



Freedom Network USA

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Security and Public Safety Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW
Washington DC 20529-2240

October 13, 2020

**RE: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services;
DHS Docket No. USCIS-2019-0007; RIN 1615-AC14**

Submitted via: www.regulations.gov

Dear Mr. McDermott:

On behalf of Freedom Network USA (FNUSA), I submit this comment in response to the proposed rule, entitled “**Collection and Use of Biometrics by US Citizenship and Immigration Services**” published by the Department of Homeland Security (DHS) in the Federal Register on September 11, 2020 (hereinafter “proposed rule”).

FNUSA, established in 2001, is a coalition of 71 non-governmental organizations and individuals¹ that provide services to, and advocate for the rights of, trafficking survivors in the United States. As the largest network of 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.²

Trafficking survivors have been robbed of their earned income by the traffickers who have exploited and abused them. Most foreign national trafficking survivors also have incurred debts in their home country while attempting to access a well-paid job in the US. Trafficking survivors have been physically, emotionally, and psychologically abused and exploited by recruiters, employers, and poorly regulated labor sectors that regularly leave them struggling to support their families while pursuing justice.

Traffickers often restrict the movement of their victims. Surveil them. And threaten the health and safety of both the victim and their family members. Foreign national survivors are also threatened with deportation or retribution from law enforcement. Traffickers rely on survivors’ distrust of law enforcement, based on their experiences in their home countries. Traffickers exploit survivors fear of deportation and the debts or physical dangers of their

¹ Find the full list of members at <https://freedomnetworkusa.org/join-us/>

² More information on FNUSA is available at <https://freedomnetworkusa.org>

home countries.³ In addition, traffickers often force their victims to engage in unlawful conduct. Sex trafficking victims, by definition, have always been forced to commit a crime. This leaves trafficking victims with often significant criminal records including arrests and convictions.⁴ Traffickers then use the victims fear of the criminal legal system or of deportation to further entrap and exploit them.

In recognition of these challenges, Congress created the T and U Visas⁵ to ensure that survivors have access to immigration protections while they work with the justice system. Trafficking survivors routinely rely on nonprofit legal service providers, including our members, for representation in immigration matters. These under-resourced providers work diligently to provide high quality, specialized assistance for trafficking survivors. They need less barriers to protection, not more, to ensure trafficking survivors have access to justice.

Therefore, we strongly oppose the barriers to justice created by the proposed rule, especially for survivors of human trafficking. Instead, we call on DHS to develop policies and procedures that ensure that immigrant survivors of human trafficking and other forms of violence and exploitation have equal access to critical, life-saving protections.

I. Arbitrarily Short Comment Period Excludes Key Stakeholders

As a preliminary matter, FNUSA strongly objects to the unusually short notice and comment period for such an important and complex piece of rulemaking. Even in normal circumstances, rulemaking of this complexity would deserve a period of at least 45 days. And yet, these are not normal circumstances. We are in the midst of a global pandemic that is reducing work hours and access across the US. Child care and schools are shuttered or operating at reduced capacity, further reducing the availability of workers and advocates to engage in the rulemaking process. Additionally, immigrants are disproportionately impacted by the pandemic, falling ill and dying at disproportionately high rates. Service providers who work with human trafficking survivors are critical stakeholders for this rulemaking, but must focus on the increased needs, vulnerabilities, and outreach gaps for the asylee and immigrant populations; making them less available to focus on rulemaking comment periods. Therefore, releasing this proposed rulemaking with such a short comment window seems designed to exclude critical stakeholders from this important process. **For this reason, FNUSA urges DHS to rescind the proposed rule immediately as a matter of procedural fairness to the public and key stakeholders.** DHS may choose to reissue the proposed rule with a comment window of at least 60 days in order to have adequate time to provide comments.

These proposed changes constitute an unnecessary, harsh, and unlawful gutting of the immigration protections enshrined in US and international law. FNUSA is especially concerned about the extraordinary impact and harm that would befall human trafficking survivors, including those who were trafficked outside of the US and have fled to the US

³ See USDOJ Office for Victims of Crime Training and Technical Assistance Center *Human Trafficking Task Force eGuide*, section on Foreign National Victims, <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/45-victim-populations/foreign-national-victims/>

