁵

We have been filing for adjustment of status immediately after the grant of a T visa if there never was an investigation. We have also filed after a grant of a T visa when the investigation is

¹⁰¹ INA § 245(l)(1).

¹⁰² 8 CFR § 214.11(p)(1). *See also* § 821 of TVPRA 2005, which amends the Act to allow status for up to four years.

¹⁰³ 8 CFR § 214.11(p)(2).

¹⁰⁴ Although, if such notice was not given, one could argue that USCIS failed to meet their own regulatory standards.

¹⁰⁵ 8 CFR 214.11(p)(2).

complete. To date, these applications have been accepted and remain pending. Employment authorizations can then be issued under the category of adjustment pending. However, this leaves T visa holders who have exceeded the four years of T status with no proof of their status.

V. Industries Where Victims are Predominantly Found

Provided below are examples of industries that are most commonly associated with trafficking victims. This is in no way a comprehensive list, but merely a reference tool as well as a possible flag for identifying potential victims. For each of these categories, please note a brief fact pattern to provide further guidance in the identification process.

A. Factory Workers

One of the most well-known trafficking cases is the following. At the Korean-owned Daewoosa factory in American Samoa, 251 Vietnamese “guest workers” – more than 90 percent of them women – were held for nearly two years, under conditions of indentured servitude sewing clothing for J.C. Penney, Sears and Target. The labels read, “Made in the USA” since American Samoa is a U.S. territory. However, the women were not even paid the already very low \$2.60 an hour minimum wage in Samoa. The women were beaten, sexually harassed, threatened with deportation and imprisonment, starved, forced to work 12 to 18 hours a day, seven days a week when rush orders came in, and to live in crowded rat-infested dormitories. The U.S. Department of Labor has assessed the Daewoosa factory a total of \$604,225 in back wages and fines.

B. Migrant Workers

Pedro came to the U.S. on an H-2A visa to work as a fruit harvester for a large farm-labor contractor. When he was recruited, the company said that he would receive the federal-mandated rate of pay for farm workers (which is higher than the minimum wage), housing, and transportation. Although he was a monolingual Spanish speaker, he had to sign a contract that was written in English. Upon arriving in the U.S., the contractor took his passport and other identification documents; the contractor explained that they needed to do this since other workers had walked off the job. Pedro worked 12 hours a day, seven days a week. He was not paid even the minimum wage, and he was not paid in a timely manner. He was not allowed to take meal breaks, and passed out on at least four occasions during work hours from dehydration. He was not allowed to see a doctor and instead was told to return to work. Pedro slept in a trailer with nine other men, and had to do his laundry in the sink. As an H-2A visa holder, he was legally bound to this contracting company or he would have to return to Guatemala. Pedro felt like he had little recourse to complain about the working conditions.

C. Domestic Workers

Ami was brought to the U.S. from India to work as a nanny for a family in New York. She was promised a wage four times greater than what she would earn in India. She was told that she would be treated like a family member. When Ami arrived, she was required to work 15-17 hours a day, cooking, cleaning, and doing laundry for the entire family, as well as childcare. She

was forced to sleep on the floor and her documents were withheld. She was told that if she went outside without permission or telling her employers when she would be back, she would be arrested on the spot. For three years of work, she was never paid.

When Ami finally asked to leave the house to attend church, which she had been denied for three years, she was thrown out of the family home. An Indian nanny in the building helped her find a place to stay. However, Ami was worried about her legal status, and that she would be deported since she no longer had a valid visa. With the help of a community-based organization whose members spoke her language, Ami reported her traffickers to the police, the FBI, and to DOJ. After numerous calls to law enforcement advocating the merits of the case, DOJ was interested in investigating the case, and decided to interview Ami to evaluate the case and determine if she might be a credible witness.

D. Household Employees of Diplomats

Teresa was a young woman working as a nanny in her home country in Latin America. The family she worked for were diplomats, and when the husband was posted to the United States, the family asked her to accompany them in the same capacity. Teresa was reluctant to leave her home and her own family, but her employers promised her education, English lessons, and increased wages. On this basis, Teresa agreed and came to the United States. Once here, she was required to sleep on the kitchen floor, to work fourteen hour days, was paid only rarely and far less than what was agreed, and was not allowed to leave the apartment. She was also continually verbally abused and threatened with deportation if she complained. A friend of the employer's witnessed the situation, and contacted ICE who rescued Teresa from the situation, and referred her to a social service agency. However, since the traffickers were diplomats, no prosecution was ever pursued because of diplomatic immunity. Moreover, the ICE agents involved in the "rescue" were reluctant to provide the LEA certification, but did so after continuous requests. Teresa is now resettled in the U.S. in T status.

