



# Freedom Network USA

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U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue, NW  
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Via E-mail: [USCISFRComment@uscis.dhs.gov](mailto:USCISFRComment@uscis.dhs.gov)

**RE: DHS DOCKET No. USCIS-2011-0010, Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status**

Dear Ms. Deshommes:

I am writing to submit Freedom Network USA’s comments to DHS DOCKET No. USCIS-2011-0010, Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status.

Freedom Network USA (FNUSA) is a national alliance of experienced advocates advancing a human rights-based approach to human trafficking in the United States. Our members believe that empowering survivors with choices and support leads to transformative, meaningful change. Together, we influence federal and state policy through action and advocacy. We prioritize the self-determination and empowerment of survivors in the development of policies, procedures and programs. Our members work directly with survivors whose insights and strengths inform our work. And through our national effort, we increase awareness of human trafficking and provide decision makers, legislators, and other stakeholders with the expertise and tools to make a positive and permanent impact in the lives of all survivors.

First, we would like to commend DHS for issuing detailed regulations on this topic. However, it is important to note that the previous regulations were issued as an Interim Rule on January 31, 2002 and were never finalized. The Trafficking Victims Protection Act of 2000 has been reauthorized four times since those regulations were published (in 2003, 2005, 2008, and 2013). Each reauthorization amended significant requirements related to the T nonimmigrant status (T Visa). Significant confusion has been created by the outdated and inaccurate regulations. It is unknown how many applications were incorrectly filed or how many trafficking survivors have been wrongfully advised that

they do not qualify for relief. We urge DHS to update these regulations in a timely way to reflect any changes in the law.

Additionally, FNUSA would like to whole-heartily commend DHS for making the following clarifications and guidance:

- Expanding the definition of Law Enforcement Agency (LEA) to include State and local agencies, as well as those that detect and investigate (but do not prosecute) human trafficking;
- Removing the filing deadline for applicants whose trafficking occurred prior to October 28, 2000, acknowledging the that there was no statutory requirement for the deadline;
- Clarifying that if a T Visa holder is unable to file within the 4-year filing deadline for adjustment of status, there are exceptional circumstances that may allow them to adjust later;
- Eliminating the three passport-photographs requirements for T Visa applications for both principal and derivative applicants, which saves victims and organizations time and money;
- Discontinuing the practice of weighing evidence as primary and secondary in favor of the “any credible evidence” standard;
- Providing additional guidance on how victims of attempted trafficking are eligible to apply for a T Visa even when they have not performed labor, services, or sex acts; and
- Referencing the confidentiality provisions that specifically apply to human trafficking survivors under 8 U.S.C. § 1367(a)(2) and (b).

Finally, FNUSA has specific feedback and recommendations on 20 sections of the Interim Rule. These comments are presented in the same order as they were presented in the Interim Rule.

## 1. Definition of Involuntary Servitude

**Current Language:** 8 CFR 214.11(a) Involuntary Servitude. Involuntary servitude means 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 condition, that person or another person would suffer serious harm or physical restraint; or a condition of servitude induced by the abuse or threatened abuse of legal process. Involuntary servitude includes a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint.

**Recommended Language:** [include two additional definitions under “Involuntary Servitude”]

*Serious harm* means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

*Abuse or threatened abuse of the legal process* means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

**Comments:** We applaud DHS for providing clarification on the definition of involuntary servitude to encompass the broader understanding of the definition of “severe form of trafficking in persons.” We believe that while the removal of the *Kozminski* citation will help to clarify the inclusion of psychological coercion, we believe it is best to mirror the current definitions of “forced labor” in 18 U.S. Code §1589 and “sex trafficking” in 18 U.S. Code §1591. Both definitions were amended by TVPRA of 2008 to include definitions of “serious harm” and “abuse or threatened abuse of the legal process.”

Including the legal definitions of both of these terms under 8 CFR 214.11(a) will help to clarify the definition of involuntary servitude and avoid misinterpretations due to different understandings of “serious harm” and “abuse or threatened abuse of the legal process”.

Based on our experience, not all attorneys, law enforcement, and advocates understand that serious harm is not based on subjective severity, but instead a broad definition that encompasses all surrounding circumstances and could include financial and reputational harm.

Similarly, practitioners often do not realize that “abuse or threatened abuse of legal process” includes administrative and civil processes.

## **2. Performing labor, services, or commercial sex is not necessary**

**Current Language:** 8 CFR 214.11(f)(1) ...If a victim has not performed labor or services, or a commercial sex act, the victim must establish that he or she was recruited, transported, harbored, provided, or obtained for the purposes of subjection to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, or patronized or solicited for the purposes of subjection to sex trafficking. The applicant may satisfy this requirement by submitting: (i) An LEA endorsement as described in paragraph (d)(3) of this section; (ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35; or (iii) Any other evidence, including but not limited to, trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and/or affidavits. In the victim’s statement prescribed by paragraph (d)(2) of this section, the applicant should describe what the alien has done to report the

crime to an LEA and indicate whether criminal records relating to the trafficking crime are available.

**Recommended language:** ...If a victim has not performed labor or services, or a commercial sex act, the victim must establish that he or she was recruited, transported, harbored, provided, or obtained for the purposes of subjection to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, or patronized or solicited for the purposes of subjection to sex trafficking. The applicant may satisfy this requirement **with sufficient information and detail in the victim's statement (prescribed by paragraph (d)(2) of this section), which may also be corroborated** by submitting:

- (i) An LEA endorsement as described in paragraph (d)(3) of this section;
- (ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35; or
- (iii) Any other evidence, including but not limited to:
  - (A) trial transcripts;
  - (B) court documents;
  - (C) police reports;
  - (D) news articles;
  - (E) copies of reimbursement forms for travel to and from court;
  - (F) affidavits from case managers, therapists, medical professionals, witnesses, or other victims of the same trafficking scheme;
  - (G) correspondence or other documents from the trafficker, including letters, photos, emails, or text messages; or
  - (H) documents used in furtherance of the trafficking scheme such as recruitment materials, advertisements, pay stubs, log books, or contracts.
- (iv) In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should describe what the alien has done to report the crime to an LEA and indicate whether criminal records relating to the trafficking crime are available.

**Comments:** FNUSA applauds DHS for clarifying that performing labor, services, or commercial sex is not required to be a victim of a severe form of trafficking in persons. Specifically, we are pleased to see that DHS has acknowledged that there may be scenarios where a victim may be removed from the trafficking situation by LEA without completion of the criminal act or a victim who may escape on their own. FNUSA believes this clarification is consistent with the legislative intent and statutory language of the TVPA.

Additionally, FNUSA appreciates that at new 8 CFR 214.11(f)(1), USCIS has chosen to provide examples of evidence that may be submitted to demonstrate the trafficker's purpose even if no commercial sex or forced labor actually occurred. FNUSA appreciates that USCIS indicates that this list is not limited, however, we recommend adding the noted examples. In FNUSA's experience, most trafficking cases are not prosecuted, do not have law enforcement or other court documents as support, have no media articles, have no witnesses, and have no written proof from their traffickers. Given this reality, the regulations should emphasize the many types of evidence that victims can submit. FNUSA also believes, based on its experience with the evidence

often available to victims, that the regulations clearly articulate that a statement from the victim may be sufficient under the 'any credible evidence' standard.

