

Physical presence is often the eligibility requirement that legal advocates have a difficult time understanding. Often time, advocates assume that the physical presence on account of trafficking requires the description of how the survivor was trafficked into the U.S., others have missed address this issue in their T Visa application. This practice advisory will break down the physical presence eligibility requirement and provide successful strategies in approach this requirement.

### What is “Physical Presence on Account of Trafficking”?

Amongst the eligibility requirements for T nonimmigrant status under INA 101(a)(15)(T)(i), trafficking survivors has to show they have been:

“...**physically present in the United States**, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, **on account of such trafficking**, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking.”<sup>1</sup>

DHS has historically interpreted the “physical presence” requirement for the T visa to mean that (1) the trafficking occurred in the U.S. and (2) the victim has not left the U.S. since the trafficking occurred.<sup>2</sup> Physical presence does not mean that the victim has to have been brought to the U.S. by a trafficker, but focuses on the applicant’s current situation and why the applicant’s presence in the U.S. today is in connection with the trafficking. <sup>3</sup> In fact, an applicant can demonstrate that they were recruited and trafficked in the U.S, without a trafficker transporting them into the U.S. and still be considered to be physically present as long as their current presence in the U.S. is related to the trafficking. In the 2017 T Visa regulations, DHS has expanded and clarified the definition of physically present on account of trafficking to include situations where the applicant either departed the U.S. after escaping the trafficking<sup>4</sup> or all the trafficking occurred abroad<sup>5</sup>, if evidence can demonstrate that the applicant was brought into the U.S. for the purposes of participating in an investigation or judicial process related to the trafficking. However, DHS has clarified that applicants whose trafficking occurred abroad who fled to the US to escape their trafficking where no extraterritorial jurisdiction or nexus to the US exist will not be deemed physically present on account of trafficking.<sup>6</sup>

An applicant is physically present on account of trafficking if they can demonstrate that he or she:

- Is present because he or she is currently being subjected to a severe form of trafficking in persons;
- Was liberated from a severe form of trafficking in persons by an LEA;
- Escaped a severe form of trafficking in persons before an LEA was involved, but never departed the United States;

---

<sup>1</sup> INA §101(a)(15)(T)(i)(I)

<sup>2</sup> 8 CFR §214.11(g)(2002)

<sup>3</sup> “Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status” <https://www.federalregister.gov/d/2016-29900/p-222>. (where physical presence requirement is only phrased in the present tense to require consideration of the victim’s current situation, and whether the victim can establish that their current presence in the United States is on account of trafficking)

<sup>4</sup> 8 CFR §214.11(g)(1)(v)(2017)

<sup>5</sup> 8 CFR §214.11(g)(3)(2017)

<sup>6</sup> See supra note 3 at 81 Fed. Reg. at 92273. In the comments to the new regulations, DHS specifically notes, “If a victim of trafficking abroad made his or her way to the United States and the reason is not related to or on account of the trafficking and the victim was not allowed valid entry to participate in an investigative or judicial process related to trafficking or the trafficker, this victim cannot meet the physical presence requirement and would not be eligible for T nonimmigrant status . . . .”

- Was subject to a severe form of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons; or
- Is present on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.<sup>7</sup>

## Common Physical Presence Analysis

Scenario	Physically Present on Account of Trafficking?
Enters U.S. legally or unauthorized, meets trafficker several years after entry, and is trafficked in U.S.	Yes
Escapes trafficking and does not have contact with law enforcement for years	Yes
Trafficked in U.S. but leaves U.S. after trafficking	No, unless can show return is because of original trafficking or new trafficking situation
Trafficked in U.S., returns home, trafficked by another back to U.S.	Yes
Trafficked in U.S. but deported	No, unless can show return is because of original trafficking or new trafficking situation
Brought into U.S. to cooperate with law enforcement after being deported	Yes
Brought into U.S. by law enforcement for civil case	Yes
Trafficking occurs solely outside U.S. and victim flees to U.S. for safety	No
Trafficking occurs solely outside U.S. but brought to U.S. by law enforcement for investigation/judicial process	Yes