E. Restaurant Workers

When Li was sixteen, a man came to his village recruiting young men for jobs in the U.S. He told Li that he could make a lot of money to send home to his parents. Since Li's parents were getting older and there were no jobs available in the village, Li decided to take this opportunity. His parents scraped together their savings to pay the man. Li was advised that he would then have to pay a balance of \$20,000 after he arrived.

Li traveled with six other young men. He was given travel documents to pass through checkpoints in Korea and Canada, but after he cleared each of the checkpoints the papers were taken away. Once he arrived in Canada, Li was held in captivity for twenty days where he was deprived of food, threatened, and interrogated about his extended family. When he finally reached the U.S., he was allowed to live with his uncle in San Francisco. However, he was forced to work seven days a week, fourteen hours a day for the traffickers, who kept most of his salary. In addition, the traffickers often asked him to perform criminal activity, and threatened his family if he does not agree. Recently, the traffickers threatened his parents in China.

F. Sex Workers

Susanna and Penelope are two adolescent girls who were trafficked into the United States from a South American country and forced into sex work. The trafficker lured them to the U.S. by claiming he could get them jobs. He also told one of the girls that he would reunite her with her mother, who was already in the U.S. The trafficker created personal relationships with these girls, thus earning their trust. For example, he told Susanna and her family that he wanted to marry her, and acted as a boyfriend, while he created a platonic “older brother” friendship with Penelope. Ultimately, he sexually assaulted both girls and forced them to work against their will in a brothel. Susanna and Penelope were resourceful enough to escape from him one night, and made contact with the local police. Both were under the age of 18, meaning that they were not required to cooperate with a reasonable request from law enforcement in order to qualify for a T visa. However, they are now choosing to cooperate with law enforcement in the prosecution of their trafficker.

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Part B: Preparing The T Nonimmigrant Visa Application Package

I. The Basics of the Application

Victims of severe trafficking may apply directly to the USCIS for T status. While the TVPA recognizes trafficking protection as a humanitarian type of immigration status, it is classified as a non-immigrant visa. A petition is made by submitting Form I-914 (with Form G-28 designating the representative or counsel) along with supporting documentation to the VSC.¹⁰⁶ If filing a fee waiver, that request should be filed concurrently with the I-914.¹⁰⁷

The **basic application package** should include:¹⁰⁸

- Biometric filing fee or fee waiver request (form EOIR-26 is acceptable for fee waiver);¹⁰⁹
- three passport photographs of the applicant;¹¹⁰
- duly signed and executed Form I-914;
- duly signed and executed form G-28 (on blue paper);
- duly signed and executed Form I-192, waiver of inadmissibility (if appropriate);
- evidence supporting the claim (including a personal statement/affidavit);
- country condition reports and any other objective evidence supporting the claim;

¹⁰⁶ U.S. Citizenship and Immigration Services, Vermont Service Center, 75 Lower Welden Street, St. Albans, VT 05479-0001. "T Visa Application" should also be written in bold on the application package.

¹⁰⁷ These forms can be downloaded off the internet, *available at* www.uscis.gov. It is important to use the most current version of the forms, which are updated often.

¹⁰⁸ *See* 8 CFR § 214.11(d)(2).

¹⁰⁹ USCIS filing fees are subject to change, so the biometric fee should be verified before submitting. If the incorrect fee is submitted, USCIS will reject the application. As of the date of this manual's publication, the biometric fee is \$80.00 per individual between the ages of 14 and 79. Biometrics include fingerprinting to facilitate background checks. The biometrics fee may be waived. Applicants are notified of the time and location for the fingerprinting at the Application Support Center (ASC).

¹¹⁰ Standards for the photographs can be found at www.travel.state.gov/passport/pptphotos/composition_checklist.html.

- a supporting letter, brief, or memorandum of law establishing the criteria for T status:
 - that the applicant is a victim of a severe form of trafficking in persons;
 - that the applicant is physically present in the United States on account of the trafficking; and
 - that the applicant would suffer extreme hardship involving unusual and severe harm if he or she were removed from the United States.¹¹¹
- a cover letter acting as a roadmap to the evidence included.¹¹²

II. Preparing and Drafting the T Visa Application Package

A. Completing the Forms

1. *The G-28*

The G-28 is the notice of appearance that an attorney or representative of a religious, charitable, social service, or similar organization is designated as the representative on behalf of a person involved in a matter before the USCIS. There is no filing fee associated with the G-28, but USCIS prefers that it is on light blue paper so it stands out.