### 3. Evidence of victimization

**Comments:** FNUSA applauds DHS for eliminating the distinction between primary and secondary evidence and the use of the 'any credible evidence' standard. FNUSA commends DHS for its consistent initiative to invite public comment and provide thoughtful consideration of all previously submitted comments. FNUSA agrees that the clarifying language eliminates the misconception that the I-914 Supplement B is required or carries more evidentiary weight than other forms of evidence. Based on our experience as national technical assistance providers, attorneys routinely postpone filing T Visa applications without the I-914 Supplement B. We believe that this clarifying language will encourage applicants and attorneys to appropriately file T Visa applications. Further, we believe that eliminating this distinction will alleviate any misconceptions that law enforcement officers might have regarding responsibilities created by completing a Form I-914 Supplement B. We hope that this will encourage more law enforcement officers to certify.

### 4. Definition of Law Enforcement Agency

**Current Language:** 8 CFR 214.11(a) *Law Enforcement Agency (LEA)* means a Federal, State, or local law enforcement agency, prosecutor, judge, labor agency, children's protective services agency, or other authority that has the responsibility and authority for the detection, investigation, and/or prosecution of severe forms of trafficking in persons. Federal LEAs include but are not limited to the following: U.S. Attorneys' Offices, Civil Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Diplomatic Security Service (Department of State); and Department of Labor.

**Recommended Language:** 8 CFR 214.11(a) *Law Enforcement Agency (LEA)* means a Federal, State, or local law enforcement agency, prosecutor, judge, labor agency, children's protective services agency, or other authority that has the responsibility and authority for the detection, investigation, and/or prosecution of severe forms of trafficking in persons. Federal LEAs include but are not limited to the following: U.S. Attorneys' Offices, Civil Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Diplomatic Security Service (Department of State); ~~and Department of Labor;~~ **Equal Employment Opportunity Commission (EEOC); and National Labor Relations Board (NLRB).**

**Comments:** FNUSA believes that the list of Federal LEAs should be expanded to explicitly include agencies who are likely to identify trafficking including the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). While FNUSA acknowledges that the list provided in the regulations is not

exhaustive, explicitly including the EEOC and NLRB informs victims and victim-advocates of these agencies that have taken seminal roles in investigating and pursuing remedies for trafficking victims and have already been endorsing LEA certification for T Visas.

The EEOC has also made notable efforts in pursuing cases involving trafficked workers including cases against Signal International, LLC, Henry's Turkey Services, Global Horizons, Marine Services Company, and Del Monte Fresh Produce. The EEOC has aggressively pursued human trafficking cases under anti-discrimination laws, particularly cases discriminating on the basis of race, national origin, and sex, including sexual harassment. Similarly, the NLRB has already taken steps to begin providing LEA T Visa certifications.

By expanding the explicit list of Federal agencies, victims will be better informed of where they can report their victimization. Additionally, the more expansive list will reduce confusion as to which LEA agencies can provide T Visa certifications. In FNUSA's experience, employees of EEOC and NLRB have expressed confusion as to whether they have the authority to provide T Visa certifications because their organization is not explicitly listed in the regulations, but are explicitly listed in the U Visa regulations.

## 5. Physical presence on account of trafficking in persons

**Current Language:** 8 CFR 214.11(g) Physical Presence. To be eligible for T-1 nonimmigrant status an applicant must be physically present in the United States, American Samoa, or at a port-of-entry thereto on account of such trafficking.

(1) *Applicability*. The physical presence requirement requires USCIS to consider the alien's presence in the United States at the time of application. The requirement reaches an alien who:

- (i) Is present because he or she is currently being subjected to a severe form of trafficking in persons;
- (ii) Was liberated from a severe form of trafficking in persons by an LEA;
- (iii) Escaped a severe form of trafficking in persons before an LEA was involved, subject to paragraph (g)(2) of this section;
- (iv) 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
- (v) 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.

(2) *Departure from the United States*. An alien who has voluntarily departed from (or has been removed from) the United States at any time after the act of a severe form of trafficking in persons is deemed not to be present in the United States as a result of such trafficking in persons unless:

- (i) The alien's reentry into the United States was the result of the continued victimization of the alien;
- (ii) The alien is a victim of a new incident of a severe form of trafficking in persons; or
- (iii) The alien has been allowed reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking, described in paragraph (g)(4) of this section.

**Recommended language:**

To be eligible for T-1 nonimmigrant status an applicant must be physically present in the United States, American Samoa, or at a port-of-entry thereto on account of such trafficking.

(1) *Applicability.* The physical presence requirement requires USCIS to consider the alien's presence in the United States at the time of application. The requirement reaches an alien who:

- (i) Is present because he or she is currently being subjected to a severe form of trafficking in persons;

- ~~(ii) Was liberated from a severe form of trafficking in persons by an LEA;~~

- ~~—(iii) Escaped a severe form of trafficking in persons before an LEA was involved, subject to paragraph (g)(2) of this section;~~

- ~~(iv) Was subject to a severe form of trafficking in persons at some point in the past and whose continuing current presence in the United States is directly related to the original trafficking in persons; or~~

- ~~(viii) Is present on account of the alien having been allowed entry into entered the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.~~

~~(2) *Departure from the United States.* An alien who has voluntarily departed from (or has been removed from) the United States at any time after the act of a severe form of trafficking in persons is deemed not to be present in the United States as a result of such trafficking in persons unless:~~

- ~~(i) The alien's reentry into the United States was the result of the continued victimization of the alien;~~

- ~~(ii) The alien is a victim of a new incident of a severe form of trafficking in persons; or~~

- ~~(iii) The alien has been allowed reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking, described in paragraph (g)(4) of this section.~~

**Comments:** FNUSA appreciates that at 8 CFR 214.11(g), DHS has clarified the circumstances in which an applicant who has departed the US after trafficking or whose victimization occurred outside of the US is still eligible for a T visa and may still meet the physical presence requirement. FNUSA is appreciates that DHS has removed the requirement that a survivor show they had no 'opportunity to depart.' However, FNUSA believes that DHS has interpreted 'physical presence on account of trafficking' too narrowly. At 8 CFR 214.11(g)(1) & (2), DHS creates a presumption that those individuals whose trafficking occurred outside of the US or who traveled outside of the

US after their trafficking situation and subsequently returned, are not physically present in the US on account of trafficking in persons. This presumption has no statutory basis, see 8 US Code §1101(a)(15)(T)(i)(II).

The statute requires only that the applicant be in the US, and that their presence in the US is 'on account of' their victimization. Although the statute gives one specific example (allowed entry for participation in investigative or judicial processes), the statute does not suggest that this example is meant to limit physical presence in the way described by DHS.

Trafficking victims may be physically present in the US on account of their trafficking victimization in many situations. They may have been trafficked to a neighboring country which failed to protect them, and then fled to the US for protection. They may have been trafficked to the border of the US and then abandoned or escaped, arriving at a US port of entry immediately upon fleeing the trafficker. They may have been trafficked within the US, but forced to leave the US by the trafficker, and have returned to the US for protection. They may have been trafficked from the US to another country, and then returned to the US for protection. They may have traveled outside of the US, been trafficked, and then returned to the US for protection. They may have entered the US through any means necessary to ensure their safety, only able to report to US law enforcement or file a civil suit after arriving in the US. Surely these examples raise possible claims for physical presence in the US on account of trafficking. Surely Congress did not intend to ignore victims of US traffickers who were trafficked out of the US or removed from the US as punishment.