## Successful Arguments for Physical Presence

Most trafficking survivors do not come forward immediately after they escape their trafficking situation which is why many trafficking survivors apply for their T visa years after escaping their trafficking situation. This means that most often, trafficking survivors must demonstrate that they were subject to a severe form of trafficking in persons at some point in the past and their continuing presence in the U.S. is directly related to the original trafficking in persons pursuant to 8 CFR 214.11(g)(1)(iv). This puts the onerous on the T visa applicant to substantiate why they're present in the U.S. today, potentially years after their escape, still is in direct connection to their trafficking. It is not sufficient to explain how the applicant arrived in the U.S., but instead the applicant must explain why they have remained in the U.S. because of the trafficking. While the arguments below work for the other physical presence factors, this advisory will focus on successful arguments for applicants who were trafficked at some point in the past and their continuing physical presence is related to their trafficking.

<sup>7</sup> 8 CFR §214.11(g)(1)(2017)

Common physical presence arguments:

- Currently in the US to receive victim services for injuries or trauma sustained from the trafficking
- Currently in the US to cooperate with law enforcement with criminal investigation or prosecution of the trafficker
- Currently in the US to access legal remedies, including obtaining protection against the trafficker and civil damages
- Cannot leave US because of fear of retaliation from their trafficker in home country
- Currently in US because no resources to leave the U.S. (Despite removing the “opportunity to depart” requirement from the 2017 regulations, DHS has historically looked at the applicant’s individual circumstances such as trauma, injury, and lack of resources to understand why a victim of trafficking may still be in the United States after their escape from the trafficking situation<sup>8</sup>)

One of the strongest arguments to demonstrate that the applicant has met the physical presence requirement is that the applicant is connected to social services, specifically specialized trafficking services.<sup>9</sup> This shows that the applicant is present in the U.S. currently to receive treatment for the trauma and injuries sustained in direct connection to their trafficking. Legal advocates can attach a case manager supporting declaration, which explains the victims services the applicant is currently accessing.<sup>10</sup>

Another legal physical presence argument is that the applicant is to continue to access legal remedies. This can be straight forward to argue once the trafficking is reported because an argument can then be made that an investigation can be opened and the applicant will need to be present in the U.S. to participate in that investigation. Another option is to evaluate whether the applicant is interested in receiving civil remedies by participating in civil litigation, wage and hour claims, or other labor-related claims. Despite civil remedies being a strong argument for showing physical presence and a great option for legal relief for victims of trafficking, very few attorneys ask their clients whether this is something they may be interested in. Failing to evaluate the applicant’s interest in engaging in civil relief, not only cuts them off from the benefits from civil relief but also takes away the ability for the applicant to use this argument for the physical presence eligibility requirement for the T visa and take away the possibility of the applicant getting Continued Presence.<sup>11</sup>

## Difference between Extreme Hardship and Physical Presence

Extreme hardship<sup>12</sup> and physical presence often overlap and may be difficult for advocates to distinguish the arguments. Often the same factors that would apply to physical presence would also be relevant to show that the applicant would suffer extreme hardship if they were forced to be removed from the US.

---

<sup>8</sup> See supra note 3 at 81 Fed. Reg. at 92273.

<sup>9</sup> If you are unsure what organizations provide social services to HT survivors, please use the following resources to find closest service provider for trafficking survivors: (1) Office of Victims of Crime Services:

<https://ovc.ncjrs.gov/humantrafficking/map.html#1>; (2) Trafficking Victim Assistance Program locations through USCRI:

<http://refugees.org/find-a-location/>; (3) National Human Trafficking Hotline Referral Directory:

<https://humantraffickinghotline.org/training-resources/referral-directory>

<sup>10</sup> A sample case manager declaration is available here: <https://castla.box.com/s/zbraicx18kuuvdbv602tjrqe95zw3v2z>.

<sup>11</sup> Continued Presence is available to applicants who have filed civil action under 18 USC §1595 are eligible to receive continued presence. See 22 USC §7105(c)(3)(A)(iii).

<sup>12</sup> For extreme hardship, advocates should refer to 8 CFR § 214.11(i)(2) and chose at least 3 of the factors listed in the regulations to make the extreme hardship argument. The strongest and most persuasive extreme hardship arguments are the ones that related why the applicant will suffer extreme hardship if removed because of their trafficking experience. Generic arguments that home country is dangerous and filled with gangs will be less persuasive and should be avoided.

