



# Freedom Network USA

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**Statement to the Border Security, Facilitation, and Operations Subcommittee**  
**House Committee on Homeland Security**  
**Member Briefing**  
**September 19, 2019**  
**Impacts of DHS Policies on Human Trafficking Survivors**

The Freedom Network USA (FNUSA), established in 2001, is a coalition of 68 non-governmental organizations and individuals that provide services to, and advocate for the rights of, trafficking survivors in the United States. As the largest network of survivors and providers working directly with trafficking survivors in the US, we are uniquely situated to evaluate the impact of US government efforts to address human trafficking, identify challenges, and propose solutions.

In collaboration with our members, FNUSA has identified the following challenges that have arisen or worsened due to recent DHS policies and procedures. We present these challenges and recommendations to you in a sincere hope that we can collaborate to more effectively identify and protect survivors, and support robust prosecutions of traffickers.

## **1. Fee Waiver Denials (T and U Visas)**

While humanitarian relief applications do not have a fee, there are associated applications for which survivors must request a fee waiver. Those waivers used to be routinely granted. Advocates have reported, however, that their fee waiver applications are routinely denied, even for applicants who are detained (and therefore clearly have no income). Advocates report no clear standard for approval- fee waivers have been approved for some forms and denied for others filed by family members with the exact same waiver application, filed concurrently.

While many are approved upon resubmission or appeal, there is a significant cost in time for the survivor, the advocate's representative, and the Service. Coupled with the new public charge guidance, many survivors fear that they will be denied relief if they cannot afford the filing fees and are delaying filing, staying in abusive and exploitative situations, or working in unsafe or underground employment in order to pay the fees.

The most common fee-based application for trafficking survivors is the I-192, which is filed concurrently with T Visa applications to waive any possible grounds of inadmissibility for survivors and family members physically present in the US. The fee is \$950 per person.

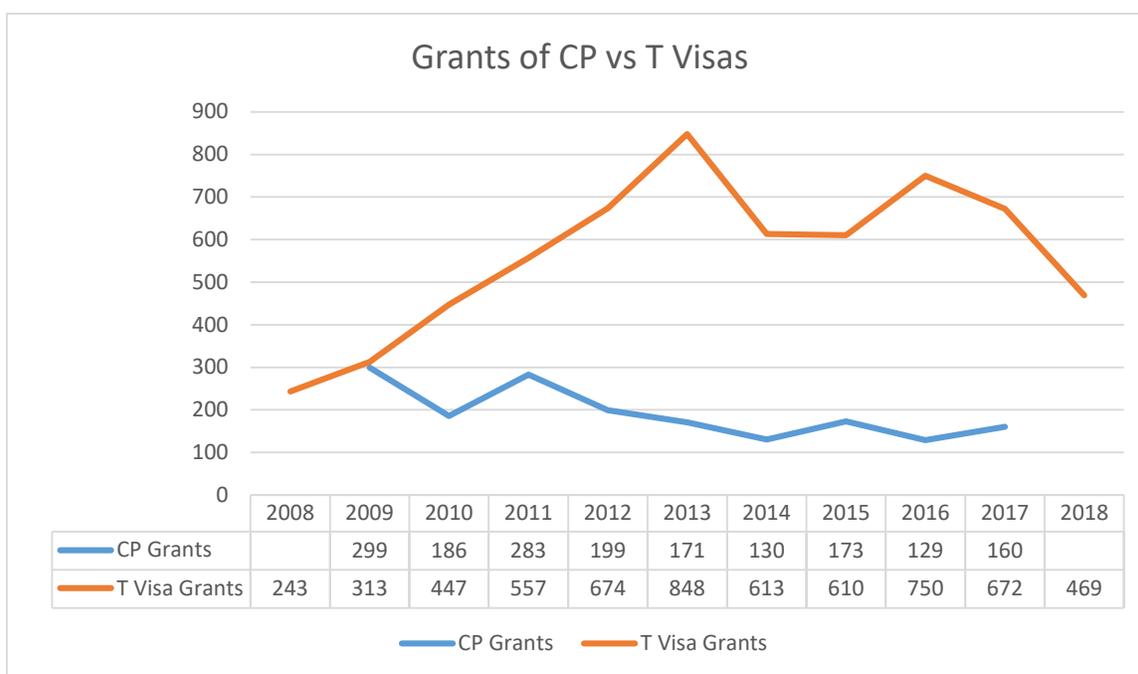
The other common fee-based form for survivors is the I-290B for Motions to Reconsider or Appeals, the fee is \$675. Given the increase in denials, survivors are filing these applications significantly more often. Especially problematic is when fee waivers are denied for motions that were timely filed, but the filing timeline is not tolled for the appeal

of the denial of the fee waiver. An unfair fee waiver denial can then create a ground for denial of the underlying motion.