Congress chose specifically to require that applicants be present in the US or at a port of entry on account of trafficking, but did not specify that the trafficking must have occurred in the US or have violated US law. This is clearly distinguished from the U Visa, created in the same legislation, that allows for victims to apply from outside of the US only if the criminal activity "violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States." 8 USC 1101(a)(15)(U)(i)(IV). Congress could have similarly limited eligibility for the T Visa to those who were victims of a crime of trafficking that occurred in the US when passing the TVPA or any of the 4 reauthorizations, but has not done so. It is inappropriate to limit the availability of this protection that Congress designed to ameliorate the scourge of human trafficking. This broader reading of the statute is the appropriate statutory interpretation given the legislative intent in protecting vulnerable victims and encouraging more victims to report crimes of trafficking.

At minimum FNUSA requests that DHS clarify that re-entry into the United States is presumed to be a result of "continued victimization" required by 214.11(g)(2)(i) when the victim returns to the US: (1) because of current fear of their traffickers in their country or last place of residence; (2) to seek treatment for victimization from trafficking which cannot be provided in their home country or last place of residence; or (3) to pursue civil



and criminal remedies against their trafficker which cannot be provided in their home country or last place of residence.

## 6. Reasonable request for assistance

**Current Language:** 8 CFR 214.11(a) *Reasonable request for assistance* means a request made by an LEA to a victim to assist in the investigation or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime. The “reasonableness” of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to: general law enforcement and prosecutorial practices; the nature of the victimization; the specific circumstances of the victim; severe trauma (both mental and physical); access to support services; whether the request would cause further trauma: The safety of the victim or the victim's family; compliance with other requests and the extent of such compliance; whether the request would yield essential information; whether the information could be obtained without the victim's compliance; whether an interpreter or attorney was present to help the victim understand the request; cultural, religious, or moral objections to the request; the time the victim had to comply with the request; and the age and maturity of the victim.

8 CFR 214.11(h)(2) *Unreasonable requests*. An applicant need only show compliance with reasonable requests made by an LEA for assistance in the investigation or prosecution of the acts of trafficking in persons. The reasonableness of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to:

- (i) General law enforcement and prosecutorial practices;
- (ii) The nature of the victimization;
- (iii) The specific circumstances of the victim;
- (iv) Severity of trauma suffered (both mental and physical) or whether the request would cause further trauma;
- (v) Access to support services;
- (vi) The safety of the victim or the victim's family;
- (vii) Compliance with previous requests and the extent of such compliance;
- (viii) Whether the request would yield essential information;
- (ix) Whether the information could be obtained without the victim's compliance;
- (x) Whether an interpreter or attorney was present to help the victim understand the request;
- (xi) Cultural, religious, or moral objections to the request;
- (xii) The time the victim had to comply with the request; and
- (xiii) The age and maturity of the victim.

**Recommended Language:** 8 CFR 214.11(a) *Reasonable request for assistance* means a request made by an LEA to a victim to assist in the investigation or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime. The “reasonableness” of the request depends on the totality of the circumstances. Factors to

consider include, but are not limited to: General law enforcement and prosecutorial practices; the nature of the victimization; the specific circumstances of the victim; severe trauma (both mental and physical); access to support services; whether the request would cause further trauma; ~~the~~ the safety of the victim or the victim's family; compliance with other requests and the extent of such compliance; whether the request would yield essential information; whether the information could be obtained without the victim's compliance; whether an interpreter ~~or attorney~~ was present to help the victim understand the request; cultural, religious, or moral objections to the request; the time the victim had to comply with the request; ~~and~~ the age and maturity of the victim; ~~and~~ the circumstances in which the request was made.

8 CFR 214.11(h)(2) *Unreasonable requests*. An applicant need only show compliance with reasonable requests made by an LEA for assistance in the investigation or prosecution of the acts of trafficking in persons. The reasonableness of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to:

- (i) General law enforcement and prosecutorial practices;
- (ii) The nature of the victimization;
- (iii) The specific circumstances of the victim;
- (iv) Severity of trauma suffered (both mental and physical) or whether the request would cause further trauma;
- (v) Access to support services;
- (vi) The safety of the victim or the victim's family;
- (vii) Compliance with previous requests and the extent of such compliance;
- (viii) Whether the request would yield essential information;
- (ix) Whether the information could be obtained without the victim's compliance;
- (x) Whether an interpreter ~~or attorney~~ was present to help the victim understand the request;
- (xi) Cultural, religious, or moral objections to the request;
- (xii) The time the victim had to comply with the request; ~~and~~
- (xiii) The age and maturity of the victim; ~~and~~
- (xiv) The circumstances in which the request was made.

**Comments:** The first edit in 8 CFR 214.11(a) is for grammatical accuracy.

Second, FNUSA does not believe that the presence of an attorney makes the law enforcement request more or less reasonable. Applying this standard would mean that victims with attorneys might be held to higher standards in compliance with LEA requests than those without. This language is similarly mirrored in 8 CFR 214.11(h)(2)(x). FNUSA recommends the words “or attorney” be stricken from this section as it recommends here in this definition.

Finally, it is critical to understand if the request was made in circumstances that were victim-centered and supportive, or intimidating and frightening. For example, requests made while the victim was being physically detained by LEA or at the trafficking location are less reasonable than those made to a victim who has been invited to meet with an

LEA at a neutral location. Similarly, FNUSA recommends that a new section be added at 8 CFR 214.11(h)(2)(xiv)

## 7. Compliance with law enforcement

**Current Language:** 8 CFR 214.11 (h)(1) *Applicability*. An applicant must have had, at a minimum, contact with an LEA regarding the acts of a severe form of trafficking in persons. An applicant who has never had contact with an LEA regarding the acts of a severe form of trafficking in persons will not be eligible for T-1 nonimmigrant status, unless he or she meets an exemption described in paragraph (h)(4) of this section.

**Recommended Language:** 8 CFR 214.11 (h)(1) *Applicability*. An applicant must have had, at a minimum, contact with an LEA regarding the acts of a severe form of trafficking in persons. **Contact can be documented by the applicant and may include a single contact with LEA by telephonic or electronic means to any federal, state, or legal law enforcement agency who has the authority to detect, investigate, and/or prosecute severe forms of trafficking in persons.** An applicant who has never had contact with an LEA regarding the acts of a severe form of trafficking in persons will not be eligible for T-1 nonimmigrant status, unless he or she meets an exemption described in paragraph (h)(4) of this section.

**Comments:** FNUSA commends DHS' removal of language that described how to obtain an LEA endorsement if the victim has not had contact with LEA and DHS' acknowledgment that formal investigation or prosecution is not required for LEA to issue an endorsement. Nonetheless, in FNUSA's experience, applicants and USCIS adjudicators have differing standards on what type of contact with law enforcement is sufficient to meet this requirement. FNUSA is aware of many cases of T Visa applications filed on behalf of victims who have documented that they reported to law enforcement, but received no LEA response, receive requests for additional evidence of law enforcement contact from VSC.

