



Freedom Network USA

September 13, 2021

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Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
Via www.regulations.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 the nations’ largest alliance of experienced advocates advancing a human rights-based approach to human trafficking in the United States. Our 81 members believe that empowering survivors with choices and support leads to transformative, meaningful change. We prioritize the self-determination and empowerment of survivors in the development of policies, procedures and programs. Our members work directly with over 2,000 survivors of trafficking each year. It is the insights and strengths of those survivors and advocates from across the country, who have experienced all forms of trafficking, that 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 thank DHS for reopening the comment period for the Interim Final Rule and for extending the comment period to a full 60 days. As DHS has noted, the Trafficking Victims Protection Act of 2000 has been reauthorized multiple times since the T Visa regulations were first published, including significant requirements related to the T nonimmigrant status (T Visa). Additionally, significant changes in policy, procedure, and implementation were made under the previous Administration. These rapid and overlapping changes have highlighted additional weaknesses and concerns in the Interim Final Rule. We appreciate the opportunity to provide additional insight and recommendations before the rule is finalized.

Additionally, FNUSA commends 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;
- 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).

FNUSA recommends the following updates, additions, and corrections to ensure that the Congressional intent to protect survivors of severe forms of trafficking in persons who are physically present in the US are afforded protection from removal so that they may recover from their trafficking experience and engage in the US judicial processes to bring their traffickers to justice.

Global Recommendations

1. **Replace “alien.”** Throughout the regulation, FNUSA recommends replacing the term “alien” with the term “applicant,” “victim,” “survivor,” or “noncitizen,” whichever is more accurate. We have included these changes in many places below, but we recommend that DHS review the entirety of the regulations related to the T nonimmigrant visa to include these changes.
2. **Add Tribal authorities.** As the authority of Tribal communities, law enforcement, and courts continues to expand, they should not be excluded from this regulation. In all places in which law enforcement agencies are defined, listed, or described, Tribal law enforcement, courts, and other relevant agencies should be included. Some examples have been included in the specific recommendations, below, but they are not comprehensive. DHS should ensure that the revised language is fully inclusive of the range of Tribal authorities which may be engaged in the detection, investigation or prosecution of acts of severe forms of trafficking in persons that might occur on tribal lands, or impact tribal members.

Specific Recommendations

FNUSA has specific feedback and recommendations on the following sections of the Interim Rule and other sections of the regulations. These comments are presented in roughly the same order as they were presented in the Interim Rule. Items that were not specifically addressed in the Interim Rule are at the end. Additional language that is recommended for the regulations are in italics, strikethrough is used for recommended deletions. We have noted the most prominent placement of the recommended changes, but additional changes in the preamble and regulations might also be needed in order to ensure consistent implementation of the recommendations.

1. Definition of Law Enforcement Agency (LEA)

Recommended Changes: [to 8 CFR 214.11(a) and throughout the regulations and the preamble]

Law Enforcement Agency (LEA) means a Federal, State, *Tribal* 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 *under any criminal, civil, Tribal or administrative laws*. Federal LEAs include but are not limited to the following: U.S. Attorneys' Offices, Civil Rights Division, Criminal Division, *Office of the Inspector General*, U.S. Marshals Service, *Bureau of Indian Affairs Police*, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), *Office for Civil Rights and Civil Liberties (Department of Homeland Security)*; Diplomatic Security Service (Department of State); *Office of the Inspector General, Office for Civil Rights (Department of Health and Human Services)*; ~~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 Office of the Inspector General at both DOJ and HHS, Bureau of Indian Affairs (BIA) Police, Office of Civil Rights and Civil Liberties at DHS, Office for Civil Rights at HHS, 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 BIA, EEOC, and NLRB informs victims, advocates and USCIS adjudicators that these agencies play seminal roles in investigating and pursuing remedies for trafficking victims and are actively involved in providing T Visa declarations for victims filing T Visas.

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 organizations are not explicitly listed in the T Visa regulations, but are explicitly listed in the U Visa regulations. Yet, the EEOC has made notable efforts in pursuing cases involving trafficked workers including litigating trafficking cases against Signal International, LLC, Henry's Turkey Services, Global Horizons, Marine Services Company, Del Monte Fresh Produce, and others. 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 T Visa certifications.

By expanding the explicit list of state, Tribal and Federal agencies authorized to sign T Visa certifications, victims will be better informed of where they can report their victimization. Additionally, the more expansive list will reduce confusion as to which state, federal and Tribal agencies can provide T Visa certifications.

2. Definition of Involuntary Servitude

Recommended Changes: [include two additional definitions to 8 CFR 214.11 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, family, 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 helps 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”. In our experience, many attorneys, law enforcement, and advocates use a common language interpretation of serious harm based on subjective severity, instead of the broad definition used in the criminal code 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 (including family court) processes.

3. Performing labor, services, or commercial sex is not necessary

Recommended Changes: [8 CFR 214.11(f)(1) and in preamble]

...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 *through any credible evidence. The victim's statement (paragraph (d)(2) of this section) may provide sufficient evidence to meet the victim's burden of proof and the victim may also submit any other credible evidence which may include but is not limited to:*

- (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) Trial transcripts;
- (iv) Court documents;
- (v) Police reports;
- (vi) News articles;
- (vii) *Photographs*;
- (viii) Copies of reimbursement forms for travel to and from court;
- (ix) *Affidavits from case managers, therapists, medical professionals, victim advocates, witnesses, or other victims of the same trafficking scheme;*
- (x) *Correspondence or other documents from the trafficker, including letters, photos, emails, or text messages; or*
- (xi) *Documents used in furtherance of the trafficking scheme such as recruitment materials, advertisements, pay stubs, log books, or contracts.*
- (xii) In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should describe what the ~~alien~~ *applicant* has done to report the crime to an LEA and indicate whether *the victim has possession of any criminal records relating to the trafficking crime.*

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 have escaped or been removed from the trafficking situation by law enforcement or others without completion of the criminal act. 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 and formatting them in such a way as to clarify that all forms of evidence are acceptable, and that an LEA endorsement or Continued Presence grant are not required or preferred forms of evidence. 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 must clearly articulate that a

statement from the victim, alone, may be sufficient under the ‘any credible evidence’ standard.