2. *The I-914*

Part A. Purpose

Generally check the first box “I’m filing an application for T-1 nonimmigrant status, and have not previously filed for such status.”

Part B. General Information

- Be sure to answer each question correctly. Verify with actual documents when filling out this form. Do not assume same or similar data from other applicants.
- Make sure to put dates in the U.S. format (Month/Day/Year) as opposed to the European format (Day/Month/Year) followed by many countries.
- **Safe Mailing Address:** This is the address to which USCIS will send notifications. It is a good idea to include the advocate’s address to ensure that the case is properly processed.

¹¹¹ 8 CFR § 214.11(d)(2)(vii).

¹¹² “T VISA APPLICATION” should be noted in red marker in the upper right-hand corner of the first page of the cover letter to make sure that the packet is properly routed by the USCIS mailroom.

- **Date and Place of Last Entry into U.S.** should be taken from the current I-94 card, or stamp in the passport. If neither passport nor I-94 is available, make an estimate and note on the form that it is an estimate.
- **Passport Information:** If passport is not available, write “N/A.”
- **Current USCIS status**¹¹³
 - Check client’s current I-94 card (this will usually be a white card stapled into the passport). It is the I-94, and NOT the visa stamp in the passport, that denotes status and authorizes length of stay. The individual’s status is noted by a letter (usually “B-1 or B-2” or “A-3” or “G-5”) and the expiration of that status is noted below.
 - If the client has been granted Continued Presence (evidenced by the ORR Certification Letter), the status is likely “Deferred Action” or “Public Interest Parole.”
 - If the client has not yet been granted Continued Presence and does not have an I-94 because he or she crossed the border without inspection, note “EWI” (for Entered Without Inspection) and *consult an immigration attorney with trafficking experience before filing.*¹¹⁴
 - If the client entered and the status has since expired, and has not yet been granted Continued Presence, write status type and date of expiry.¹¹⁵

Part C. Details Related to T Nonimmigrant Status

Q1, 3, 4. Check all boxes “Yes.”

Q2. If you do not have an LEA endorsement from a federal agency on form I-914 Supplement B, check “No” and attach secondary evidence of cooperation with law enforcement. If I-914 Supplement B is enclosed, or if you were advised that such LEA endorsement would be sent to USCIS, check “Yes” and list the information in response to **Question 5**. A Federal Law Enforcement Agency (such as the USCIS/ICE, FBI, DOL, or DOJ Civil Rights Division) must be contacted **prior** to submitting the T application.

Q6. Applicant is Under 18 as of the date of filing the application.

¹¹³ Filing a petition for someone who is not eligible could result in a “Notice to Appear” (NTA) before an immigration judge (IJ) and subsequent removal (deportation) from the United States.

¹¹⁴ Form I-192 should be filed to waive any and all grounds of inadmissibility.

¹¹⁵ *Id.*

Q7. Note if there was compliance with requests for investigation or prosecution

Q8. First Visit to the U.S. Include all entries to the U.S., even if prior visits were made unlawfully, but *consult an immigration attorney prior to filing if applicant has made prior unlawful entries.*

Q9. Entry on Account of Trafficking. Check “Yes.”

Q10. Employment Authorization. Check “Yes.” No additional form or fee is required.

Q11. Applying for Eligible Family Members. Answer “Yes” if a Supplement A for a spouse, child(ren), and/or parent(s) is included. If there are no qualified family members, or if the applicant will file for them at a later time, check “No.”

Part D. Processing Information

These questions are to determine “admissibility,” a legal standard required for all foreign nationals applying for a legal status to either enter or extend their stay in the U.S. It is also very important to the ultimate “green card” application. Be sure to answer truthfully to each question, especially questions about criminal conduct in the U.S. If the answer to ANY of the questions is “Yes,” the applicant will have to file an I-192 Waiver.¹¹⁶

Q1. Criminal History. This may include prostitution, even if it was forced. You may want to check the immigration regulations and statutes to make sure that the applicant’s admission to a criminal act does not permanently bar immigration benefits.

Q2. Public Charge. Pursuant to the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. 108-193, § 4(b)(4) (codified as amended at 8 U.S.C. 1182(d)(13)), receiving cash assistance from the U.S., state, or local government is no longer a grounds of inadmissibility for the T visa and does not necessitate the filing of an I-192.

Q3, 10, 11, 12, 13, 15. Answering yes to these questions should not bar T visa issuance, but *consult an immigration attorney to make sure that the applicant is eligible for a waiver.* Filing an application for someone who is not eligible could result in he or she being placed in “deportation” or “removal proceedings” before an immigration judge.