The recommended language clarifies that: (1) a single contact with law enforcement documented by the applicant is sufficient to meet the compliance eligibility requirement; and (2) that this contact can be with any law enforcement office that has the authority to detect, investigate, or prosecute severe form of trafficking in persons. Moreover, with the removal of the language that directed applicants to the DOJ hotline, the recommended language would provide further guidance to applicants on how they can meet this eligibility requirement.

This clarification will ensure that applications are not delayed by unnecessary requests for additional information about their cooperation with law enforcement by providing clear guidance on the minimum amount of contact with law enforcement that is required to meet this eligibility requirement and signals to applicants, as well as USCIS, that compliance with law enforcement is not contingent on law enforcement responding back to the victim after their initial report.

## 8. Minors exempt from compliance with any reasonable request

**Current Language:** 8 CFR 214.11(h)(4)(ii) *Age*. The applicant is under 18 years of age. An applicant under 18 years of age is exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution, but he or she must submit evidence of age. Applicants should include, where available, an official copy of the alien's birth certificate, a passport, or a certified medical opinion. Other evidence regarding the age of the applicant may be submitted in accordance with 8 CFR 103.2(b)(2)(i).

**Recommended Language:** 8 CFR 214.11(h)(4)(ii) *Age*. The applicant **was** under 18 years of age **at the time of victimization**. An applicant under 18 years of age **at the time of victimization** is exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution, but he or she must submit evidence of **the** applicant's age **at the time of victimization**. Applicants should include, where available, an official copy of the alien's birth certificate, a passport, or a certified medical opinion. Other evidence regarding the age of the applicant may be submitted in accordance with 8 CFR 103.2(b)(2)(i).

**Comments:** Trafficking victims, especially child victims of trafficking, suffer long-term trauma as a result of their trafficking experience which may inhibit their ability to cooperate with law enforcement at any period. 8 US Code §1101(a)(15)(T)(i)(III) clearly outlines the standard for cooperating with law enforcement and includes a clear exception that a victim of trafficking who has not attained 18 years is not required to cooperate with LEA. See 8 US Code §1101(a)(15)(T)(i)(III)(aa-cc). It is important to note that minors experience psychological traumatization at a deeper level and therefore may find it even harder than adults to confide in individuals regarding painful and intimate events.<sup>1</sup> In comparing refugee children to child trafficking victims in the URM program, a report indicates that trafficked children “are more difficult to engage than the average refugee child...and trafficked children can often take up to a year or more to ‘settle in’ and trust the program.”<sup>2</sup>

By requiring the applicant to be under 18 years of age at the time of filing rather than the time of victimization, DHS is narrowing the interpretation of this eligibility requirement beyond the scope of the statute. This interpretation would require a victim who was trafficked for a year beginning at age 16 to report to law enforcement if the T Visa

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<sup>1</sup> Heather Clawson, Nicole Dutch & Megan Cummings, *Law Enforcement Response to Human Trafficking and the Implications for Victims: Current Practices and Lessons Learned*, at 37 (National Institute of Justice No. 216547, 2006).

<sup>2</sup> *Care for Trafficked Children*, United States Conference of Catholic Bishops, April 2006 at 4. Specifically, 22 USC § 7105(b)(1) enables a child from another country who *may have been* subjected to a severe form of trafficking in persons to be eligible for benefits and services in the United States (emphasis added). Section 212(a)(2) of the TVPRA provides for interim assistance for minors who “*may have been* subjected to a severe form of trafficking in persons” (emphasis added).<sup>2</sup> As explained in the TVPRA 2008, the purpose of the statute is to allow “a potential victim” of a severe form of trafficking to request federally funded benefits and services to the same extent as a refugee. This highlights the need for exceptions for minors as they have been trafficked to account for their vulnerabilities.

application was filed after she turned 18, but not if she was quick enough to file before, putting undue pressure on young survivors to relate their trafficking experience to USCIS as quickly as possible regardless of their need for healing.

As further indication that DHS intended to interpret this requirement as the age of victimization, USCIS itself in clarifying the T nonimmigrant visa, writes on its website, “*If under the age of 18 at the time of the victimization, or if you are unable to cooperate with a law enforcement request due to physical or psychological trauma, you may qualify for the T nonimmigrant visa without having to assist in investigation or prosecution*” (emphasis added).<sup>3</sup>

Additionally, Vermont Service Center adjudicators have reiterated at several Freedom Network Conferences over years, most recently in April 2016, that this eligibility requirement is broadly interpreted to apply to applicants who were victimized prior to turning 18 years old, not for victims who are under 18 years of age before filing. This narrower interpretation requiring the victim to be under 18 years of age at the time of filing instead of victimization would be especially devastating to child applicants who are currently in detention facilities and do not have the time or opportunity to report or fully engage with law enforcement but turn 18 years of age before they can file their T visa. Often attorneys are unable to meet with child trafficking victims until they are near 18 years of age or after they have turned 18 years of age; again, this is due to access and because of the special vulnerabilities they face as children. Thus, it is important that the regulation be written clearly to reflect this statutory interpretation and intention.

## 9. Trauma exception

**Current Language:** 8 CFR 214.11(h)(4)(i) *Trauma*. The applicant is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons due to physical or psychological trauma. An applicant must submit evidence of the trauma. An applicant may satisfy this by submitting an affirmative statement describing the trauma and any other credible evidence. “Any other credible evidence” includes, for instance, a signed statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim's mental state, and medical, psychological, or other records which are relevant to the trauma. USCIS reserves the authority and discretion to contact the LEA involved in the case, if appropriate...

**Recommended Language:** 8 CFR 214.11(h)(4)(i) *Trauma*. The applicant is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons due to physical or psychological trauma. An applicant must submit evidence of the trauma. An applicant may satisfy this by submitting an affirmative statement describing the trauma and any other credible evidence. “Any other credible evidence” includes, for instance, a signed

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<sup>3</sup> See USCIS, “Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status.” <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=a53dc7f5ab548210VgnVCM100000082ca60aRCRD&vgnnextchannel=02ed3e4d77d73210VgnVCM100000082ca60aRCRD>.

statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim's mental state **or medical condition;** ~~and~~ **medical;** ~~or~~ **psychological records documenting the trauma or its impact;** ~~or~~ **disability determinations** or other records which are relevant to the trauma. USCIS reserves the authority and discretion to contact the LEA involved in cases **where the applicant has contacted LEA but was unable to comply with reasonable requests due to trauma**, if appropriate.

**Comments:** FNUSA commends DHS on providing clarification on supporting evidence that may be included to evaluate whether an applicant meets the trauma exception to the LEA cooperation requirement. FNUSA agrees that a victim's own statement may be sufficient to establish qualification for the exception. FNUSA recommends a few additional examples of documents that might assist USCIS in making these determinations.

However, FNUSA is concerned that the current language might discourage applicants who fear that USCIS's discretion to contact LEA would jeopardize their or their family's safety. This would undermine the purpose of this exception. The recommended language reflect the language in the preamble and clarifies that USCIS will only reach out to LEA if the victim has had initial contact with law enforcement. The recommended language further clarifies that DHS will not contact a LEA where there is no LEA contact because there will not be a LEA involved with the applicant's case.

The trauma exception was created with the consideration that some applicants who fall under this exception have serious concern for their own safety as well as for their families and that this concern may be psychologically debilitating for a victim to move forward with filing an application. By including this clarifying language, DHS would be encouraging applicants to move forward with filing a T Visa application without fear that USCIS will reach out to LEA and potentially endanger their safety when they meet this exception.