Further, victims may not know whether any criminal records relating to the trafficking exist. LEAs are not always forthcoming with victims about the extent of their recordkeeping, and state and local laws and practices may limit the documentation that they are able to provide to victims. They may fail to respond to the victim and/or their attorney, they may withhold documents, or may give an incomplete answer about the status of any such records. The victim cannot be held responsible for knowledge about records that are not in their possession. Additionally, this suggests that criminal records are preferred over other evidence, which is contrary to the ‘any credible evidence’ standard.

4. Evidence of victimization

Comments: FNUSA applauds DHS for eliminating the distinction between primary and secondary evidence and correctly adopting the ‘any credible evidence’ standard. FNUSA agrees that clarifying language is needed to eliminate the misconception that the I-914 Supplement B is required or preferred over other forms of evidence. Based on our experience, attorneys often postpone filing T Visa applications when they are unable to obtain the I-914 Supplement B. We believe that this clarifying language will encourage applicants and attorneys to appropriately file T Visa applications as early as possible.

In fact, FNUSA members report that they continue to receive Requests for Additional Evidence (RFEs) from USCIS requesting a I-914 Supplement B or a grant of Continued Presence and specifying that only if the applicant is unable to produce such documentation should other forms of evidence be submitted. This indicates that USCIS adjudicators incorrectly consider the I-914 Supplement B or Continued Presence to be preferred forms of evidence in violation of the ‘any credible evidence’ standard. FNUSA recommends that the Final Rule and the preamble make clear and specifically acknowledge that: an applicant may not have access to any evidence beyond their personal statement; and that the statement, alone, may provide sufficient detail to prove T Visa eligibility. USCIS cannot, under the any credible evidence standard, require T visa applicants to explain their inability to provide any specific forms of evidence, nor should USCIS be requesting any specific form of evidence in an RFE, NOID, or any other communication.

5. Physical presence on account of trafficking in persons

Recommended Changes: [8 CFR 214.11(g) and in preamble]

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 *applicant’s* presence in the United States at the time of application. The requirement reaches an *applicant* 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 applicant~~ 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 *began* is deemed ~~not~~ to be present in the United States as a result of such trafficking in persons *if the applicant's removal, reentry, or departure is related to unless:*

- (i) ~~The alien's reentry into the United States was the result of the continued victimization of the applicant;~~
- (ii) ~~The alien is a victim of~~ A new incident of a severe form of trafficking in persons;
- (iii) *Fear of ongoing victimization or revictimization by traffickers;*
- (iv) *Seeking treatment or services related to trafficking victimization which cannot be provided in their home country or last place of residence;* or
- (vi) ~~The applicant~~ *alien has been allowed entered* 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.

(3) Presence for participation in investigative or judicial processes. An ~~alien applicant~~ who was allowed initial entry or reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking will be deemed to be physically present in the United States on account of trafficking in persons, regardless of where such trafficking occurred. To satisfy this section, an ~~alien applicant~~ must submit documentation to show valid entry into the United States and evidence that this valid entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking. *An applicant who entered the United States without a valid entry, must submit documentation that they are physically present in the United States and that their entry is for participation in a criminal, civil, or administrative investigation, prosecution or judicial process associated with an act or a perpetrator of trafficking to satisfy this section.*

(4) Evidence. The applicant must ... perpetrator of trafficking. USCIS will consider any credible evidence presented to determine the physical presence requirement, including *but not limited to the alien's applicant's responses to questions on the application for T nonimmigrant status, documentation submitted by the applicant, and the applicant's personal statement regarding: about when he or she escaped the trafficker, when and*

how the applicant learned that they were a victim of human trafficking and may be eligible for services and protection in the United States on account of such victimization, and what activities he or she has undertaken since that time including the steps he or she may have taken to deal with the consequences of having been trafficked, and the applicant's ability to leave the United States.

Comments: FNUSA appreciates that at the new 8 CFR 214.11(g), DHS has clarified that an applicant who has departed the US after trafficking or whose victimization occurred outside of the US may still be eligible for a T visa and may still meet the physical presence requirement. FNUSA 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 began and subsequently returned, are not physically present in the US on account of trafficking in persons. This presumption has no statutory basis and should be removed, 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 of a survivor who has departed and then returned to the US after the trafficking ended (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. These regulations narrow the interpretation of physical presence so drastically, that trafficking victims are being denied the protection and support that the TVPA was designed to provide.

Trafficking victims may be physically present in the US on account of their trafficking victimization in many situations. Congress understood when it drafted the original TVPA and its subsequent reauthorizations that human traffickers recruit, control, abuse and place trafficking victims lives in danger both inside and outside of the US. Exempting whole categories of human trafficking victims from T Visa protection by regulations too narrowly crafted is contrary to the Congressional history and purpose of the TVPA. Ultimately, these narrow regulations thwart the ability of US government agencies to protect trafficking survivors and to investigate, prosecute and convict human traffickers because trafficking victims are unable to access T Visa protections and safely assist LEA.