The Comprehensive Training and Technical Assistance Program is supported by Grant No.2015-VT-BX-K029 awarded to CAST by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in the presentation and training materials are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice. **This material cannot be reproduced without consent from CAST.**

However, to be successful, distinct legal arguments for physical presence and extreme hardship must be made. Physical presence is meant to explain why the applicant is in the U.S. today, where as extreme hardship is meant to show the severe and unusual harm that would occur to the applicant if they were removed from the U.S. and returned to home country.

Physical Presence	Extreme Hardship
Currently in US to access victim services for trafficking survivors	Would suffer extreme hardship if removed from US and return to home country where comparable victim services that are crucial for recovery is not available
Currently in US to cooperate with LEA investigation and/or prosecution of trafficker	Would suffer extreme hardship if removed from US because applicant would lose access to the U.S. criminal justice system and ability to hold trafficker accountable
Currently in US because cannot leave due to fear of retaliation from trafficker in home country	Would suffer extreme hardship because trafficker could severely harm the applicant in home country
Accessing current legal remedies	Would suffer extreme hardship if removed from US because applicant would lose access to the U.S. legal system and remedies

## Departing the U.S. After Trafficking

Another aspect of the physical presence argument is to demonstrate that the applicant has never departed the US and has remained in the US on account of trafficking after escaping. It is irrelevant whether the applicant’s departure was voluntary or if they were removed from the US through removal proceedings.<sup>13</sup> Once an applicant departs the U.S, the applicant will be presumed not to be physically present, unless they can demonstrate that:

- Their re-entry into the United States was the result of the continued victimization;
- They are a victim of a new incident of a severe form of trafficking in persons; or
- They have been allowed reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.<sup>14</sup>

To successfully overcome the departure from the US, the most recent entry into the US must be related to a new trafficking incident or to the initial trafficking through a showing of continued victimization or return to the US for the purpose of participating in an investigation or judicial process related to the initial trafficking. Remember, for continued victimization, an applicant must show that the trafficker forced the applicant to return to the U.S. Upon the applicant’s departure, the trafficker threatens to harm applicant if they do not return to the US, and the applicant returns to the US as a result of the trafficker’s threats, this would be an example of continued victimization that could demonstrate that the applicant is still physically present despite leaving the US. Returning to the US to obtain social services because of experiencing on-going trauma from the trafficking will not constitute continued victimization; actions taken by the trafficker as a part of the on-going trafficking scheme must be shown to demonstrate continued victimization.

<sup>13</sup> 8 CFR §214.11(g)(2)(2017)

<sup>14</sup> *Id.*

The Comprehensive Training and Technical Assistance Program is supported by Grant No.2015-VT-BX-K029 awarded to CAST by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in the presentation and training materials are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice. **This material cannot be reproduced without consent from CAST.**

To successfully argue that an applicant is allowed reentry to participate in the investigation or judicial process to overcome a departure from the US and be presumed to be physically present on account of trafficking, the applicant must demonstrate that the reentry was valid, and that the reentry was reasonably close in time to the participation in investigation or judicial process.<sup>15</sup> In terms of evidence of valid reentry, the regulations and the preamble to the 2017 T visa regulations do not specify what will be accepted as evidence of valid reentry. All that is required is a showing that the applicant was allowed valid reentry through parole or other immigration relief.<sup>16</sup> In rare cases, applicants have been able to overcome their departure if they returned to the U.S. and immediately engaged in civil litigation or the criminal justice process. However, in these cases, applicants were able to show evidence of participation in investigation, or filed criminal or civil complaint, close in time to their reentry. The longer the time period is between valid reentry into the US and evidence of participation in investigation or judicial process, the less reasonable the argument is that the applicant's reentry was for the purpose of participating in an investigation or judicial process related to the trafficking.