## **10. Referral to law enforcement and Department of Health and Human Services**

**Current Language:** 8 CFR 214.11(d)(1)(iii) *Minor applicants*. When USCIS receives an application from a minor principal alien under the age of 18, USCIS will notify the Department of Health and Human Services to facilitate the provision of interim assistance.

**Recommended Language:** 8 CFR 214.11(d)(1)(iii) *Minor applicants*. When USCIS receives an application from a minor principal alien under the age of 18 **at the time of filing**, USCIS will notify the Department of Health and Human Services to facilitate the provision of interim assistance. **If the applicant does not want this notification to HHS occur, the applicant should notify USCIS of this on their initial application.**

**Comments:** FNUSA appreciates DHS' continuing prioritization of encouraging minor applicants to access federal public benefits. However, in some states, both children and adults are eligible to receive state benefits while the T Visa application is pending. For example, in California, foreign national survivors (adults and children) are entitled to 8 months of state-funded public benefits prior to the T visa approval upon identification as a victim of trafficking. Notifying HHS and obtaining an HHS certification for federal benefits for a minor victim of trafficking while a victim is accessing state-funded benefits could prematurely terminate access to these state-funded benefits and automatically transfer the individual to receiving the federal benefits. In these cases, the victim is not able to receive the full spectrum public benefits (8 months of cash-aid assistance through state-funded benefits + 8 months of federal refugee cash aid assistance) that they are entitled to. Because this precertification benefit is dependent on the individual state, the recommended language would provide notice to applicants that state-funded benefits may exist and place the burden on the applicant to notify USCIS should they not want to immediately access the federal interim assistance.

**Current Language:** 8 CFR 214.11(o) *USCIS employee referral*. Any USCIS employee who, while carrying out his or her official duties, comes into contact with an alien believed to be a victim of a severe form of trafficking in persons and is not already working with an LEA should consult, as necessary, with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence. The ICE office may, in turn, refer the victim to another LEA with responsibility for investigating or prosecuting severe forms of trafficking in persons. If the alien has a credible claim to victimization, USCIS may advise the alien that he or she can submit an application for T nonimmigrant status and seek other benefit or protection for which he or she may be eligible, provided doing so would not compromise the alien's safety.

**Proposed Language:** 8 CFR 214.11(o) *USCIS employee referral*. Any USCIS employee who, while carrying out his or her official duties, comes into contact with an alien believed to be a victim of a severe form of trafficking in persons and is not already working with an LEA should consult, as necessary, with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence. **The USCIS employee should consider whether the potential victim is represented by an attorney or receiving services from a social services agency when determining whether a consultation with ICE officials is appropriate.** The ICE office may, in turn, refer the victim to another LEA with responsibility for investigating or prosecuting severe forms of trafficking in persons. **However, any such referral must comply with the restrictions enumerated in 8 CFR 214.11(p) *Restrictions on use and disclosure of information relating to applicants for T nonimmigrant classification*.** If the alien has a credible claim to victimization, USCIS may advise the alien that he or she can submit an application for T nonimmigrant status and seek other benefit or protection for which he or she may be eligible, provided doing so would not compromise the alien's safety.

**Comments:** USCIS must act carefully in referring potential trafficking victims to LEAs. Trafficking victims may choose to not work with law enforcement for many reasons including their age, trauma or fears of law enforcement. As regulations at 8 CFR

214.11(h) notes, the requirement to report to law enforcement can be waived for T nonimmigrant visa applicants. A report by USCIS to ICE for such an applicant, or potential applicant, would defeat the purpose of the exceptions and may cause further harm to the potential victim. USCIS should be especially cautious of such consultations when the potential victim is represented by an attorney or receiving services from a social services agency, which may indicate that the potential victim is making informed decisions about reporting to law enforcement.

## 11. Evidentiary standards and burden of proof

**Current Language:** 8 CFR 214.11(d)(5) *Evidentiary standards and burden of proof.* The burden is on the applicant to demonstrate eligibility for T–1 nonimmigrant status. The applicant may submit any credible evidence relating to a T nonimmigrant application for consideration by USCIS. USCIS will conduct a de novo review of all evidence and may investigate any aspect of the application. Evidence previously submitted by the applicant for any immigration benefit or relief may be used by USCIS in evaluating the eligibility of an applicant for T–1 nonimmigrant status. USCIS will not be bound by previous factual determinations made in connection with a prior application or petition for any immigration benefit or relief. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence.

**Recommended Language:** 8 CFR 214.11(d)(5) *Evidentiary standards and burden of proof.* The burden is on the applicant to demonstrate eligibility for T–1 nonimmigrant status. The applicant may submit any credible evidence relating to a T nonimmigrant application for consideration by USCIS. USCIS will conduct a de novo review of all evidence **in the administrative record** and may investigate any aspect of the application. Evidence previously submitted by the applicant for any immigration benefit or relief may be used by USCIS in evaluating the eligibility of an applicant for T–1 nonimmigrant status. USCIS will not be bound by previous factual determinations made in connection with a prior application or petition for any immigration benefit or relief. USCIS will determine, in its sole discretion, the evidentiary value of ~~previously or concurrently submitted~~ **submitted evidence in the administrative record. If investigation of the administrative record results in unfavorable evidence, the applicant must be given a copy of the evidence to allow the applicant to adequately respond.**

**Comments:** FNUSA has witnessed an increase in the issuances of Request for Additional Evidence (RFE) asking applicants to explain inconsistencies that adjudicators have found in the applicant’s administrative record that the applicant is not privy to. These inconsistent statements often arise from agencies who do not provide full records through Freedom of Information Act (FOIA) requests. As a result, many survivors of trafficking have been placed in a situation which requires them to blindly defend themselves from alleged inconsistent statements that may detrimentally impact their ability to obtain immigration relief.

For example, trafficking survivors are sometimes detained by Customs and Border Patrol (CBP) who is tasked with the identification of potential victims of trafficking



among its other responsibilities. Advocates have reported that CBP's interview practices have not been trauma-informed and have not led to the accurate identification of trafficking victims. Advocates have reported instances where victims have been treated like criminals or even interviewed within close proximity of their traffickers.

Consequently, the victim was unable to provide information related to their trafficking experience. The statements made during these interviews can later appear to be inconsistent statements in the administrative record. Often, the contents of these CBP interviews are not released in FOIA requests. Without access to these records, a victim-applicant would not be able to be given an opportunity to respond to provide further context (e.g., the location of the trafficker during the interview, trauma, fear) to the allegedly inconsistent statements. The adjudicator is also disadvantaged because they would never obtain this critical information from the applicant before having to make a determination of granting T nonimmigrant status. While some attorneys are able to anticipate some of the inconsistent statements, some administrative records contain more information than the applicant knows or remembers.

The recommended language provides the enforcement and protection of every applicant's constitutional right to due process while still recognizing USCIS's sole discretionary authority to evaluate the evidentiary value of all evidence contained in the administrative record. Additionally, the statement provides notice to applicants and their advocates that all prior statements made to immigration officials (including ICE and CBP) will be reviewed by USCIS.

