

# FREEDOM NETWORK (USA)

## to Empower Trafficked and Enslaved Persons

April 1, 2002

Immigration and Naturalization Service  
Policy Directive and Instructions Branch  
Attn: TVPA Implementation Team  
425 I Street, NW  
Room 4034  
Washington, DC 20536  
Email: [insregs@usdoj.gov](mailto:insregs@usdoj.gov)

RE: *INS No. 2132-01*  
*67 FR 4784 (Jan. 31, 2002)*

Dear Implementation Team:

These comments of the Freedom Network (USA) to Empower Trafficked and Enslaved Persons relate to the recently proposed regulations on new classification for victims of severe forms of trafficking in persons and eligibility for T nonimmigrant status. *See 67 FR 4784 (Jan. 31, 2002).*<sup>1</sup> Members of the Freedom Network (USA) have provided services to trafficked persons in some of the major trafficking cases in the United States and have actively promoted a human rights response to trafficking worldwide and in the United States.

The Victims of Trafficking and Violence Protection Act (VTVPA) was signed into law in October 2000<sup>2</sup>. The VTVPA created new immigration remedies for victims of severe forms of trafficking. The VTVPA is divided into three sections. One of the sections, the Trafficking Victims Protection Act of 2000 (TVPA) seeks to protect victims of trafficking, prosecute traffickers, and prevent acts of trafficking in persons. During congressional debates, legislators consistently emphasized the priority of protection, often praising the law for upholding the human rights of victims of trafficking.<sup>3</sup>

The TVPA also creates a T visa for victims of severe forms of trafficking who meet three criteria: 1) they are victims of severe forms of trafficking, 2) they have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, and 3) they would suffer extreme hardship upon removal.<sup>4</sup> By creating this visa, Congress recognized

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<sup>1</sup> The comments were made possible thanks to the contributions of the following agencies: Catholic Legal Immigration Network, Inc; International Human Rights Law Group; Lutheran Immigrant & Refugee Services; Midwest Immigrant & Human Rights Center a Program of Heartland Alliance; National Immigration Law Center; National Immigration Project of the National Lawyer's Guild; NOW Legal Defense and Education Fund; Safe Horizon; and U.S. Conference of Catholic Bishops.

<sup>2</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1464 (October 28, 2000) (hereinafter VTVPA).

<sup>3</sup> Trafficking Victims Protection Act/Conference, Passage." Senate Record Vote Analysis: Vote No. 269. 106th Congress, 2nd Session. (Oct. 11, 2000).

<sup>4</sup> *Trafficking Victims Protection Act*, § 107(e). Not sure about the citation

and validated the real fears of victims of trafficking, including deportation, retribution, and revictimization. In the preamble to its proposed regulations, the Immigration and Naturalization Service (INS) recognizes that “Congress’ intentions in passing the TVPA were to further the humanitarian interests of the United States and to strengthen the ability of government officials to investigate and prosecute trafficking in persons crimes by providing temporary immigration benefits to victims.”<sup>5</sup>

We commend the INS’s efforts in recognizing the vulnerability of victims of trafficking and the need to “create a safe haven for certain eligible victims of severe forms of trafficking in persons who are assisting law enforcement.”<sup>6</sup> However, certain provisions of the proposed regulations fail to provide the full protection created by the TVPA. We suggest that the INS use the guidance and expertise it has developed in asylum law and in dealing with cases under the Violence Against Women Act (VAWA) when implementing the TVPA. We recommend that certain provisions contained in the proposed regulations be clarified to become consistent with the spirit of the law: to protect victims of severe forms trafficking.

#### ▪ **8 CFR §103.7 - Fees**

The fees required by the Interim Rules for trafficking applications are excessive and should be eliminated or, at least, significantly reduced. If a fee is required, the preamble should state that fee waivers must be generously considered.