## FAQ About Physical Presence

### What happens if your applicant escaped more than five years ago?

In these older cases, it becomes essential to explain why the applicant still remains in the U.S. even though it has been several years after escaping their trafficking situation. It becomes more crucial that the applicant is accessing trafficking-specific services and reporting their trafficking to law enforcement to demonstrate physical presence in the US on account of trafficking. The applicant must also address what challenges they faced as a result of the trafficking that took them longer to come forward and obtain services or report the trafficking. For some applicants, it may be because they did not know they were trafficked and were entitled to protections and legal remedies until speaking with an attorney. For others, severe trauma either prevented them from going to the police to report their crime or to seek services. Whatever the reason is, it needs to be clearly articulated in the applicant's declaration.

### What if the applicant was caught at the border or at a port-of-entry and no trafficking occurred in the U.S.?

It is important to keep in mind that a T visa is a law enforcement tool in addition to being a form of humanitarian relief. This means that a nexus between the trafficking and the US must exist to allow law enforcement to have jurisdiction to investigate the trafficking in order for the applicant to be physically present in the U.S. on account of trafficking.<sup>17</sup> Although the trafficking act of either forced labor or commercial sex has not occurred in this case, the applicant can show that they were recruited, harbored, transported, provided or obtained **for the purpose of trafficking in the United States** and demonstrate attempted trafficking.<sup>18</sup> AAO opinions also clearly state that in these attempted trafficking cases, clear evidence of the trafficker's intention to bring the applicant to the U.S. for "the purpose of subjection to involuntary servitude" is needed.<sup>19</sup> An application declaration alone can be sufficient evidence of trafficker's intention. Examples of trafficker's intention that must be included in the application declaration

---

<sup>15</sup> See supra note 3 at [81 Fed. Reg. at 92272](#)

<sup>16</sup> See supra note 3 at [81 Fed. Reg. at 92272](#)

<sup>17</sup> See supra note 3 at [81 Fed. Reg. at 92273](#)

<sup>18</sup> See supra note 3 at [81 Fed. Reg. at 92271](#)

<sup>19</sup> In Re: Applicant, 2007 WL 5353806 (2007). See also Matter of \_\_\_\_ (AAO VSC Feb. 21, 2007).

The Comprehensive Training and Technical Assistance Program is supported by Grant No.2015-VT-BX-K029 awarded to CAST by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in the presentation and training materials are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice. **This material cannot be reproduced without consent from CAST.**

are: 1) applicant was told by the trafficker the intention to force them to engage in commercial sex, involuntary servitude, or debt bondage, 2) applicant overheard the trafficker tell another of the trafficker's intention to traffic applicant in the U.S., or 3) applicant had knowledge of the trafficker forcing other people into commercial sex, involuntary servitude, or debt bondage so could infer that the applicant was also going to be treated the same.

## Tips on Responding to RFEs Related to Physical Presence

- Look to see if USCIS has a misstatement of law:
  - We have seen the following boiler-plate language located at the bottom of the physical presence RFE: “The evidence must also establish that 1) you are currently the victim of a severe form of trafficking in persons, or 2) you have recently been liberated from your trafficker; or 3) you are assisting law enforcement; or 4) your presence is required for assistance in a criminal or civil investigation against your traffickers.”
    - This language that has been omitted is from [8 CFR 214.11\(g\)\(1\)\(iv\)](#).
    - Be sure to address the misstatement of law in the RFE Response.
  - If you do not see the explicit misstatement of law, look to see if you can infer from the comments within the RFE, that the adjudicator is incorrectly applying this misstated law and come to the incorrect conclusion that the person is not physically present in the U.S. because VSC has failed to recognize [8 CFR 214.11\(g\)\(1\)\(iv\)](#).
- Look at the initial cover letter and initial declaration submitted.
  - Were arguments explicitly made that demonstrates that the applicant is physically present on account of trafficking today? (e.g. currently receiving victim services, reporting trafficking and cooperating with LEA, or accessing US legal system to obtain justice against trafficker)
  - Does the initial declaration also explain in the applicant's words what has happened since the departure of the trafficking situation until reporting of the trafficking crime?
  - If any components are missing from either the cover letter or declaration, be sure to address them in the RFE response cover letter and supplemental declaration.

## Further Questions

If you have additional questions or wish to republish this materials, please contact [technicalassistance@castla.org](mailto:technicalassistance@castla.org).