## 12. Bona fide determinations

**Current Language:** 8 CFR 214.11(e)(2) *USCIS determination*. An application will not be treated as bona fide until USCIS provides notice to the applicant.

(i) *Incomplete or insufficient application*. If an application is incomplete or if an application is complete but does not present sufficient evidence to establish prima facie eligibility for each eligibility requirement for T-1 nonimmigrant status, USCIS may request additional information, issue a notice of intent to deny as provided in 8 CFR 103.2(b)(8), or may adjudicate the application on the basis of the evidence presented under the procedures of this section.

(ii) *Notice*. Once USCIS determines an application is bona fide, USCIS will notify the applicant. An application will be treated as a bona fide application as of the date of the notice.

**Recommended Language:** (2) *USCIS determination*. An application will ~~not~~ be treated as bona fide ~~until USCIS provides notice to the applicant~~ if, after reviewing the complete application, USCIS determines that the facts, if proven true, would lead to approval.

(i) *Incomplete or insufficient application*. If an application is incomplete or if an application is complete but does not present sufficient evidence to establish prima facie eligibility for each eligibility requirement for T-1 nonimmigrant status, USCIS may request additional information, issue a notice of intent to deny as provided in 8 CFR 103.2(b)(8), or may adjudicate the application on the basis of the evidence presented under the procedures of this section.

(ii) *Notice*. Once USCIS determines an application is bona fide, USCIS will notify the Applicant **within 90 days of receipt of the initial application**. An application will be treated as a bona fide application as of the date of the notice.

**Comments:** While FNUSA acknowledges that USCIS cannot guarantee a bona fide determination within 90 days because of case-specific circumstances, FNUSA is concerned that DHS continues to minimize the importance of having a bona fide determination issued within 90 days of filing. DHS has minimized this issue in the current preamble, but also in previous DHS issued memos. In the May 22, 2009, USCIS memo Michael Aytes, Acting Deputy Director wrote:

USCIS does not currently have a backlog of I-914 cases; therefore, focusing on issuing interim EADs is not necessary. USCIS believes it is more efficient to adjudicate the entire I-914 and grant the T status, which produces work authorization for the applicant, rather than to touch the application twice in order to make a bona fide determination. However, in the event that processing times should exceed 90 days, USCIS will conduct bona fide determinations for the purpose of issuing employment authorization.<sup>4</sup>

In the current preamble, DHS continues to de-prioritize the processing of bona fide determinations. In FNUSA's experience, T Visa applications are not issued within 90 days of initial filing. Currently, T Visa applicants wait six to twelve months on average to receive a T Visa approval. As of the date of filing these comments, VSC is processing applications from May 16, 2016 (a processing time of almost 7 months). During this time, T Visa applicants are unable to receive many federally funded benefits or work legally in the United States. This time in limbo leaves victims dependent on service providers or vulnerable to further exploitation.

The intent of Congress in creating a bona fide determination standard was to ensure that victims can have access to a streamlined process for securing access to benefits and employment. See 22 USC §7105(b)(1)(E)(II)(aa) (indicating that certification for federal benefits can be granted if an applicant has made a bona fide application for a visa under INA §101(a)(15)(T)). In FNUSA's experience, a bona fide determination is very rarely granted and the regular processing time for T Visa applications has delayed the applicant's ability to access crucial public benefits or employment authorization. Moreover, in our experience, we have only seen bona fide determinations be made once an applicant is already in removal proceedings, but when there is a delay in the adjudication of the applications. FNUSA has seen no difference in frequency of issuance of bona fide determination even when a bona fide determination has been requested by Office of Chief Counsel, Executive Office for Immigration Review or the attorney-of-record representing the applicant.

The recommended language mirrors the practical application of prima facie evidence in the VAWA context by underlining the fact that USCIS will, in fact, issue these

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<sup>4</sup> Memorandum, "Response to Recommendation 39: 'Improving the Process for Victims of Trafficking and Certain Criminal Activity: The T and U Visas.'" USCIS (May 22, 2009).

determinations in a timely manner if the applicant has met the criteria for bona fide determination. As in the VAWA context, the determination will allow trafficking victims become more stable through the prompt access to federal benefits rather than having to wait through the current lengthy adjudication of the T Visa application.

### **13. Derivatives facing ‘present danger of retaliation’**

**Current Language:** 8 CFR 214.11(k)(iii) *Family member facing danger of retaliation.*

Regardless of the age of the principal alien, if the eligible family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of trafficking or cooperation with law enforcement, in consultation with the law enforcement officer investigating a severe form of trafficking, eligible family member means a T-4 (parent), T-5 (unmarried sibling under the age of 18), or T-6 (adult or minor child of a derivative of the principal alien).

**Recommended Language:** 8 CFR 214.11(k)(iii) *Family member facing danger of retaliation.* Regardless of the age of the principal alien, if the eligible family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of trafficking or cooperation with law enforcement, in consultation with the law enforcement officer investigating a severe form of trafficking, eligible family member means a T-4 (parent), T-5 (unmarried sibling under the age of 18), or T-6 (adult or minor child of a derivative of the principal alien). **USCIS will expedite processing of these applications within 30 days given the danger a family member is facing.**

**Comments:** USCIS should expedite the processing of applications where family members are facing danger. This will enable DHS to encourage victims of trafficking to come forward to report their victimization.

FNUSA also wants to recognize that the current statute has negatively impacted victims of trafficking and their immediate adult children. The current language requires an applicant to have a spouse that has been granted T-2 status before the applicant can apply for their adult children that are in present danger of retaliation from the trafficker. As a result, an applicant that does not have an eligible spouse, will not be able to apply for their adult children. Those children remain vulnerable to continued threats from the trafficker. This goes against the legislative intent to protect vulnerable family members of victims of trafficking who face the present danger of retaliation from the trafficker because of the applicant's escape from the trafficking or cooperation with law enforcement. FNUSA understands DHS's limited ability to address these concerns, but wanted to comment on the current victims of trafficking who have had threats made against their families overseas that are being negatively impacted because of this restriction. FNUSA hopes for changes to be made to allow adult children of principal applicants who face a current fear of retaliation to be an eligible derivative to be admitted into the U.S.

## 14. Evidence demonstrating a ‘present danger of retaliation’

**Current Language:** 8 CFR 214.11(k)(6). Evidence demonstrating a present danger of retaliation. An alien seeking derivative T nonimmigrant status on the basis of facing a present danger of retaliation as a result of the T-1 victim's escape from a severe form of trafficking or cooperation with law enforcement, must demonstrate the basis of this danger. USCIS may contact the LEA involved, if appropriate. An applicant may satisfy this requirement by submitting:

- (i) Documentation of a previous grant of advance parole to an eligible family member;
- (ii) A signed statement from a law enforcement official describing the danger of retaliation;
- (iii) An affirmative statement from the applicant describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement (ordinarily an applicant's statement alone is not sufficient to prove present danger); and/or
- (iv) Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses.