Q4, 5, 6, 7, 8, 9, 14. If the applicant answers “Yes” to any of these questions, a I-192 waiver may be more difficult to obtain. The specific circumstance surrounding the issue should be carefully evaluated, and an attorney or advocate with expertise in the field should be consulted. Answering “Yes” to these questions can seriously compromise eligibility for the T visa.

¹¹⁶ Fee waiver and RFE issue

Part E. Information about Family Members

Include information about the spouse and/or child(ren), even those that applicant is not currently seeking to bring in. Applicants who are under 21 years old can also include their parents and unmarried siblings under 18 years of age on the date that T application is submitted. Form I-914, Supplement A and appropriate fee should be included for those qualifying family members who will join applicant.

Part F. Attestation and Release

Signature by the applicant certifying that everything is true and correct under penalty of perjury, and that the applicant understands that the USCIS can and will use the information in the application against the traffickers and share this information with other government agencies.

Part G. Certification

Should be completed by attorney or advocate who assisted in the preparation of the petition. This is a normal part of any immigration petition or application.

3. *The I-914, Supplement A*

Note: A separate Supplement A and filing fee must be included for each family member being sponsored. A separate G-28 should also be included to ensure the attorney or advocate receives notification. Derivatives who are applying from outside the U.S., will undergo an interview at the appropriate consular post. However, they are not required to know the substance of the underlying T visa application. Attorneys should examine whether derivative applicants face inadmissibility issues, such as unlawful presence, issues around unlawful entry, or prior criminal convictions.

Part A. Relationship

Check the appropriate relationship. Note that parents and unmarried siblings under the age of 18 can only be included if the applicant is under 21 at the time of filing. Note that the form has yet not been amended to include unmarried siblings.

Part B. Information about the main applicant.

If the Supplement A is filed together with the original I-914, check “Submitted” for the last question in this section. Otherwise, check the relevant box and include appropriate evidence of that status.

Part C. Information about Derivative Applicant

Be sure to answer all questions. Answer “None” or “N/A,” but do not leave blanks. The questions regarding ‘**Immigration Proceedings**’ refers to Deportation or Removal

Proceedings, only. Check “Yes” only if the Family Member has been ordered to appear before an Immigration Judge in the U.S.

Part D. Processing Information

As with Part D on the Form I-914, these questions are to determine “admissibility.” Be sure to answer truthfully to each question. *If the answer to any question is “Yes,” consult an immigration attorney to determine eligibility for a waiver and/or risk of deportation or removal.*

Part E. Attestation and Release

This is the same as Part F on the Form I-914. If the family member is in the U.S., he or she should sign. If the family member is NOT in the U.S., only the applicant needs to sign.

Part F. Certification

The same as Part G on Form I-914.

Application for Employment Authorization:

Derivatives of T status are eligible for employment authorization when they are inside the U.S. To obtain employment authorization, derivatives must file form I-765 accompanied by form G-28, if represented by counsel, two passport photos, appropriate filing fee, and indicate on the form I-765 eligibility under (c)(25). Such employment authorization should last for the duration of the T-1 nonimmigrant status.¹¹⁷ File for derivatives after they arrive in the U.S. if they were not present at the time of the initial application with the Vermont T Visa Unit. If they are present in the U.S. at the time of the initial application, an I-765 for the derivative can be sent in at the same time as the I-914.

4. *The I-914, Supplement B*

- This is the official “Law Enforcement Attestation,” also referred to as the “LEA” endorsement. If included with the application, it can serve as the primary evidence for all elements, except extreme hardship.
- The LEA endorsement must be from a qualified federal agency.¹¹⁸ At present, it cannot be from state or local law enforcement¹¹⁹ (although such documentation may be credible “secondary evidence”).

¹¹⁷ 8 CFR § 214.11(o)(10).

¹¹⁸ 8 CFR § 214.11(e). Qualified federal agencies include, but are not limited to, the offices of the Department of Justice, the United States Attorneys, the Civil Rights and Criminal Divisions, FBI, USCIS, ICE, the United States Marshals Service, and the Diplomatic Security Service of the Department State.

- Keep close track of all attempts to obtain the LEA endorsement - including phone and fax log, email copies, and letters.
- In pursuing the LEA endorsement, attorneys/advocates may want to draft the LEA endorsement to ensure that it addresses all of the legal elements directly. This can be an extremely powerful document if it provides thorough and complete information and is free from contradictions.

5. *The I-192*¹²⁰

It may be necessary to file this form if any of the answers were “Yes” to Form I-914, part D. However, because there is a non-waivable filing fee of \$545 for each applicant, and because this fee is often unobtainable for many victims, VSC has agreed to preliminarily review the application to determine if an I-192 is necessary.