A few common scenarios provide illustrative examples of trafficking victims who are physically present in the US on account of trafficking and would be eligible for T Visa protections under our recommended language:

- Victims who have been trafficked to a neighboring country which failed to protect them, and then fled to the US for protection.
- Victims who 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.
- Victims who have been trafficked within the US, but forced to leave the US by the

trafficker, and have returned to the US for protection.

- Victims who have been trafficked from the US to another country, and then returned to the US for protection.
- Victims who have traveled outside of the US, been trafficked, and then returned to the US for protection.
- Victims who were trafficked within the US, forced to leave the US by their trafficker, and then returned to the US through any means necessary to reunite with family, access services and protection in the US, and/or to report to LEA and/or file a civil suit.
- Victims who have entered the US through any means necessary to ensure their safety from their traffickers and were only able to report to US law enforcement or file a civil suit after arriving in the US.

Human trafficking victims who experienced each of these should have the opportunity to provide any credible evidence to USCIS to demonstrate that the victim is physically present in the US on account of trafficking.

Note that 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. In this way the statutory structure of the T Visa is clearly distinguishable 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 many subsequent reauthorizations. But Congress never chose to do so.

FNUSA also disagrees with DHS’ interpretation of “including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking.” 8 USC 1101(a)(15)(T)(i)(II). DHS, in the Interim Final Rule, asserts that this language, “require[s] the victim’s entry through a lawful means.” 81 Fed Reg. 92274. There is no basis for this interpretation in the plain language of the statute. The language Congress added to the statute merely lists one example of a situation in which a survivor departed the US and then returned. Congress did not state that this is the only re-entry that can demonstrate physical presence or that the entry must be legal or arranged by a government agency. In fact, Congress did not specify the manner of entry, include the word “legal” or “lawful” or point to any statutory provisions for legal entries, or use any language to indicate the limitation that DHS has read into the statute.

For example, those entering the US to engage in a civil lawsuit are unlikely to enter in a manner arranged by a government agency. While DHS acknowledges that it “does not interpret the phrase “judicial processes” as referring only to investigations or

prosecutions,”¹ it does not structure the regulations and comments to include the practical implications of non-criminal processes. It is likely that no law enforcement agency will be involved in a civil proceeding, and it is therefore unlikely that the survivor would be able to enter the US through a legal means. 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 and to seek justice through any available means.

Additionally, in cases where the survivor exited the trafficking more than 5 years ago, USCIS routinely issues a request for evidence to demonstrate that the survivor’s continuing presence is related to the trafficking. In practice, this has imposed a de facto, ultra vires filing deadline that is inconsistent with the lived experiences of survivors of human trafficking. In FNUSA’s experience, most survivors do not know that they were victims of human trafficking until many years after they leave the trafficking situation, if ever. They do not identify their experience as trafficking, precisely because of the manipulation and coercion of their traffickers. Their traffickers often instill in their victims a distrust of authority and distrust of institutions, so survivors may not reach out for services or know that they are victims. Many survivors are identified by service providers only when the survivors are seeking other forms of support or immigration options including family based petitions, TPS, DACA or asylum. FNUSA recommends changes to the regulations that better include the lived experience of trafficking survivors.

FNSUA also recommends removing the reference to the “applicant’s ability to leave the United States.” USCIS has already deleted the requirement that the applicant prove that they did not have an “opportunity to depart” as “unnecessary and counterproductive.” Therefore, evidence of the applicant’s ability or inability to leave the United States is also unnecessary and counterproductive. Instead, USCIS should focus on any credible evidence submitted by the applicant to establish that their current presence in the United States is on account of trafficking, regardless of whether they may have been physically able to depart.

6. Reasonable request for assistance

Recommended Changes: [8 CFR 214.11(a), 8 CFR 214.11(h)(2) and in preamble] 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; ~~T~~; *the safety of*

¹ 81 Fed Reg 92274.

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 a *qualified* interpreter ~~or attorney~~ was *provided by the LEA to ensure help* the victim understood ~~understand~~ the request; cultural, religious, or moral objections to the request; the time *and circumstance in which* the victim had to comply with the request; ~~and~~ the age, *ability, health,* 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 *and nature* 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 a *qualified* interpreter ~~or attorney~~ was present to *ensure that help* the victim understood ~~and~~ the request;
- (xi) Cultural, religious, or moral objections to the request;
- (xii) The time *and circumstances in which* the victim had to comply with the request; ~~and~~
- (xiii) The age, *ability, health,* and maturity of the victim; *and*
- (xiv) *The circumstances in which the request was made.*

Comments: FNUSA recommends changes in both the definition of 'reasonable requests' and in the 'unreasonable requests' sections for consistency. First, we recommend changes in the definition to clarify that all trauma, not just 'severe' trauma, should be considered when assessing the reasonableness of LEA requests. There is also a recommended edit in 8 CFR 214.11(a) for grammatical accuracy.

FNUSA does not believe that the presence of an attorney makes the LEA request more or less reasonable. Applying this standard would mean that victims with attorneys might be held to higher standards of compliance with LEA requests than those without. Thus, we recommend striking this reference.

Ensuring appropriate language access during LEA interactions is critical to victim protections, and is legally required. Title VI of the Civil Rights Act of 1964 and Executive Order 13166 require the use of qualified interpreters when police and prosecutors

interact with LEP individuals. Unfortunately, the use of unqualified persons (including family members, untrained bilingual staff, and onlookers) and refusal to provide interpreters for LEP individuals who speak some English continues to be a widespread practice that undermines the effectiveness of criminal investigations and prosecutions nationwide. Qualified interpreters must be used for requests of LEP trafficking victims to be reasonable and the use of unqualified interpreters both violates federal law and is unreasonable.