*Recommendation: Adjudicate fee waiver applications fairly, and ensure that survivors are not burdened by repeated, baseless denials. USCIS should comply fully with the law and regulations to ensure trafficking survivors are protected in compliance with the TVPA.*

## 2. Continued Presence (CP) Application not Submitted by Law Enforcement (LE)

Continued Presence (CP) is an important, temporary, immigration remedy that ensures victims of human trafficking are able to access emergency services and support, as well as legal employment, while working to apply for long-term immigration status.<sup>1</sup> Unfortunately, the number of T Visa grants remains significantly higher than the grants of CP, as reported in the annual TIP Report and USCIS data on T Visas to date<sup>2</sup>:



The data indicates that less than 50% of identified trafficking victims who have reported their victimization to law enforcement are receiving the immediate protection they need. This limits the survivors' access to health and mental health care, education, employment, and housing; resulting in victims who are less likely to participate in the investigation and prosecution of the traffickers.

The astounding lack of CP applications is a problem that predates this Administration, however there still has been no improvement. There are various reasons given by law enforcement for their refusal to apply for CP.

<sup>1</sup> Authorized at 22 USC 7105(c)(3)

<sup>2</sup> <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-914-application-t-nonimmigrant-status>, including T Visa data for FY18 through Q3

*Recommendation: FNUSA has routinely recommended that DHS conduct a comparison of CP applications to T Visa applications, by ICE Field Office. Intensive training and support should be provided to Field Offices with the largest gap. FNUSA also recommends that DHS encourage Federal Victim-Witness Coordinators, not just prosecutors and investigators, file CP applications for survivors.*

### **3. CP is processed slowly**

When law enforcement does apply for CP, the processing times for the CP applications have increased from an average of 6-8 weeks to a minimum of 3 months. One advocate reports that CP was not issued until after the T Visa was fully adjudicated.

*Recommendation: DHS should establish a processing time of no more than 30 days for CP. USCIS should comply fully with the law and regulations to ensure trafficking survivors are protected in compliance with the TVPA.*

### **4. CP lapsing prior to granting T Visa causing exposure to removal**

CP is now issued for 2 years, but generally not renewed if the investigation or prosecution has ended. However, T Visa processing times are now over 2 years, and longer if an RFE has been issued (and they are issued in almost every case). Therefore, the few trafficking survivors who have been issued work authorization through CP now lose their work authorization after 2 years until their T Visa is adjudicated. Advocates report that survivors have lost employment due to this gap. Other survivors have lost access to supportive programs while they were working, but then lose employment authorization and are left without support, and vulnerable to re-exploitation.

*Recommendation: USCIS should reduce T Visa processing times to 6-9 months (the historical average), and extend work authorization for survivors with pending T Visas through Deferred Action or extending CP. USCIS should comply fully with the law and regulations to ensure trafficking survivors are protected in compliance with the TVPA.*

### **5. T Visa Requests for Evidence (RFEs) and Denials Inconsistent with Regulations**

Advocates report a troubling pattern of RFEs and denials that are inconsistent with prior interpretations of the law and regulations. There are several common issues that indicate changes in USCIS standards or training of adjudicators. An excellent analysis of Administrative Appeals Office (AAO) decisions reflecting these changes was published by Refugees International, "Abused, Blamed, and Refused: Protection Denied to Women and Children Trafficked Over the U.S. Southern Border," available at <https://www.refugeesinternational.org/reports/2019/5/21/abused-blamed-and-refused-protection-denied-to-women-and-children-trafficked-over-the-us-southern-border>.