**Recommended Language:** 8 CFR 214.11(k)(6). Evidence demonstrating a present danger of retaliation. An alien seeking derivative T nonimmigrant status on the basis of facing a present danger of retaliation as a result of the T-1 victim's escape from a severe form of trafficking or cooperation with law enforcement, must demonstrate the basis of this danger. USCIS may contact the LEA involved, if appropriate. An applicant may satisfy this requirement by submitting:

- (i) Documentation of a previous grant of advance parole to an eligible family member;
- (ii) A signed statement from a law enforcement official describing the danger of retaliation;
- (iii) An affirmative statement from the applicant describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement (~~ordinarily~~ an applicant's statement alone ~~is not~~ **may be** sufficient to prove present danger); and/or
- (iv) Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses. **This evidence may be from the U.S., home country, or country where applicant's eligible family member is facing present danger of retaliation.**

**Comments:** While FNUSA acknowledges that 8 US Code 1101(a)(15)(ii)(III) directs USCIS to consult with law enforcement on these cases, law enforcement may choose not investigate trafficking cases due to lack of evidence and/or lack of resources. They may not be able to form an opinion about the danger in the home country. In these cases, DHS should consider ‘any credible evidence’ to demonstrate present danger of retaliation. The determination of LEA to not move forward with an investigation or to be

unaware of the dangers facing the trafficking victim's family members, should not inhibit USCIS from considering other evidence of present danger. Including the clarifying language gives victims security in knowing that the applications of their family members will be considered even if LEA does not decide to move forward with a criminal investigation.

In FNUSA's experience, victims of trafficking have difficulty keeping in regular contact with family members who are in remote areas abroad. In situations where there is a present danger of retaliation, the communication between the victim and family members in danger become more difficult. Therefore, it can be impossible to collect documentation of a present danger of retaliation. FNUSA believes that consideration of the difficulty of collecting evidence should be reflected in the acknowledgement that a victim's state alone may be sufficient evidence. At a minimum, the regulation should clearly state that police reports filed in the home country and affidavits from witnesses from the home country may demonstrate a present danger of retaliation, especially for cases where evidence exist primarily in the applicant's home country.

DHS should consider that the victim and their family may be in a dangerous situation from their trafficker if applying under this provision, and should not make the regulatory requirements more stringent than originally intended. The intent of the statute is to secure protection for family members in a timely manner. The recommended language ensures that the regulations uphold this intention of the statute.

## 15. Waivers

**Current Language:** 8 CFR 212.16(b) *Treatment of waiver request.* USCIS, in its discretion, may grant a waiver request based on section 212(d)(13) of the Act of the applicable ground(s) of inadmissibility, except USCIS may not waive a ground of inadmissibility based on sections 212(a)(3), (a)(10)(C), or (a)(10)(E) of the Act. An applicant for T nonimmigrant status is not subject to the ground of inadmissibility based on section 212(a)(4) of the Act (public charge) and is not required to file a waiver form for the public charge ground. Waiver requests are subject to a determination of national interest and connection to victimization as follows.

(1) National interest. USCIS, in its discretion, may grant a waiver of inadmissibility request if it determines that it is in the national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.

(2) Connection to victimization. An applicant requesting a waiver under section 212(d)(13) of the Act on grounds other than the health-related grounds described in section 212(a)(1) of the Act must establish that the activities rendering him or her inadmissible were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I) of the Act.

(3) Criminal grounds. In exercising its discretion, USCIS will consider the number and seriousness of the criminal offenses and convictions that render an applicant inadmissible under the criminal and related grounds in section 212(a)(2) of the Act. In cases involving violent or dangerous crimes, USCIS will only exercise favorable discretion in extraordinary circumstances, unless the criminal activities were caused by,

or were incident to, the victimization described under section 101(a)(15)(T)(i)(I) of the Act.

**Recommended Language:** 8 CFR 212.16(b) *Treatment of waiver request.* USCIS, in its discretion, may grant a waiver request based on section 212(d)(13) of the Act of the applicable ground(s) of inadmissibility, except USCIS may not waive a ground of inadmissibility based on sections 212(a)(3), (a)(10)(C), or (a)(10)(E) of the Act. An applicant for T nonimmigrant status is not subject to the ground of inadmissibility based on section 212(a)(4) of the Act (public charge) and is not required to file a waiver form for the public charge ground. Waiver requests are subject to a determination of national interest and connection to victimization as follows.

(1) National interest. USCIS, in its discretion, may grant a waiver of inadmissibility request if it determines that it is in the national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.

(2) Connection to victimization. An applicant requesting a waiver under section 212(d)(13) of the Act on grounds other than the health-related grounds described in section 212(a)(1) of the Act must establish that the activities rendering him or her inadmissible were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I) of the Act.

~~(3) Criminal grounds. In exercising its discretion, USCIS will consider the number and seriousness of the criminal offenses and convictions that render an applicant inadmissible under the criminal and related grounds in section 212(a)(2) of the Act. In cases involving violent or dangerous crimes, USCIS will only exercise favorable discretion in extraordinary circumstances, unless the criminal activities were caused by, or were incident to, the victimization described under section 101(a)(15)(T)(i)(I) of the Act.~~

**Comments:** FNUSA agrees that DHS has discretionary authority to waive the criminal grounds of inadmissibility for T Visa applicants if the criminal activities were caused by or incident to the trafficking under INA §212(d)(13). Nonetheless, FNUSA reiterates comments made in the previous commentary period that the language in 8 CFR 212.16(b)(3) is not statutorily required. FNUSA also believes that this language is unnecessarily stringent given that INA 212(d)(3)(B) already gives the Attorney General broad discretion to approve a waiver of inadmissibility. Trafficking survivors commonly have unfavorable criminal histories that may not be incident to the trafficking but are often part of the scheme that makes them vulnerable to exploitation. If these criminal acts are viewed with more scrutiny, it could have a chilling effect where applicants who have more lengthy criminal histories will be likely denied and less willing to attempt to file T Visa applications.

## 16. Waiting List

**Current Language:** 8 CFR 214.11(j)(1) *Waiting list.* All eligible applicants who, due solely to the cap, are not granted T-1 nonimmigrant status will be placed on a waiting list and will receive written notice of such placement. Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications

receiving the highest priority. In the next fiscal year, USCIS will issue a number to each application on the waiting list, in the order of the highest priority, providing the applicant remains admissible and eligible for T nonimmigrant status. After T-1 nonimmigrant status has been issued to qualifying applicants on the waiting list, any remaining T-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

**Recommend Language:** 8 CFR 214.11(j)(1) *Waiting list*. All eligible applicants who, due solely to the cap, are not granted T-1 nonimmigrant status will be placed on a waiting list and will receive written notice of such placement. Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications receiving the highest priority. In the next fiscal year, USCIS will issue a number to each application on the waiting list, in the order of the highest priority, providing the applicant remains admissible and eligible for T nonimmigrant status. **USCIS will grant bona fide determination to T-1 applicants who are placed on the waiting list to enable applicants to access federal public benefits and apply for employment authorization. USCIS will notify HHS of any applicant placed on the waiting list in the same manner it notifies HHS for approved T-visa applicants.** After T-1 nonimmigrant status has been issued to qualifying applicants on the waiting list, any remaining T-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

**Comments:** In the U Visa context, DHS has already considered that the time on the waitlist puts the applicant at risk of exploitation and has allowed for these waitlisted applicants to access deferred action and employment authorization. Similarly, qualified trafficking survivors on the waitlist should have access to employment authorization and federal benefits to ensure they do not remain vulnerable to exploitation and/or trafficking. In the preamble, DHS notes that it will consider providing temporary relief on a case by case basis to applicants on the waiting list who are participating in investigations in the US; but DHS should routinely grant these determinations in a timely manner should the T Visa cap be reached. Including this specific language makes clear that being placed on the waitlist will give USCIS the opportunity to make bona fide determinations to ensure that survivors will be able to access benefits and work authorization while waiting for visas to become available.