Finally, it is critical to understand the context in which requests are being made of human trafficking victims. It makes an important difference whether 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 same requests made to a victim who has been invited to meet with an LEA at a location of their choosing, after they have begun receiving supportive services. Beyond the age and maturity of the survivor, the ability and health of the survivor are also relevant. A survivor with a disability or suffering from injuries or illness may be less able to respond to LEA requests without reasonable accommodations. It is critical that USCIS consider the totality of the circumstances in order to determine if an LEA request is reasonable for that survivor at the time and in the manner in which the request was made.

7. Compliance with reasonable requests from LEA

Recommended Changes: [8 CFR 214.11(h)(1) and in preamble]

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 Tribal law enforcement or regulatory agency or court 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 regarding the type and extent of contact with LEA which is sufficient to meet this requirement. FNUSA is aware of many survivors who have documented in their T Visa application that they reported to an LEA, but received no response, who then received requests for additional evidence (RFEs) from USCIS requesting additional documentation of LEA contact including a Supplement B or proof of Continued Presence. Such requests indicate a preference for a specific type of evidence, in violation of the 'any credible evidence' standard.

Further, federal, state, and Tribal judges are LEAs who routinely detect human trafficking and encounter human trafficking victims in court. The regulations need to explicitly clarify that participation in civil, family, juvenile, criminal, Tribal, administrative or any type of court proceedings involving human trafficking or where the victim reveals facts of the trafficking to the court clearly meets the ‘contact with an LEA’ requirement.

The recommended language clarifies that: (1) a single contact with any LEA documented by the applicant is sufficient to meet the compliance eligibility requirement; and (2) that this contact can be with any LEA that has the authority to detect, investigate, or prosecute severe forms of trafficking in persons. Trafficking remains a crime that is not well understood. Labor trafficking is especially challenging for Tribal, state and local agencies that are unfamiliar with the issue, have limited resources, or have not prioritized this crime. Advocates note that reporting labor trafficking is routinely met with no response from LEA across the country. Survivors cannot be required to force LEA to investigate this crime. The law merely requires that survivors respond to reasonable requests, and the regulations must make clear that the burden of educating and training LEA cannot fall on the shoulders of survivors.

8. LEA Reasonable Request Exemption: Trauma

Recommended Changes: [8 CFR 214.11(h)(4)(i) and in preamble]

8 CFR 214.11(h)(4)(i) *Trauma*. The applicant is unable to cooperate with a reasonable request for assistance in the Federal, State, *Tribal* or local investigation or prosecution of acts of trafficking in persons due to physical or psychological trauma, *the circumstances of the victim during which the trauma was experienced, and the applicant’s current ability to cooperate*. An applicant must submit evidence of the trauma. *Evidence may include information about the traumatic impact based on all of the surrounding circumstances and background of the applicant, including their age, maturity, health, disability, and history of abuse or exploitation*. An applicant may satisfy this by submitting an affirmative statement describing the trauma as well as 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 *or medical condition*; ~~and~~ *medical, or psychological records documenting the trauma or its impact*; ~~;~~ *disability determinations*; or other records which are relevant to the trauma. *When an applicant is found to have satisfied this exemption, the applicant is not required to have had any contact with an LEA, including reporting the trafficking*. USCIS reserves the authority and discretion to contact the LEA involved in cases *where the applicant has already contacted LEA but was unable to comply with reasonable requests due to trauma*, if appropriate;

Comments: FNUSA commends DHS for 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 notes that several applicants who have applied using

this exemption have received RFEs requesting additional proof of reporting the trafficking to an LEA. It seems that further clarification is needed to ensure that USCIS adjudicators understand that applicants who qualify for the exemption are not required to have any contact with any LEA.

Additionally, 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 reflects 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 an 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.

9. LEA Reasonable Request Exemption: Age

Recommended Changes: [8 CFR 214.11(h)(4)(ii) and in preamble]

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 *applicant's* ~~alien's~~ birth certificate, a passport, or a certified medical opinion. *Any credible* 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 LEA at any time. 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.² 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."³ Statutes of limitations on child abuse have been extended across the US, to better account for the amount of time needed for a child victim to come forward.

² 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).

³ *Care for Trafficked Children*, United States Conference of Catholic Bishops, April 2006 at 4.

Further, scientific research shows that exposure to violence and trauma during childhood and adolescence has significant and negative psychological and neurobiological impacts on the child's development. One of the most significant issues that arises from childhood and adolescent exposure to abuse, trauma, and stress is the negative impact of such exposure on the executive functioning, both cognitively and physiologically leading to distancing, numbing and avoidance that lasts well into adulthood and impedes child trafficking victims ability to come forward⁴.

DHS is narrowing the interpretation of this eligibility requirement beyond the scope of the statute by setting the time of filing, rather than the time of victimization, as the relevant age. This interpretation would require a victim who was trafficked at age 17 to immediately either file a T Visa application or report to an LEA before turning 18. This approach puts undue pressure on young survivors to relate their trafficking experience to USCIS regardless of their need for healing.

Previously, USCIS itself noted, "*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).⁵ The narrower interpretation in the 2016 Interim Rule is especially devastating to child applicants who are held in immigration detention facilities and turn 18 years before they can apply for their T Visa. Often attorneys are unable to meet with child trafficking victims until shortly before or after they turn 18. This is especially common for child trafficking survivors who are in the custody of the ORR and are not released until the turn 18. These child survivors have limited access to services and support, including immigration representation, even if they have been identified as trafficking victims.