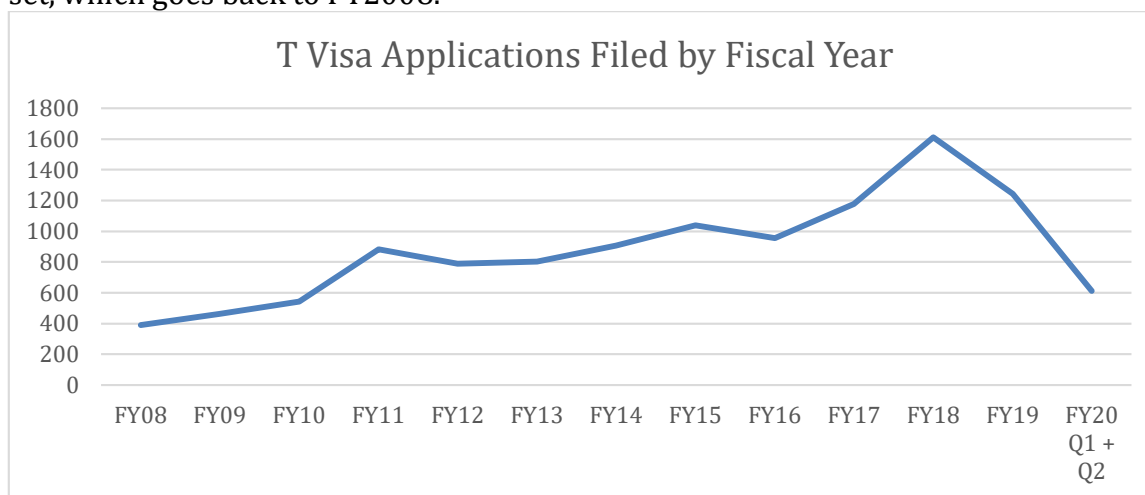
⁴ Id, section on Legal Needs, <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/legal-needs/criminal-defense/>

⁵ See 8 USC 1101 (15)(T) and (U).

seeking safety and protection, those who were trafficked en route to the US, and those who have been trafficked after they arrived in the US. These changes would preclude many trafficking survivors from the protection and support that the US Government has promised in domestic and international law.

II. Proposed Rule Exacerbates Already Hostile Environment for Victims

Over the last several years, DHS' constant barrage of immigration policy restrictions have reduced the number of applicants, rather than providing relief to the most vulnerable. These policy changes have created a significant chilling effect in a survivors' willingness to reach out to access these protections Congress created for them. Key changes that have threatened access for justice for trafficking survivors include the Notice to Appear policy, shifting interpretations of the 'physical presence on account of trafficking' T Visa element, and refusal to acknowledge trafficking in the context of a marriage or by a smuggler⁶. FNUSA members report that survivors have refused to file a T Visa application due to their fears of deportation, and that some have even returned to the trafficking situation rather than seek out protection.⁷ USCIS' data shows a historically frightening decline in T Visa applications. FY19 and FY20 are on track for the first decline in T Visa applications for 2 consecutive years in the available data set, which goes back to FY2008.⁸



A. Expanded Biometrics Collection

The expansion of biometrics collection included in the proposed rule is unnecessary, cruel, expensive, and overbroad. Specifically, the proposed rule expands USCIS authority to collect

⁶ See Refugees International Report *Abused, Blamed, and Refused: Protection Denied to Women and Children Trafficked Over the US Southern Border* 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>

⁷ For more information about the barrage of attacks on trafficking survivors and other failures of protection, see *FNUSA's Input for the 2020 Trafficking in Persons Report* at <https://freedomnetworkusa.org/app/uploads/2020/02/FNUSA2020TIPReportFINAL2020Jan15.pdf> and *Jean Bruggeman's Statement to the Border Security, Facilitation, and Operations Subcommittee* at <https://freedomnetworkusa.org/app/uploads/2020/02/FNUSAHomelandSecurityStatement19Sept2019.pdf>

⁸ Data available at https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2020_qtr2.pdf

biometric data beyond fingerprints and photographs to include additional “modalities” such as iris scan, palm print, facial recognition, voice print, and DNA.⁹ While USCIS purports it will not deploy an absolute biometric requirement in all instances for all forms,¹⁰ the proposed rule fails to specify which modalities will be used for survivor-based relief.

Survivors, as discussed above, have been threatened, abused, isolated, and surveilled by their traffickers. Collection of undisclosed biometrics by a government agency that has promised to deport victims whose applications are denied will cause unimaginable psychological harm to survivors. Trafficking victims live in fear of being watched, followed, and abused by their traffickers. The act of being fingerprinted is difficult enough, without also being palm printed, iris scanned, face scanned, recorded, and having DNA sampled.