## 17. Revocation

**Current Language:** 8 CFR 214.11(m)(2)(iv). The LEA that signed the LEA endorsement withdraws or disavows its contents and notifies USCIS and provides a detailed explanation of its reasoning in writing.

**Recommended Language:** 8 CFR 214.11(m)(2)(iv). The LEA that signed the LEA endorsement withdraws or disavows its contents and notifies USCIS and provides a detailed explanation of its reasoning in writing. **USCIS must review the application and reassess the applicants eligibility for T-1 nonimmigrant status in light of the explanation**

provided by the LEA, and considering all other evidence provided by the applicant under the 'any credible evidence' standard.

**Comments:** FNUSA acknowledges that the law enforcement certification is a tool for LEAs to combat and prosecute human trafficking and that given the power to provide the certification to an applicant, LEA should also have the power to revoke. However, as USCIS has amended the regulations to clarify that an LEA endorsement is not primary evidence, the withdrawal of such an endorsement (which was never required or preferred) cannot be the basis for an automatic Notice of Intent to Revoke. USCIS should reconsider the application with all of the evidence presented, including any statements from the LEA regarding the endorsement. USCIS may well find that the application continues to meet the requirements for T-1 Nonimmigrant status, especially where the basis for the revocation/withdrawal/disavowal of the LEA endorsement is not clear or is unrelated to the eligibility factors. As stated in the preamble: "An LEA does not determine if the victim meets the 'severe form of trafficking definition' under Federal law. That is a determination that is made by USCIS." If USCIS determines that the application no longer meets the requirement, USCIS should then issue a Notice of Intent to Revoke, allowing the applicant sufficient time to respond.

## 18. Interviewing T Visa Applicants

**Current Language:** 8 CFR 214.11(d)(6) *Interview.* USCIS may require an applicant for T nonimmigrant status to participate in a personal interview. The necessity and location of the interview is determined solely by USCIS in accordance with 8 CFR part 103. Every effort will be made to schedule the interview in a location convenient to the applicant.

**Recommended Language:** 8 CFR 214.11(d)(6) *Interview.* No interview is required for an applicant for T nonimmigrant status. However, USCIS may ~~require~~ request that an applicant for T nonimmigrant status ~~to~~ participate in a personal interview. The necessity and location of the interview is determined solely by USCIS in accordance with 8 CFR part 103. Every effort will be made to schedule the interview in a location convenient to the applicant.

**Comments:** While FNUSA acknowledges that DHS is allowed discretion in interviewing applicants who apply for T Visas, FNUSA would recommend the new regulations explicitly state that no interview is required for T Visas applicants. Victims of a severe form of trafficking in persons often face high levels of trauma from their victimization. DHS has already acknowledged in the new regulations that some victims may have severe forms of trauma that would make them unable to cooperate with law enforcement for a criminal investigation. This acknowledgment and consideration should also be extended to an interview with USCIS. Knowing that they might get interviewed could inhibit a victim of trafficking from coming forward due to trauma or fear. By explicitly stating that an interview is not required, applicants will feel more assured that DHS has considered the dynamics of trauma surrounding trafficking



survivors. If USCIS requests an interview, but the applicant declines, USCIS would then make a determination based on the application as provided.

## 19. Marriage of a T-1

**Current Language:** 8 CFR 214.11(k)(5)(iv) *Marriage of an eligible family member.* An eligible family member seeking T-3 or T-5 status must be unmarried when the principal files an application for T-1 status, when USCIS adjudicates the T-1 application, when the eligible family member files for T-3 or T-5 status, when USCIS adjudicates the T-3 or T-5 application, and when the family member is admitted to the United States. If a T-1 marries subsequent to filing the application for T-1 status, USCIS will not consider the spouse eligible as a T-2 eligible family member.

**Recommended Language:** 8 CFR 214.11(k)(5)(iv) *Marriage of an eligible family member.* An eligible family member seeking T-3 or T-5 status must be unmarried when the principal files an application for T-1 status, when USCIS adjudicates the T-1 application, when the eligible family member files for T-3 or T-5 status, when USCIS adjudicates the T-3 or T-5 application, and when the family member is admitted to the United States. ~~If a T-1 marries subsequent to filing the application for T-1 status, USCIS will not consider the spouse eligible as a T-2 eligible family member.~~

**Comments:** DHS is unnecessarily narrowly interpreting INA § 101(a)(15)(T)(ii) requiring that the spousal relationship must exist at the time of filing. The only requirement INA § 101(a)(15)(T)(ii) has with regard to the timing of the filing of the principal's application is with regards to unmarried siblings under 18 years of age. In FNUSA's experience, there have been many trafficking survivors who are forcibly brought or defrauded into coming to the US with the intention of returning to their home country. Due to the trauma they have received or threats of danger from their trafficker, however, they are often unable to return to their home country. As a result, some trafficking survivors have left their intimate partners in their home country with no way to establish a spousal relationship prior to filing for a T Visa. In these cases, the family is unable to reunify. The intent of the T Visa is to provide protection to trafficking victims and their eligible family members. The recommended language takes these restrictions into consideration and allows DHS to make discretionary decisions on evaluating derivative applications.

## 20. Employment authorization for family members

**Current Language:** 8 CFR 214.11(k)(10) *Employment authorization.* An alien granted derivative T nonimmigrant status may apply for employment authorization by filing an application on the form designated by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) in accordance with form instructions. For derivatives in the United States, the application may be filed concurrently with the application for derivative T nonimmigrant status or at any later time. For derivatives outside the United States, an application for employment authorization may only be filed after admission to the United

States in T nonimmigrant status. If the application for employment authorization is approved, the derivative alien will be granted employment authorization pursuant to 8 CFR 274a.12(c)(25) for the period remaining in derivative T nonimmigrant status.

**Recommended Language:** 8 CFR 214.11(k)(10) *Employment authorization.* An alien granted derivative T nonimmigrant status may apply for employment authorization by filing an application on the form designated by USCIS ~~with the fee prescribed in 8 CFR 103.7(b)(1)~~ in accordance with form instructions. **T nonimmigrant status applicants are exempt from fees associated with employment authorization.** For derivatives in the United States, the application may be filed concurrently with the application for derivative T nonimmigrant status or at any later time. For derivatives outside the United States, an application for employment authorization may only be filed after admission to the United States in T nonimmigrant status. If the application for employment authorization is approved, the derivative alien will be granted employment authorization pursuant to 8 CFR 274a.12(c)(25) for the period remaining in derivative T nonimmigrant status.

**Comments:** DHS has taken significant steps in addressing and eliminating fees associated with applying for T nonimmigrant status. Because DHS has already acknowledged the excessiveness and burden of the fees on T nonimmigrant applicants, DHS should extend its exemption of fees to family members of T-1 applicants when they apply for Employment Authorization and remove the burden of requiring a fee waiver.

At a minimum, FNUSA requests that DHS clarify that a fee waiver may be submitted to DHS in lieu of the fees associated with Employment Authorization application for family members.

Thank you, in advance, for your consideration of these comments and recommendations.



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