Additionally, this interpretation is at odds with the clear distinction Congress provided at 8 USC 1255(I)(1)(C)(iii), which specifically directs that survivors who were "younger than 18 years of age at the time of the victimization" are exempt from complying with reasonable request from LEA for the purposes of adjusting status. It is inconsistent to require such child survivors to report their victimization to an LEA and respond to their requests in order to be granted a T Visa, but to be exempt from any contact with an LEA in order to adjust status. Thus, the most reasonable interpretation of the vague requirement at 8 USC 1101(15)(T)(III)(cc) is to understand that the exemption refers to the age at the time of the victimization.

⁴ Faiza Chappell, Meaghan Fitzpatrick, Alina Husain, Giselle Hass and Leslye E. Orloff, Understanding the Significance of a Minor's Trauma History in Family Court Rulings (May 17, 2021)

<https://niwaplibrary.wcl.american.edu/pubs/understanding-effects-of-trauma-on-minors>

⁵ USCIS, "Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status."

<https://web.archive.org/web/20170427100243/https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status>.

10. Referral to Law Enforcement and Department of Health and Human Services

Recommended Changes: [8 CFR 214.11(d)(1)(iii), 8 CFR 214.11(o) and in preamble] 8 CFR 214.11(d)(1)(iii) Minor applicants. When USCIS receives an application from a ~~minor~~-principal *applicant who is 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 even without HHS Certification. For example, in California, non-citizen survivors (adults and children) are entitled to 8 months of state-funded public benefits upon identification as a victim of trafficking.⁶ 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. Because this precertification benefit is dependent on the individual state,⁷ 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.

Proposed Changes: 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 *immigrant 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 confidentiality protections at 8 USC 1367 and the restrictions in 8 CFR 214.11(p) Restrictions on use and disclosure of information relating to applicants for T nonimmigrant classification.* If the *immigrant alien* has a credible claim to victimization, USCIS may advise the *immigrant 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 *immigrant's alien's* safety.

Comments: USCIS must act carefully in referring potential trafficking victims to LEAs. Trafficking victims may choose to not work with LEAs for many reasons including their age, trauma or fears. As 8 CFR 214.11(h) notes, the requirement to report to LEAs can be waived for T nonimmigrant visa applicants. A report by USCIS to ICE for such an

⁶ Daniel Enos and Leslye E. Orloff, Access to State-Funded Public Benefits in California for Survivors (May 14, 2019) <https://niwaplibrary.wcl.american.edu/pubs/california-benefits>

⁷ NIWAP, All State Public Benefits Charts and Map (2021) <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>

applicant, or potential applicant, would defeat the purpose of the confidentiality protections at 8 USC 1367 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 LEAs.

11. Evidentiary Standards and Burden of Proof

Recommended Language: [8 CFR 214.11(d)(5) and in preamble]

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 *or otherwise located in the administrative record* 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 *the totality of the previously or concurrently submitted evidence submitted by the applicant and in the administrative record. If information contained in the administrative record could result in an unfavorable determination, the applicant shall be given a copy of the evidence in the administrative record that could contribute to an unfavorable decision on the victim's application for T nonimmigrant status, and the victim shall be provided an opportunity to respond to such adverse evidence.*

Comments: FNUSA has witnessed an increase in the issuances of Request for Additional Evidence (RFE) by USCIS asking applicants to explain inconsistencies that adjudicators have found in the applicant's administrative record. Often, however, the applicant does not have access to, and is not aware of, these purported inconsistent records. This includes records of observations or opinions made by DOS or DHS officers at the time of a previous inspection, admission, or application for a previous immigration benefit. Those records are generally lacking in the context and are based on the subjective impression of the federal employee or contractor. The unfavorable information in the administrative record may be based, in whole or part, on actions or statements of the trafficker or the accomplices of the trafficker. It may be based on observations of the applicant, or comments made by the applicant, who was under threat from or under the control of the trafficker at the time. The official may have been mistaken or biased in their observation or opinion or the officials may have used an unqualified interpreter to obtain and incorrectly record misinterpreted information. 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 and interviewed by CBP within close proximity of their traffickers. These victims are almost always unable to

provide information related to their trafficking experience due to their fear of retaliation from the trafficker. 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 included in responses to FOIA requests. Without access to these records, a victim-applicant is not able to provide further context (e.g., the location of the trafficker during the interview, trauma, fear, information about whether a qualified interpreter was used) to address the allegedly inconsistent statements.

12. Bona Fide Determinations

Recommended Changes: [8 CFR 214.11(e) and in preamble]

8 CFR 214.11(e)

(1) Criteria. After initial review, an application will be determined to be bona fide if:

- (i) The application is properly filed and complete;
- (ii) The application does not appear to be fraudulent;
- (iii) The application presents prima facie evidence of each eligibility requirement for T-1 nonimmigrant status;
- (iv) Biometrics and background checks are complete; and
- (v) The applicant *presents prima facie evidence that the applicant is:*

(A) Admissible to the United States; or

(B) Inadmissible to the United States based on a ground that may be waived (other than section 212(a)(4) of the Act); and either the applicant has filed a waiver of a ground of inadmissibility described in section 212(d)(13) of the Act concurrently with the application for T nonimmigrant status, or USCIS has already granted a waiver with respect to any ground of inadmissibility that applied to the applicant. USCIS may request further evidence from the applicant. All waivers are discretionary and require a request for waiver, on the form designated by USCIS.

Alternative Changes:

8 CFR 214.11(e)

(1) Criteria. After initial review, an application will be determined to be bona fide if:

- (i) The application is properly filed and complete;
- (ii) The application does not appear to be fraudulent;
- (iii) The application presents prima facie evidence of each eligibility requirement for T-1 nonimmigrant status;
- (iv) Biometrics and background checks are complete.