If VSC determines that the I-192 should be filed, it will send the attorney of record (as evidenced by the G-28) a Request for Evidence (RFE). The RFE will provide a specific timeframe during which the I-192 must be submitted. If an I-192 is requested, note that two copies per applicant should be included.

Completing the form

Q1-6. are self-explanatory.

Q7. Desired Port of Entry into U.S. Enter “Vermont Service Center” and the city of the nearest District Office. For example: “VSC/New York, NY”

Q8. Means of Transportation. Enter “N/A.”

Q9. Proposed Date of Entry. Enter the date on which you are filling out the form.

Q10. Approximate Length of Stay in the U.S. Enter “Indefinite.”

Q11. My Purpose for Entering the U.S. This will most likely be either:

“To serve as a witness in a criminal trafficking case.” *or*

“To cooperate with law enforcement against traffickers.”

¹¹⁹ As noted in Part A, the TVPRA does provide that LEA endorsements may be submitted by state or local law enforcement officials. However, current policy as announced by U.S. Citizenship & Immigration Services Associate Director of Operations William Yates in an April 15, 2004 memorandum is that this provision must wait for further guidance to be in effect.

¹²⁰ Even though the applicant may be physically in the United States, in order to permit them to be “entered” into a legitimate status, the I-192 must be filed.

Q12. I Believe I May be Inadmissible. List the issues to which applicant answered “Yes” to in Part D of the I-914. Consult someone with expertise in this area to make sure the ground is eligible for a waiver.¹²¹ The most common may be:

- “Receipt of public benefits as a Certified Trafficking Victim;”
- “Entered the U.S. on a fraudulent visa;”
- “Since entering the U.S. I violated my non-immigrant status;”
- “I was forced to work as a prostitute;”
- “I entered the U.S. without inspection;” and
- “I was arrested for [prostitution] as a result of my trafficking situation.”

Q13. This question is asking if the applicant has filed this form before. For most, if not all, the answer will be “have not previously filed.” If the applicant has never applied to enter the U.S. before, the answer is certainly “have not previously filed.”

Q14. The applicant should sign and date the form.

Q15. Should be completed by attorney or advocate who assisted in the preparation of the petition. This is a normal part of any immigration petition or application.

6. EOIR-26A “Fee Waiver Request”

- Fee waivers are available at the sole discretion of the USCIS.¹²²
- Form EOIR-26A (which is normally filed with the immigration court under the “Executive Office of Immigration Review” can be used for this purpose).¹²³ Make a note in the cover letter that the filing fee waiver request is made pursuant to 8 CFR 103.7(c)(1).¹²⁴
- The fee waiver lists the applicant’s assets, income, and expenses, to show that the applicant does not have sufficient funds to pay the application fee.¹²⁵

¹²¹ Trafficking survivors are **not considered “unlawfully present”** if they demonstrate that the severe form of trafficking “was at least one central reason for the alien's unlawful presence in the United States.” 8 U.S.C. § 1182 (a)(9)(B)(iii)(V) (2006).

¹²² See 28 CFR § 103.7(c) (2003).

¹²³ Available at www.usdoj.gov/eoir/formslist.htm.

¹²⁴ This is not a required form, and an affidavit by the applicant is also acceptable.

¹²⁵ Gail Pendleton, National Immigration Project, *Practice Pointers on Filing with VSC*, Feb. 27, 2002.

- Applying for a fee waiver will not prejudice the applicant.
- Only one fee waiver needs to be filed to cover all applications submitted together.

7. *Photographs and Filing Fees*

- Applicant must include three passport photographs, with name and A# (if available) on the back of each photo in pencil.
- Biometric fee of \$80 and any other fees that are not being waived should also include applicant's name. Fees can be paid with check or money order.¹²⁶
- If applying for relative(s), a Form I-914 Supplement A (and Form I-765 if the relative is already in the U.S.) must be completed for each relative, including three passport photographs of the relative and the \$80 biometric fee (for relatives aged 14-79).
- The name of the relative should be written on the back of each photo in pencil or felt-tipped pen.

B. **Preparing The Supporting Documentation**¹²⁷

1. *Personal Statement/Affidavit*

Applicant should submit a detailed personal statement or affidavit. Make sure that each element is directly addressed:

- Victim of a “severe form of trafficking”¹²⁸
 - State that he or she is a victim of a severe form of trafficking;
 - Discuss the circumstances surrounding the victimization;
 - Were they in control of passport and other identification;
 - Were they free to leave;
 - Were they threatened with deportation/removal or police involvement;
 - Were they physically or psychologically threatened; and

¹²⁶ It is helpful to pay by check, because the cancelled check will have applicant's case number on it and is also proof of filing if USCIS misplaces the file.