- a. Applying the ‘opportunity to depart’ requirement that was removed from the regulations and was never based in the law.** The TVPA does not limit the timeline for applications. Trafficking survivors are eligible for T Visas regardless of how long ago the trafficking occurred. However, the original regulations included an erroneous requirement limiting eligibility to those who had no opportunity to depart the US after the trafficking. This was remedied in the 2016 Interim Rule, “Removes the current regulatory “opportunity to depart” requirement for those who escaped traffickers before law enforcement became involved.” (<https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29900.pdf#page=1>). USCIS seems to be applying this standard again, as advocates report that RFEs are common if the trafficking occurred many years ago, questioning whether the applicant is present in the US on account of the trafficking.
- b. Refusing to recognize trafficking by intimate partners as human trafficking, suggesting it is ‘merely’ domestic violence.** The intersection of domestic violence and human trafficking has been acknowledged, studied, and addressed for many years. The TVPA does not require or exclude any specific relationship between a trafficker and their victim. Traffickers often use marriage as one form of entrapping victims. However, advocates report a high rate of RFEs and denials for cases of human trafficking committed by intimate partners and spouses. The TVPA is very clear that the elements of trafficking are the key factors, regardless of the prior or current relationship between the trafficker and the victim.
- c. Refusing to acknowledge trafficking by smugglers and their associates.** While there is a distinction between smuggling and human trafficking, the distinction should be used to clearly identify when smuggling turns into trafficking. Smuggling does not include forced labor, in fact it is quite the opposite. Smugglers do the work of transporting the immigrant. Advocates report, however, that RFEs and denials are common where the victim paid a smuggler, and USCIS is claiming that the forced labor or commercial sex was a part of the smuggling endeavor. The TVPA is very clear that the elements of trafficking are the key factors, regardless of the prior or current relationship between the trafficker and the victim.
- d. Refusing to recognize forced criminality.** Trafficking survivors are often forced to commit crimes by their traffickers. Sex trafficking cases almost always include exclusively forced criminality, and labor trafficking often also includes forced criminality. Survivors commonly have criminal records as a direct result of their trafficking experience. And yet, advocates report that USCIS is denying inadmissibility waivers for crimes related to the trafficking, or is requesting extensive police records of the arrests. These requests are both a violation of the any credible evidence standard that applies to these cases, and are requesting documents that are not relevant to the issue- as arrest records are one-sided

records that have not been proven true. Court records related to dispositions are the appropriate documents to request.

*Recommendation: USCIS should engage with advocates to more quickly identify and address patterns of concern. USCIS should also provide clear updates to the field regarding any changes in policy or practice, in compliance with the Administrative Procedure Act. Finally, USCIS should comply fully with the law and regulations to ensure trafficking survivors are protected in compliance with the TVPA.*

## 6. Slow T Visa Processing (2+ years vs. 6-9 months)

The USCIS website currently projects a processing time of 18-22.5 months for T Visa applications (I-914). <https://egov.uscis.gov/processing-times/> USCIS further discloses historical case processing times ranging from 6.4-9 months from FY15-FY17, jumping to 11.4 months in FY18. <https://egov.uscis.gov/processing-times/historic-pt> This extraordinary delay is a significant hardship for all survivors. For some survivors, this delay is life-threatening.

Most have no access to legal employment during this period. As noted above, CP (which provides work authorization) is rarely granted and, even when it is granted, expires while the T Visa is still pending. T Visa approvals

### **T Visa Statistics**

<b>Fiscal Year</b>	<b>T-1 Visa Applications Received</b>	<b>T-1 Visa Approvals</b>	<b>T-1 Visa Denials</b>	<b>T-1 Visas Pending</b>	<b>Processing Time</b>
2009	461	290	63	307	
2010	541	446	102	305	
2011	882	556	145	502	
2012	790	667	81	565	
2013	804	851	97	421	
2014	908	619	135	590	
2015	1,040	611	239	809	6.4 months
2016	955	748	175	869	7.9 months
2017	1,177	669	213	1,180	9 months
2018	1,613	576	300	1,916	11.4 months
2019	954 (Q1-Q3)	324	231	2,282	15.6 months

[https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t\\_visastatistics\\_fy2019\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2019_qtr3.pdf)

USCIS should be issuing Bona Fide Determinations (BFD) for T Visa applicants to ensure access to federally funded public benefits while the T Visa is pending, but USCIS refuses to routinely issue such determinations. “Once an alien submits an application for T-1 nonimmigrant status, USCIS will conduct an initial review to determine if the application is a bona fide application.” 8 CFR 214.11(d)(7). The BFD makes a trafficking survivor eligible for Certification by the Department of Health and Human Services, demonstrating eligibility for federally-funded public benefits. See 22 USC 7105(b)(1)(E).

Thus, the long processing times plus the failure of law enforcement to apply for Continued Presence, plus the failure of USCIS to issue Bona Fide Determinations leaves trafficking survivors without access to legal employment, identification documents, and access to life-saving benefits for several years after presenting themselves to the US government.