USCIS gives no credible explanation for this extensive data collection. DHS cannot even give a complete estimate of the cost.¹¹ And DHS cannot prove the reliability of these methods. Many of these biometrics, like facial recognition, have been found to be extremely unreliable, racially biased, and reinforce bias against transgender individuals.¹² USCIS’ claim to use voice prints in USCIS call center processes is not only deeply disturbing, but also raises concerns of racial and gender bias.¹³ Furthermore, these biometrics will likely link to databases that have incomplete, inaccurate or outdated information about the applicant. As explained above, trafficking survivors are often forced to engage in unlawful conduct as part of the trafficking scheme, for example. This leaves survivors at heightened fear of biometrics collection, and likely to have the scans connect to negative information. USCIS indicates applicants will be offered an opportunity to rebut derogatory information the agency considered, but does nothing to offer applicants redress when these errors occur or provide a way to challenge the information in the database.

Lastly, the expansion of biometrics is deeply concerning for survivors who have reason to fear *who* has access to this information. Traffickers often threaten to report survivors to the police or to the immigration authorities in order to maintain power over their victims and keep them silent.¹⁴ Congress created confidentiality protections for survivors codified at 8 USC § 1367, to ensure that abusers and other perpetrators cannot use the immigration system against their

⁹ Proposed Rule at 56355.

¹⁰ *Id.* at 56351

¹¹ See Proposed Rule at 56345, “DHS does not know what the costs of expanding biometrics collection to the government in terms of assets and equipment.”

¹² Ali Breland. “How white engineers built racist code – and why it’s dangerous for black people” *The Guardian* (December 4, 2017), available at <https://www.theguardian.com/technology/2017/dec/04/racist-facial-recognition-white-coders-black-people-police>; See also Matthew Gault. “Facial Recognition Software Regularly Misgenders Transgender People” *Vice* (Feb. 19, 2019), available at

<https://www.vice.com/en/article/7xnwed/facial-recognition-software-regularly-misgenders-trans-people>

¹³ Joan Palmiter Bajorek. “Voice Recognition Still Has Significant Race and Gender Biases” *Harvard Business Review* (May 10, 2019), available at <https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases>

¹⁴ See *e.g.* Samantha Schmidt. “Deputy accused of sexually assaulting girl, 4, threatening to have mother deported if she spoke up.” *Washington Post* (June 18, 2018) available at

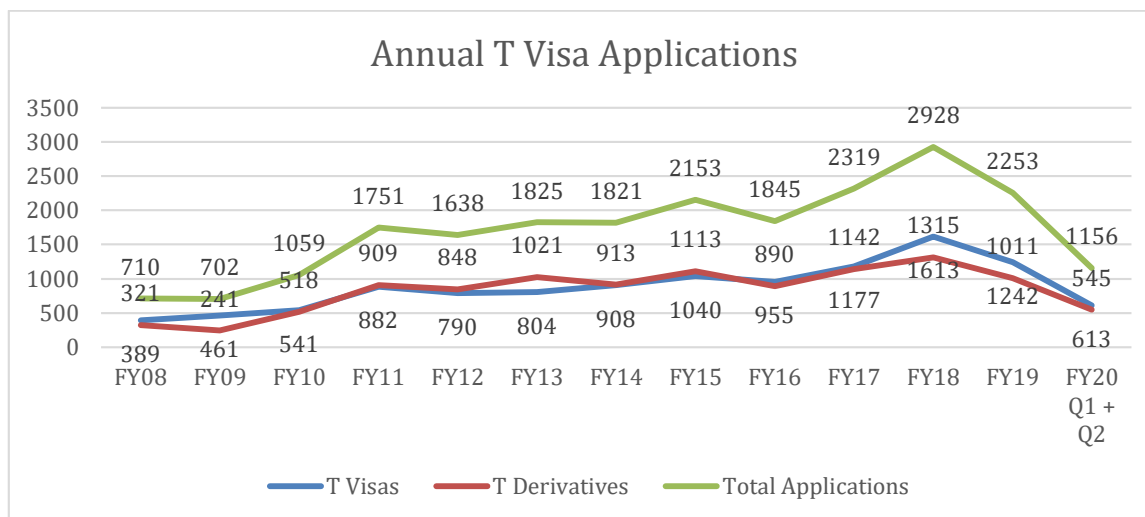
<https://www.washingtonpost.com/news/morning-mix/wp/2018/06/18/deputy-accused-of-sexually-assaulting-girl-4-threatening-to-have-mother-deported-if-she-spoke-up/>

victims.”¹⁵ Despite the numerous policies put in place surrounding survivor information, violations of these provisions occur with regularity. This sweeping expansion of biometrics collection will undoubtedly lead to additional disclosures (either intentionally or through vulnerabilities to hacking¹⁶ and other breaches), which will jeopardize survivor safety. The proposed rule, in fact, acknowledges “unquantified impacts” related to privacy concerns,¹⁷ but does nothing to address them.