¹²⁷ Samples of supporting documents may be available on Boat People SOS' and the National Immigration Project's websites.

¹²⁸ 8 CFR § 214.11(f).

- Encourage a chronological, personal account of the victimization considering the elements and factors used to determine if this was appropriate for T visa submission.
- Physically Present Due to Trafficking¹²⁹
 - Date, place, manner, and purpose of entry;
 - Explain current presence on account of victimization;
 - Show absence of a clear chance to leave, in light of circumstances including trauma, injury, lack of resources, or seizure of travel documents; and
 - Letter from NGO or clinical social worker affidavit may be helpful to describe situation, trauma experienced, et cetera. Particularly from NGOs located in applicant's home country.
- Complied with any reasonable request for assistance from an LEA¹³⁰
 - State compliance with requests and cite LEA endorsement;
 - Name the responsible LEA;
 - Indicate whether specific records of the crime are available;
 - If no LEA certification then explain why it does not exist or is unavailable, such as an attorney affirmation, secondary evidence noted below, or affidavits;
 - Detail good faith attempts to obtain an LEA endorsement, and note corroborating documentation;
 - Secondary evidence may include court documents, police reports, trial transcripts, and affidavits from affiliated agencies.¹³¹ Consider also using documentation from state or local police, or District Attorney's office. While they cannot submit the LEA endorsement, such documentation can certainly be used as a strong basis for credible secondary evidence; and

¹²⁹ 8 CFR § 214.11(g).

¹³⁰ 8 CFR § 214.11(h).

¹³¹ 8 CFR § 214.11(h)(2). See also New Classification for Victims of Severe Forms of Trafficking in Persons, 67 Fed. Reg. 4784, 4788 (Jan. 31, 2002) (codified at 8 CFR Parts 103, et al.).

- If no LEA endorsement due to age, provide evidence that applicant is under 18 years of age and therefore not required to comply.¹³²
- Extreme hardship involving unusual and severe harm upon removal¹³³
 - State age and personal circumstances;
 - Physical or mental illness requiring medical attention not otherwise available in the home country;
 - Nature and extent of the medical and psychological consequences of the victimization;
 - Is applicant undergoing a course of counseling here that would be disrupted, and may not be available and/or acceptable in home country;
 - Impact of the loss of access to the US civil and criminal justice system for purposes relating to legal issues arising from the victimization;
 - Laws, social practices or customs of the home country which might penalize the Principal for having been a trafficking victim;
 - Likelihood of re-victimization and the need, ability, or willingness of home country authorities to protect the Principal; and
 - Likelihood that the Principal's safety would be seriously threatened by civil unrest or armed conflict in home country designated for Temporary Protected Status (TPS) or Deferred Enforced Departure.

Make sure to review the completed Personal Statement at least once with the applicant after it has been prepared and edited. If possible, provide the applicant with a translation of the document (if the applicant is not fluent in English). If a written translation is not possible, orally translate the Personal Statement, giving the applicant the chance to make edits and corrections.

2. *Prepare Summary of Law, Memorandum of Law, or Brief*

It is helpful to include a brief or memorandum to detail the legal basis for the petition, substantiating the grounds that support the evidentiary criteria.

¹³² 8 CFR § 214.11(h)(3).

¹³³ 8 CFR § 214.11(i).

- **Statement of Facts:** Begin with a brief reiteration of the factual basis of the claim, that includes how the individual was trafficked in and his or her victimization in the United States.
- **Argument:** Note how the facts specifically support each element:
 - is physically present in the United States, American Samoa or the Commonwealth of the Northern Mariana Islands as a result of trafficking;
 - is a victim of a severe form of trafficking in persons;
- for the purpose of a commercial sex act, which act was either induced by force, fraud, coercion, or occurred when the applicant had not reached 18 years of age;
- for the purpose of labor or services induced by force, fraud, or coercion for the purpose of subjecting the applicant to involuntary servitude, peonage, debt bondage, or slavery;
 - *Sex trafficking:* the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act;
 - *Coercion:* threats of serious harm to or physical restraint against any person; any scheme 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 the abuse or threatened abuse of the legal process;
 - *Debt bondage:* the status of a debtor arising from the debtor's pledge of his or her personal services or the services of a person under the debtor's control as a security for debt, if the value of those services is not applied to satisfy the debt or if the length and nature of the services are not appropriately limited and defined;
 - *Involuntary servitude:* a condition of servitude induced by causing a person to believe that the person or another would be seriously harmed, physically restrained, or subjected to abuse or threatened abuse of legal process if the person did not enter into or remain in the servitude; or
 - *Peonage:* status or condition of involuntary servitude based upon real or alleged indebtedness.
- would suffer extreme hardship involving unusual and severe harm upon removal; and
 - The applicant's age and personal circumstances;
 - Serious physical or mental illness of the applicant that requires medical or psychological attention not reasonably available in the foreign country;
 - The physical and psychological consequences of the trafficking activity;