Once DHS has determined the petition is bona fide, DHS determines whether the applicant is a risk to national security or public safety by reviewing the results of the background checks and other relevant discretionary factors. In considering an applicant's risk to national security or public safety, DHS will consider whether the conviction or activities in question are related to or incident to the trafficking victimization. If the convictions or activities are related to the applicant's trafficking victimization, the applicant is presumed to not be a risk to national security or public safety.

Comments: FNUSA notes with alarm that USCIS remains unable to issue bona fide determinations in a timely manner. 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.⁸

However, processing times have increased to 20-43.5 months⁹, and still bona fide determinations are not being issued.

The 2016 Interim Rule states that, “in the event of processing backlogs, DHS recognizes that a bona fide determination may offer a victim of trafficking some protection for immigration status purposes, employment authorization, and the availability of public benefits through HHS.”¹⁰ And yet, the bona fide determination process remains elusive.

During these extended processing times, T Visa applicants are unable to receive many federally funded benefits or work legally in the US. Many are under threat of imminent removal by immigration courts, and others are held in inhumane conditions in immigration detention. When trafficking survivor applicants are unable to work lawfully or access benefits and services, they remain vulnerable to re-victimization and exploitation. This delay in accessing critical services, coupled with the ongoing trauma is unacceptable and contrary to Congressional intent that provides much-needed stability to survivors to help them recover from their victimization, rebuild their life, and prevent re-victimization.

The intent of Congress in creating a bona fide determination standard was to ensure that victims 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)).

The Interim Final Rule suggests that an actual adjudication of admissibility must be made before a bona fide determination can be issued. This is contrary to Congressional intent. The bona fide determination is meant to be a quick process that is completed before a decision is made on the merits of the application. A bona fide determination does not require a full adjudication of inadmissibility, both because that is not the applicable standard of proof and because the T Visa has broad waivers of

⁸ 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).

⁹ Current processing time for I-914, as accessed on August 25, 2021, <https://egov.uscis.gov/processing-times/>.

¹⁰ 81 Fed Reg 92279.

inadmissibility. Instead, the only consideration of inadmissibility should be whether the applicant is inadmissible on security or related grounds (the only grounds which are not waivable in T visa cases¹¹) or if a waiver application has been filed. There is no reason to require only prima facie evidence of every other element required for a T Visa, but to require a full adjudication of the admissibility element. All elements should be subject to the same prima facie standard. In issuing a bona fide determination, therefore, USCIS need not conduct a full admissibility review, but only ensure that a waiver application is on file if it appears that the applicant may be inadmissible.

FNUSA has provided 2 options for implementing this more appropriate review. Either USCIS can consider the filing of the waiver form to be prima facie evidence of eligibility, or USCIS can implement the same procedure used for bona fide determinations for U Visa applicants. Either approach will focus the assessment to a narrow assessment, subject to the 'any credible evidence' standard, and should allow USCIS to begin processing bona fide determinations in a reasonable time frame while T Visa applications are pending.

Additionally, DHS should extend the Bona Fide Determination provision to include qualifying family members of I-914 applicants. Thus, bona fide determinations would also be granted to derivative family members if the principal applicant has received a bona fide determination, has properly filed a complete Petition for Qualifying Family Member of T-1 Recipient (Form I-914, Supplement A) which includes credible evidence of the qualifying family relationship, and USCIS has received the results of the qualifying family member's background and security checks based upon biometrics. This would ensure equal protection and support for the family, in spite of long adjudication times.

13. Derivatives facing 'present danger of retaliation'

Recommended Changes: [8 CFR 214.11(k)(iii) and in preamble]

8 CFR 214.11(k)(iii) Family member facing danger of retaliation. Regardless of the age of the principal *applicant alien*, if the eligible family member faces a present danger of retaliation as a result of the principal *applicant's alien's* escape from the severe form of trafficking or cooperation with *an LEA law enforcement*, in consultation with the *relevant LEA 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.*

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. Additionally, DHS should use the broader term, "LEA" rather than "law enforcement officer." The family member may face

¹¹ Limayli Huguet, Faiza Chappell and Leslye E. Orloff, Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases (November 16, 2020) (The only inadmissibility grounds not waivable for T Visa applicants are: Security and related grounds; International child abduction, and Former citizens who renounced citizenship to avoid paying taxes.)

retaliation due to the victim's cooperation with a judge, the EEOC, or any other agency defined as an LEA in the definitions section. All such danger should be considered under this section.

FNUSA also wants to recognize that the current statute has negatively impacted victims of trafficking and their siblings and 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 (or parent so that they can apply for their siblings) that are in present danger of retaliation from the trafficker. As a result, an applicant that does not have an eligible spouse or parent, will not be able to apply for their adult children or siblings. 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 an LEA. 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 US.

14. Evidence Demonstrating a 'present danger of retaliation'

Recommended Changes: [8 CFR 214.11(k)(6) and in preamble]

8 CFR 214.11(k)(6). Evidence demonstrating a present danger of retaliation. An ~~applicant~~ 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 ~~an LEA 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 ~~an LEA 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 ~~an LEA 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 but not limited to 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 US, the applicant, the applicant's family member's home country, or any country in which the eligible family member is facing danger of retaliation.*

Comments: FNUSA notes that using the term "LEA" is consistent with the regulations regarding reporting and compliance with reasonable requests. The term "LEA" has been defined to include a wide range of Federal, State, Tribal, and local officials with

responsibility to detect, investigate, and/or prosecute severe forms of trafficking in persons. Using this term consistently, throughout the regulation, will provide clarity.