Until USCIS can more clearly articulate an actual need for this expanded collection, a reliable method for ensuring their accuracy, and a robust plan for protecting the data and the privacy of impacted people; FNUSA must vigorously object to this reckless threat to survivors’ safety.

B. Expansion of DNA Collection

The proposed rule will allow DHS, in its discretion, to request, require, or accept DNA for benefit requests requiring proof of a genetic relationship,¹⁸ including applications for family members of trafficking survivors in Phase V of their implementation plan.¹⁹ USCIS data shows that thousands of trafficking survivors and their family members may be subject to these new DNA requests.²⁰ These requests will add additional costs and burdens to an already arduous adjudication process. The potential costs to survivors is staggering; DNA tests often incur a \$440 fee to test first genetic relationship and \$220 for each additional test, which are costs ***the applicant*** must take on.²¹



¹⁵ “Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402” H.R. Rep. No. 109-233, at 120 (2005). Available at <https://www.congress.gov/109/crpt/hrpt233/CRPT-109hrpt233.pdf>

¹⁶ See Brian Barret. “Hack Brief: Hack Brief: Hacker Leaks the Info of Thousands of FBI and DHS Employees” Wired (Feb. 8, 2016) at <https://www.wired.com/2016/02/hack-brief-fbi-and-dhs-are-targets-in-employee-info-hack/>

¹⁷ Proposed rule at 56364.

¹⁸ Proposed Rule at 56343.

¹⁹ Id. at 56378.

²⁰ Data available at

https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2020_qtr2.pdf

²¹ Proposed Rule at 56382

USCIS has not demonstrated that there is any systemic problem in establishing qualifying relationships for T Visas, nor has the agency acknowledged that these additional costs create significant barriers to survivors who are already facing economic instability related to their victimization. These additional financial burdens to survivors are not at all addressed in the proposed rule.

Until USCIS can more clearly articulate an actual need for this new collection, a realistic cost estimate, and an analysis of the availability and protections for family members who are hiding from traffickers; FNUSA must vigorously object to this reckless threat to the safety of survivors and their family members.

III. T Visa Adjustment of Status Evidentiary Changes

The proposed rule would make 2 substantive changes to the evidentiary requirements for a T Visa-based adjustment of status:

- consider conduct beyond the requisite period²² immediately before filing, where: (1) The earlier conduct or acts appear relevant to an individual's present moral character; and (2) the conduct of the self-petitioner/applicant during the three years immediately before filing does not reflect that there has been a reform of character from an earlier period. See generally 8 CFR 316.10(a)(2).
- remove the presumption of good moral character for applicants 14 and younger.

These provisions are simply unnecessary. T visa holders **already** are required to submit biometric evidence with their adjustment applications. Thus, USCIS already has a process to verify an applicant's identity. As indicated above, databases that USCIS searches as a result of other biometrics may also contain incomplete, inaccurate or outdated information about the applicant. Indeed, USCIS has not sufficiently demonstrated how the current process is unreliable or how it directly burdens USCIS to review these police letters.

Directing USCIS to examine an earlier period for good moral character is also **unlawful**. Congress limited the requisite period for evaluating good moral character by statute.²³ This was done to ensure that T visa holders would not be unjustly prejudiced or retraumatized by repeatedly reviewing criminal acts that they were forced to engage in as part of their abuse and exploitation. These issues would **already have** been addressed as part of their underlying T visa application. By allowing this look back beyond the period authorized by Congress, USCIS is unlawfully acting to retraumatize survivors and subjectively deny them the protections afforded under the law.

Lastly, removing the presumption of good moral character for T visa adjustment applicants under 14 creates needless barriers for young applicants and increases the burden on survivors. USCIS already had the authority to get more information from applicants if

²² For T visa applicants applying for adjustment, the requisite period is for "for a continuous period of at least 3 years since the date of admission as a nonimmigrant" or "continuous period during the investigation or prosecution of acts of trafficking." See INA 245(I)(1)(A).