- The impact on the applicant of loss of access to U.S. courts and criminal justice system for purposes such as protection of the applicant and criminal and civil redress for the acts of trafficking;
 - The impact on the applicant of interruption of counseling and other types of services;
 - The reasonable expectation that laws, social practices, or customs in the applicant's country would penalize the applicant severely for having been the victim of trafficking;
 - The likelihood of re-victimization and foreign authorities' ability and willingness to protect the applicant;
 - The likelihood that the trafficker or others acting on his or her behalf would severely harm the applicant; and
 - The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict, as demonstrated by a designation of Temporary Protected Status under INA § 244 or the granting of other relevant protections.
- has complied with any reasonable request for assistance in the investigation and prosecution of acts of trafficking in persons, unless the applicant is less than 18 years old.¹³⁴

3. *Prepare/Organize the Exhibits*

Note: The VSC wants a COMPLETE copy of each exhibit. Double-sided copies ARE acceptable to reduce bulk. Regular copies are acceptable, it is not necessary to have notarized or certified copies of documents. Translations must be provided of all documents that are not in English. The translation must include a statement of accuracy by the translator, but does not need to be notarized. When including a translation, put the translation on TOP of the original so that the Adjudicator sees the English version first.

The following is a suggested order for submitting the documents to USCIS:

1. USCIS forms and filing fees, or fee waiver. If a G-28 is submitted it should be on top and printed blue paper.

¹³⁴ “Children who have not yet attained the age of 15 at the time of application are exempt from the requirement to comply with law enforcement requests for assistance in order to establish eligibility.” 8 CFR 214.11(h). Please note that while the TVPRA changed this age to 18, that regulations have not yet been amended to reflect this change.

2. Personal Exhibits. These exhibits should come first.
 - a. Personal Statement of the Applicant. This will ALWAYS be the first exhibit;
 - b. Marriage Certificate of the Applicant. If applicant is filing for his or her spouse and/or child(ren), a copy of the Marriage Certificate/Birth Certificates, and a translation, must be included. If either the applicant or his or her spouse was previously married, include proof of the termination of all previous marriages (death certificate or divorce decree and translation); and
 - c. Birth Certificates. You must prove the relationship for any derivative family members being added to the application. For children, a copy of the child's birth certificate must be included. For parents, the applicant's birth certificate must be included. If both parents are not listed on the birth certificate, add the parent's marriage certificate.
3. General Exhibits. Following the personal exhibits are the corroborating exhibits that prove the elements required for a T visa. Try to submit at least one document, in addition to the Personal Statement, that addresses each element. Examples of general exhibits may be:
 - a. witness affidavits;
 - b. trial transcripts;
 - c. court documents;
 - d. police reports;
 - e. news articles;
 - f. travel receipts and documents; and
 - g. country condition reports.
4. The Supplement B. According to the T Visa Regulations, the Supplement B prepared by the LEA investigating/prosecuting the crime serves as primary evidence for all elements except extreme hardship. Some advocates have drafted the Supplement B for the LEA to ensure that it addresses all of the legal elements directly. This can be an extremely powerful document if it provides thorough and complete information and is free from contradictions.

5. Highlight key portions. VSC requests that the key portions of the exhibits are highlighted, especially within the longer documents. VSC Adjudicators have told advocates that this assists them greatly in identifying the important sections.¹³⁵

4. *Prepare Cover Letter*

The cover letter indexes the documents included with the application, providing a roadmap for the adjudicator. While the brief or memorandum will detail the legal basis for the petition, the cover letter lists the documents that substantiate the claim. It is helpful to add a summary of each exhibit with an explanation of how it addresses one of the required elements. Add key quotations to bolster your point.