FNUSA also notes that LEA may choose to not investigate and/or prosecute 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 must consider 'any credible evidence' to demonstrate present danger of retaliation. The determination of an 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 any credible 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 becomes 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 statement 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 exists 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

Recommended Changes: [8 CFR 212.16(b) and in preamble]

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) unnecessarily limits eligibility for T Visas. FNUSA notes that INA 212(d)(3)(B) already gives the Attorney General broad discretion to approve a waiver of inadmissibility, and that adjudications of all elements of T Visa applications are to be made based on a review of the totality of the circumstances applying the ‘any credible evidence’ standard. The language in subsection 3 unnecessarily limits the exercise of USCIS discretion absent extraordinary circumstances which are not defined in the statute and regulations.

Traffickers often target those with criminal records for abuse and exploitation. The victim’s criminal history, therefore, may not be a result of the trafficking, but may be part of the scheme that made them vulnerable to trafficking in the first place. For others, the criminal history is a result of the trauma of their trafficking experience. USCIS determinations about whether to exercise its’ discretion to grant a T Visa applicant an inadmissibility waiver for these criminal acts should be adjudicated on a case by case basis, viewed in the context of the totality of the circumstances considering any credible evidence. The language USCIS includes in subsection 3 imposes a limitation on this discretion that does not exist in statute which could dissuade applicants with criminal histories from reporting their victimization to LEA and filing T Visa applications.

16. Waiting List

Recommend Changes: [8 CFR 214.11(j)(1) and in preamble]

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 determinations 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. Should bona fide determinations be issued earlier in the adjudication process as we propose in these comments, wait list adjudication should result in an extension of the T Visa applicant's bona fide determination.

17. Revocation

Recommended Changes: [8 CFR 214.11(m)(2)(iv) and in preamble]

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 notify the T nonimmigrant applicant of the withdrawal or disavowal of the endorsement and provide the victim an opportunity to respond the information provided. In determining the impact that the withdrawal or disavowal has on the victim's T nonimmigrant status application, USCIS must review the application and reassess the applicant's eligibility for T-1 nonimmigrant status in light of the explanation provided by the LEA, and considering the totality of the circumstances and all other evidence provided by the applicant under the 'any credible evidence' standard.*

Comments: FNUSA acknowledges that the LEA certification is a tool to encourage LEAs to combat human trafficking. FNUSA also acknowledges that LEA should also have the power to revoke any certificate. However, 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." FNUSA also notes that USCIS has amended the regulations to clarify that an LEA endorsement is not primary evidence. Therefore, withdrawal of such an endorsement (which was neither required nor preferred in the first place) cannot be the basis for an automatic or even suggested Notice of Intent to Revoke.

Upon receipt of a withdrawal or disavowal, USCIS must provide the victim an opportunity to review and respond to the documentation from the LEA. USCIS must then reevaluate the totality of the application, including the applicant's response to the LEA's withdrawal/disavowal using the 'any credible evidence' standard. 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. If USCIS determines that the application no longer meets the requirement, USCIS should then issue a Notice of Intent to Revoke or a Request for Additional Evidence, allowing the applicant sufficient time to respond.

18. Interviewing T Visa Applicants

Recommended Changes: [8 CFR 214.11(d)(6) and in preamble]

8 CFR 214.11(d)(6) Interview. *No interview is required for an applicant to be granted T nonimmigrant status. However, USCIS may require request that an applicant for T nonimmigrant status to participate in an in-person or virtual interview with USCIS personnel responsible for the adjudication of T nonimmigrant visas.* The necessity, whether the interview will be in-person or virtual, and if in-person the 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 virtually or 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 recommends explicitly stating that no interview is required for T Visas applicants. USCIS should continue to make an adjudication based on the application presented using the ‘any credible evidence’ standard if the applicant is unable or unwilling to participate in an interview. Should USCIS request an interview, FNUSA urges USCIS to allow only those USCIS personnel who have been trained to adjudicate T Visa applications to interview those 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 regulations that some victims may have severe forms of trauma that would make them unable to even report their victimization to an LEA. 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 experienced by trafficking survivors. Further, by guaranteeing that any interview of a T Visa applicant will be conducted by trained adjudicators will help both reduce the trauma of any interview that USCIS determines is needed and streamline the process of including the interview in the adjudication.

19. Marriage of a T-1

Recommended Changes: [8 CFR 214.11(k)(5)(iv) and in preamble]

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) statutorily imposes with regard to the timing of the filing of the principal's application applies to unmarried siblings under 18 years of age. In FNUSA's experience, many trafficking survivors enter the US with the intention of returning to their home country in a short time and leave partners behind. Due to the trauma they have suffered, the trafficking crimes, or threats of danger from their trafficker, however, they are unable to return to their home country. As a result, some trafficking survivors have left their 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 deletion of the last sentence of the proposed rule allows USCIS to make discretionary decisions on evaluating derivative applications considering the totality of the evidence in the case applying the 'any credible evidence' standard.

20. Employment Authorization for Family Members

Recommended Changes: [8 CFR 214.11(k)(10) and in preamble]

8 CFR 214.11(k)(10) *Employment authorization.* An *applicant 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 burden of the fees on T nonimmigrant applicants, DHS should extend its exemption from 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.

21. Fees

Recommendation: FNUSA strongly recommends that DHS clarify, in all appropriate regulations, forms, instructions, and information, that all no fees shall apply to any form filed along with, or related to, an application for T nonimmigrant status or the adjustment of a T nonimmigrant.