*Recommendation: USCIS should issue Bona Fide Determinations for all T Visa applications within 3 months of filing, and provide a copy of the approval notice to the applicant and their attorney of record. USCIS should reduce T Visa processing times to 6-9 months (the historical average), and extend work authorization for survivors with pending T Visas through Deferred Action or extending CP. Finally, USCIS should comply fully with the law and regulations to ensure trafficking survivors are protected in compliance with the TVPA.*

## **7. Detained Survivors Threatened With Removal While T Visa Pending**

Increasingly, survivors are held in detention during the pendency of their case processing due to increased enforcement activities and increased mandatory detention of undocumented immigrants (from which trafficking survivors are not exempt). As with all legal representation, preparing and filing a T Visa application for a detained immigrant is more complex and time consuming than for an immigrant who is not detained. Adding this complexity to long case processing times can leave a survivor in detention for years while working toward a T Visa. Even more concerning, advocates report that some DHS ICE Enforcement and Removal Operations Offices refuse to routinely stay removals for survivors, even if a T Visa application is pending. Thus, survivors are at constant risk of removal while their T Visas are pending. Survivors who are removed will lose their eligibility for a T Visa, becoming highly vulnerable to re-exploitation. Survivors who are not removed, but remain in detention are subjected to immeasurable added stress and trauma, creating new barriers to recovery and independence upon their release.

USCIS should be issuing Bona Fide Determinations for T Visa applicants to ensure their removal cases are stayed while the T Visa is pending, but USCIS refuses to routinely issue such determinations.

Once an alien submits an application for T-1 nonimmigrant status, USCIS will conduct an initial review to determine if the application is a bona fide application. 8 CFR 214.11(d)(7)

If USCIS determines that an application is bona fide it automatically stays the execution of any final order of removal, deportation, or exclusion. 8 CFR 214.11(e)(3)

Advocates report that USCIS Office of Chief Counsel can request that USCIS issue a Bona Fide Determination for cases in proceedings, but that USCIS does not forward the decision to the attorney of record. Therefore, the survivor is unaware of the status of their T Visa case and their removal case. One advocate was able to obtain a

copy of the BFD only through filing a habeas petition, a waste of court and attorney resources.

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## **8. NTA Policy**

USCIS announced on November 8, 2018<sup>3</sup> that they would begin to apply the June 2018 Notice to Appear (NTA) Policy<sup>4</sup> to humanitarian cases (including T and U Visas and VAWA Self-Petitions) beginning on November 19, 2018. USCIS had promised in a Stakeholder call on September 27 that the policy would not be applied to humanitarian cases at this time.<sup>5</sup> Only one month later, USCIS has announced that the policy will be expanded specifically and only to humanitarian cases.

This policy puts immigrants at risk of deportation whenever they seek immigration protection, in stark contradiction of Congressional intent. Congress created these humanitarian visas to encourage reporting of crimes, to protect immigrant victims when they report the crimes committed against them, and to assist survivors in seeking services and assistance. This threat is now deterring victims from reporting the crimes committed against them, once again assuring traffickers that they can operate with impunity when they target immigrants. Advocates have reported multiple instances of survivors remaining in a trafficking situation, returning to a trafficker, and refusing to report the trafficking to law enforcement or to file a T Visa due to the NTA memo.

*Recommendation: USCIS should immediately amend this policy to exempt humanitarian cases, including T and U Visas, VAWA self-petitions, and SIJS petitions.*

## **9. Decreasing Stakeholder Engagement with USCIS**

USCIS routinely presented a workshop on T Visa adjudications, giving updates on any changes in policy or procedure, and general filing tips to advocates at the annual Freedom Network USA conference. Additionally, USCIS policy and Vermont Service Center personnel used to communicate through scheduled listening sessions and community outreach events. Since 2017, this engagement has basically ended. No USCIS representatives attended either the 2018 or 2019 FNUSA conference. Advocates report difficulty in

<sup>3</sup> <https://www.uscis.gov/news/alerts/uscis-continue-implementing-new-policy-memorandum-notices-appear>

<sup>4</sup> <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>

<sup>5</sup> [https://www.uscis.gov/sites/default/files/files/nativedocuments/USCIS\\_Updated\\_Policy\\_Guidance\\_on\\_Notice\\_to\\_Appear\\_NTA.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf)

understanding changes, and determining if there are changes in policy or if there are errors.

*Recommendation: USCIS should re-engage with stakeholders to better explain any changes, hear about concerns in the field, and work collaboratively to protect survivors. Finally, USCIS should comply fully with the law and regulations to ensure trafficking survivors are protected in compliance with the TVPA.*