5. *Assemble the Application*

- Put everything in this order (top to bottom):
 1. Cover letter printed on your agency's letterhead;
 2. **G-28** (if applicable);
 3. **Fee Waiver Affidavit** (EOIR-26 may be used);
 4. **I-914** with applicant's photos and check/money order stapled to the lower left-hand corner. Make sure that the staple does NOT go through the face of the applicant's photos;
 5. **I-914 Supplement A and I-765 (if applicable) for each family member.** Staple the three photos to the upper right-hand corner of the Supplement A and make sure the staple does not go through the face on the photos; and
 6. **Exhibits** in order, tabbed or divided with colored paper.
- **Make two copies of the complete packet.** Give one to the applicant and keep one for your files.
- **Hole punch and fasten the original application.** Use a two-hole punch and punch through the top of the pages. Fasten the entire packet with an Acco two-hole fastener.

6. *Mail the Application*

Write "T VISA" with a fat, red marker on the front of the envelope. Send it Certified, Return Receipt Requested so that you will have proof that the USCIS received it and so that

¹³⁵ Pendleton, *supra* note 19.

you will be able to track the application if it is misrouted by the USCIS mailroom to this address:

United States Citizenship & Immigration Services
Vermont Service Center
Attn: T Visa Unit
75 Lower Welden Street
St. Albans, VT 05479-0001

7. Follow Up

Keep track of the status of the application compare with others to make sure that nothing has gone wrong with the filing.

You should receive receipts within four weeks. There will be one receipt for the I-914 and one for an I-765 employment authorization (even though you didn't file this form you get a receipt because it was built-in to the I-914). You will also get receipts for each derivative application. You can track your receipt numbers at www.uscis.gov as well as sign up for email updates at that website. At this time, it is taking anywhere from three months to more than a year for a decision on a T visa. If you do not receive receipts or there are errors, you can call (802) 527-4888 to leave a message with the T visa unit. You should also consider writing to them to correct any errors. This number should not be used for case status inquiries and should only be used by the attorney or representative.

Important Dates:

- Date on HHS Certification Letter, applicant only has 30 days from issuance of this letter to elect benefits;
- Date of filing;
- Date on the Receipt Notice. Receipt Notices and a Biometric/Fingerprint Appointment should arrive within three weeks of filing;
- Date on the Bona Fide/Prima Facie Determination letter;
- Date on any Request for Additional Evidence;
- Date on the Approval Notice. T status is granted for three years. Ninety days before the three years expires, a T alien must file for adjustment of status to permanent residency, or such legal status in the U.S. will be terminated;136
- Date of interview for family members; and
- Date of approval of family members.

¹³⁶ 8 CFR § 214.11(p)(2).

III. Sample Questions for Legal Assessment

Important: This form is intended as a guide for legal practitioners.

Recruitment

- What were you told about the kind of job/situation that was offered to you?
 - Who offered you the job?
 - How much money was promised to you and by whom?
 - Did you sign a contract? If yes, where is it?
 - What were the terms of the contract?
 - What kind of visa or other documents were promised to you?
 - Was anyone paid to bring you to the U.S.?
 - Were you sold? Were you kidnapped?
-

Migration

- How were you brought to the U.S.? Were you informed of this method before you left?
- Were you in any other countries prior to your arrival here?
- Who organized your travel?
- Who accompanied you?
- If there were other people, do you know what happened to them?
- Were you always in possession of your documents? If no, who took them and how long did they keep them?
- Were you told what to say to immigration officials?
- Was a fee paid to organize your travels?

Arrival

- Where did you stay upon arrival?
 - What happened to your documents and belongings upon arrival?
 - How soon were you told to begin work?
-

Working Conditions

- What was the type of work you were expected to do?
 - Were the conditions and type of work the same as what you expected/ were told?
 - What were the hours/days of your work?
 - What was the pay? Were you paid the amount you agreed to?
 - Were you living and working at the same place? Could you leave?
 - Were you expected to pay off a loan of any kind (i.e. debt bondage)?
 - Do you owe money to your employer or anyone else?
 - Were you allowed time off? Allowed to rest if sick?
 - Were you allowed to communicate with family members? Friends? Other workers?
 - Were you able to attend religious, cultural, or educational programs?
 - Were you able to quit work and work somewhere else?
-

Safety and Risk

Were you threatened with harm at any time (before you left, in transit, upon arrival)?
Have you experienced...

- Physical coercion such as:
 - physical violence
 - threats of violence
 - torture/beatings
 - sexual abuse, harassment

- isolation/imprisonment/ incarceration
- denial of medical care
- denial of food, clothes, or other necessities
- other
- Psychological coercion such as:
 - deceit
 - threats of violence against you or your family, friends?
 - abuse of others in front of you
 - threats to report you to authorities, arrange deportation
 - verbal abuse, degrading remarks
 - speaking in a language you didn't understand
 - threat of isolation
 - other
- Are you currently fearful for your own, or anyone else's, safety?
- Do you know the current location of the traffickers?
- What would happen to you if you were to return home?