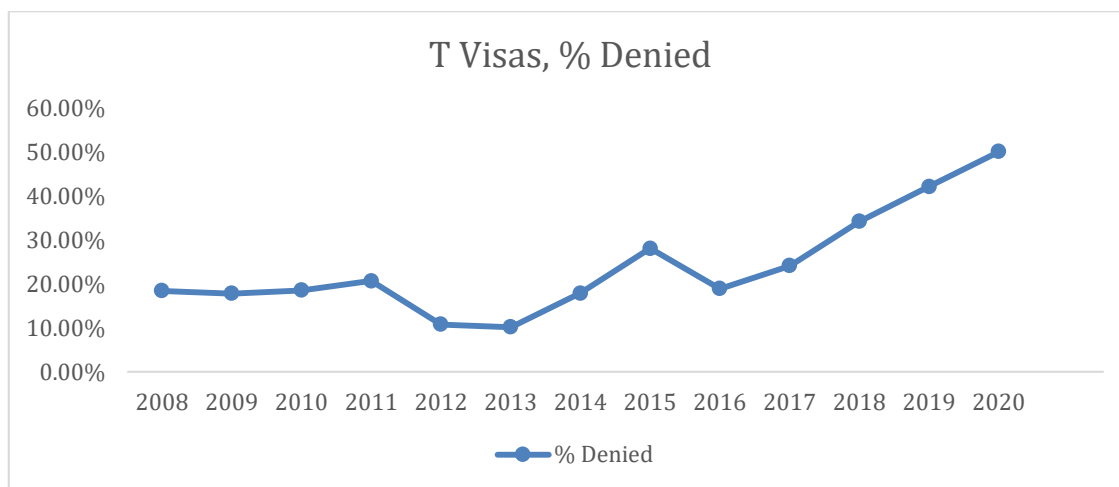
²³ *Id.*

warranted, and codifying these provisions in the regulations adds additional barriers without sufficient justification.

IV. Attempted Justification Citing Prevention of Human Trafficking is Baseless, Uniformed, and Indefensible

The proposed rule claims that the expanded collection of biometrics will somehow assist DHS in their effort to prevent or address human trafficking. This assertion is never backed with any data, analysis, reasoning, explanation, or detail of any kind. There is one claim related to supposed fraud at the border related to family groups. USCIS asserts that they found indicators of fraud and DNA testing disproved the family relationship. In fact, families are created in many ways, not all of which are related to DNA. And the definition of human trafficking is NOT a group of non-related family members claiming to be a family unit.

In fact, USCIS' supposed justification is a lie. It is clear that DHS has been acting to undermine and harm trafficking survivors for the past several years. The most recent data from USCIS shows how effective DHS has been at failing to protect human trafficking survivors. The data shows a shocking increase in the denial rates for T Visas.²⁴ The denial rate for T Visas, when taken as a percentage of total decisions made in each Fiscal Year, has skyrocketed to 50% in the first half of FY20 after hovering between 10-20% from 2008 to 2014. No explanation has been provided by USCIS for the precipitous increase seen since 2016. But since T Visa adjudications are squarely and solely in the control of USCIS, if they truly cared about preventing or addressing human trafficking, they should be working to ensure protections through the T Visa.



T Visa applicants have taken the brave step of announcing themselves to law enforcement. They have described the abuse and exploitation they have suffered. They have asked for our protection and assistance. And USCIS keeps slamming the door in their faces. No palm scan will stop abuse if the agency holding that information so callously refuses to acknowledge the abuse and exploitation presented to them in black and white.

²⁴ https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2020_qtr2.pdf

Even if we were to believe that DHS is being honest in their assertions, they do not explain how collecting biometrics will stop exploitation. How will a huge federal data base of biometrics convince an exploitive employer to pay a fair wage and provide a safe working environment? How will it stop a sex trafficker from manipulating a homeless young person into providing sex for a warm and dry place to sleep? How will it stop a diplomat from threatening to harm the family members of their domestic worker? No collection of biometrics will change the legal, economic, and racial injustices that put people at risk of human trafficking and reward the traffickers. Claiming that this unwarranted and unprecedented increase in surveillance of both immigrants and US Citizens will somehow prevent human trafficking is insulting. FNUSA invites a real program to prevent human trafficking and has already provided the US Government with extensive recommendations on the subject, available at <https://freedomnetworkusa.org/app/uploads/2020/02/FNUSA-Recommendations-for-HHS-OTIP-Prevention.pdf>.

Conclusion

In summary, the proposed rule would very specifically harm survivors of human trafficking by increasing the financial, emotional, and logistical burdens faced by T Visa applicants and their families. These harms cannot be mitigated with small edits or by providing exemptions for trafficking survivors. The existence of these barriers will deter survivors from even coming forward for protection and support, leaving them in continued abuse and exploitation. The US Government must act to protect survivors, not embolden traffickers. Therefore, Freedom Network USA urges the Department to discard these proposed changes and to, instead, stand in solidarity with human trafficking survivors.

I can be reached at jean@freedomnetworkusa.org if you have any questions or need any further information or explanation.

Sincerely,



Jean Bruggeman
Executive Director
Freedom Network USA