Comments: DHS has taken significant steps to address and eliminate fees associated with applying for T nonimmigrant status. Because DHS has already acknowledged the burden of the fees on T nonimmigrant applicants, DHS should extend its exemption from fees to all applications filed along with, or related to, an application for T nonimmigrant status, including but not limited to: I-765, I-192, Motions to Reopen/Reconsider, and Appeals.

22. Applicants and eligible family members in pending immigration proceedings

Recommendation: [8 CFR 214.11(d)(1)(i); 8 CFR 214.11(k)(2)(i)]

8 CFR 214.11(d)(1)(i) Applicants in pending immigration proceedings. ... In its discretion, DHS *shall may* agree to the *applicant's alien's* request to file with the immigration judge or the Board a joint motion to administratively close, *continue*, or terminate proceedings without prejudice, whichever is appropriate, while an application for T nonimmigrant status is adjudicated by USCIS *or, at the respondent's request, shall move to dismiss proceedings pursuant to 8 CFR 239.2(c), 1239.2(c).*

8 CFR 214.11(k)(2)(i) Eligible family members in pending immigration proceedings. ... In its discretion and at the request of the eligible family member, ICE *shall may* agree to file a joint motion to administratively close, *continue*, or terminate proceedings without prejudice with the immigration judge or the Board, whichever is appropriate, while USCIS adjudicates an application for derivative T nonimmigrant status *or, at the respondent's request, shall move to dismiss proceedings pursuant to 8 CFR 239.2(c), 1239.2(c).*

Comments: In FNUSA's experience, DHS rarely joins T Visa applicants in immigration proceedings in motions to close, continue, or terminate proceedings. The ongoing immigration case compounds the trauma of the trafficking victim, who lives in ongoing threat of removal from the protection of the US. Additionally, the active case is a substantial waste of government resources, and burdens the substantially limited resources of the victim and their representatives. The failure to close, continue, or terminate proceedings is also contrary to Congressional intent. The very creation of the T Visa was intended to protect trafficking victims from removal from the US, so that they can recover from the trafficking experience and engage in legal processes to hold traffickers accountable. Removal from the US can render the victim ineligible for the T Visa and vulnerable to re-trafficking or retaliation from the trafficker, thus DHS must ensure that all reasonable actions are taken to ensure that trafficking victims are afforded a fair and complete adjudication of the T Visa.

23. Impact of T Visa approval on immigration proceedings

Recommendation: [new section]

DHS shall agree to a non-citizen's motion to reopen, terminate or, at the respondent's request, move to dismiss proceedings without prejudice upon proof that USCIS has approved the non-citizen's application for T-1 or T- derivative non-immigrant status.

Comments: While the regulations give guidance to DHS regarding immigration proceedings for immigrants with pending T Visa applications, they are silent as to the impact of the grant of a T Visa. While unusual, there have been cases of immigrants with approved T Visas who were forced to continue to fight removal in immigration court. The ongoing immigration case compounds the trauma of the trafficking victim, who lives in ongoing threat of removal from the protection of the US. Additionally, the active case is a substantial waste of government resources, and burdens the substantially limited resources of the victim and their representatives. The failure to close, continue, or terminate proceedings is also contrary to Congressional intent. The very creation of the T Visa was intended to protect trafficking victims from removal from the US, so that they can recover from the trafficking experience and engage in legal processes to hold traffickers accountable. Removal from the US can render the victim vulnerable to re-trafficking or retaliation from the trafficker, thus DHS must ensure that T Visa holders are protected from ongoing litigation and the threat of removal.

24. Impact of denial of T nonimmigrant status

Recommendation: [new section]

FNUSA appreciates the statement in the Preamble that “USCIS does not have a policy to refer applicants for T nonimmigrant status for removal proceedings absent serious aggravating circumstances, such as the existence of an egregious criminal history, a threat to national security, or where the applicant is implicit in the trafficking.” Preamble, Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92266, 92283 (Dec. 19, 2016). The agency should incorporate language to this effect into the regulation itself.

Issuing NTAs to survivors of trafficking undermines both the humanitarian and law enforcement purposes of the statute. USCIS’s 2018 to 2021 policy of issuing a Notice to Appear to survivors of trafficking if their T Visa application was denied had a devastating chilling effect on survivors of trafficking. FNUSA members represented multiple clients during that time who chose not to report their trafficking to an LEA or to apply for a T Visa out of fear that they might be placed in removal proceedings if their application was denied. Some trafficking victims suffered ongoing abuse and exploitation, while others were re-trafficked due to this policy.

25. Adjustment of Status

Recommended Changes:

8 CFR 245.23(a)(6): “(i) has, since first being lawfully admitted as a T-1 nonimmigrant and until the conclusion of adjudication of the application, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, as defined in 8 CFR 214.11(a), (ii) would suffer extreme hardship involving unusual and severe harm upon removal from the United States, as provide in 8 CFR 214.11(i); or (iii) *was younger than 18 years of age at the time of the victimization qualifying the applicant for relief under section 1101(a)(15)(T) of the INA.*”

Comment: Currently, DHS regulations related to adjustment of status are inconsistent with the statute. 8 USC 1255(l)(C)(iii) specifically exempts trafficking victims who were

under the age of 18 at the time of their qualifying victimization from engaging with law enforcement. An exemption that is notably missing from the regulations.

Thank you, in advance, for your consideration of these comments and recommendations. Please contact me at jean@freedomnetworkusa.org if you have any questions or need any further information.

A handwritten signature in black ink that reads "Jean Bruggeman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Jean Bruggeman
Executive Director
Freedom Network USA