The basic filing fees for trafficking applications include the fee for the principal applicant that is set at \$200. If any additional family members apply, the fee increases by \$50 for each family member for a maximum amount of \$400. In addition, applicants must submit fees for fingerprinting at a cost of \$50 for each derivative applicant aged 14-79. Added to these costs are fees for any waivers of inadmissibility that will be necessary. The fee for the I-192 (waiver of inadmissibility) is currently \$195. Finally, if a family member files an application subsequent to the principal applicant, he or she must pay the total \$200 fee. In sum, fees for immigrating a family of four could reach almost \$1000. These fees do not include costs for legal services.

Such fees are excessive, especially when one considers the types of situations that Congress intended to remedy. The T visa is available for individuals who have been held captive as virtual slaves in forced labor, slavery or involuntary servitude situations. Given the very nature of their victimization, it is unlikely that such individuals will have sufficient resources available to apply for this remedy.

In the supplementary information appended to the proposed regulations, the INS explained that it is required to collect fees to recover the cost of providing immigration and naturalization benefits. Under the Immigration and Nationality Act (INA) § 286(m), the INS is required to set fees at a level that covers the cost of providing the services but, in calculating fees, the INS must include the costs of “services provided without charge to asylum applicants or other immigrants.” Thus, the congressional mandate to recover the costs of services specifically envisions that in some circumstances the INS for humanitarian reasons must provide services to individuals who cannot afford to pay for them. In the TVPA, Congress expressly acknowledged that victims of trafficking would have economic needs similar to those experienced by refugees,

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<sup>5</sup> 67 FR 4784 (Jan. 31, 2002)

<sup>6</sup> *Id.* at 4785.

and provided that they should be eligible to receive benefits and services to the same extent as refugees. It is therefore reasonable and consistent with Congress's expressed purpose in enacting the TVPA for the INS to process these applications free of charge.

The supplementary information also discusses the way the INS arrived at its fee structure. It states that the application for trafficking is comparable to the I-360 (Petition for Special Immigrant). The current fee for an I-360 is \$130. Because T visas allow individuals to apply for work authorization, it added on another additional \$70, even though the INS need not track a separate form for work authorization. We believe that, if a fee for the T visa application is required, it should be imposed at \$130, the level of the I360, the application that the INS considers comparable to the T visa application.

Finally, the supplementary information discusses the availability of a fee waiver but states that its consideration will be in the sole discretion of the INS. We suggest that the preamble to the rule state that the INS will consider fee waiver applications in a generous manner.

In short, we believe that the fee needs to be eliminated. If the fee is not deleted, it must be significantly reduced and the preamble should direct the INS to grant waivers in a generous manner.

▪ **8 CFR §212.16, *et.al.* – Applications for exercise of discretion relating to T nonimmigrant status**

**Waivers of inadmissibility**

The TVTPA provides waivers of inadmissibility grounds for T nonimmigrants, such as the general nonimmigrant waiver of INA §212(d)(3). In addition to any other waiver that might be available under INA §212, the Attorney General may waive, in his discretion and if he considers it to be in the national interest to do so, the application of:

- the health and public charge inadmissibility grounds; and
- any other inadmissibility grounds, except for the security and related grounds, the international child abduction ground, and the renunciation of U.S. citizenship to avoid taxation, if the activities that rendered the person inadmissible were caused by, or were incident to, the trafficking victimization.<sup>7</sup>

The statute thus allows a T nonimmigrant to apply for any general waiver for which he or she is eligible, but also provides a special waiver for activities that are caused by or incident to the trafficking victimization.

**Fees for waivers**

In order to obtain waivers of these grounds, INS is requiring all applicants to submit a separate waiver form with an added fee of \$195. This is an unduly expensive and complicated procedure to require of these victims. As the TVPA acknowledges the similarities between victims of trafficking and refugees, it should be noted that refugees are not charged fees to apply for a

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<sup>7</sup> INA § 212(d)(13)(B).

waiver of grounds of inadmissibility for admission. It is therefore reasonable and consistent with Congress's expressed purpose in enacting the TVPA for the INS to process requests for waivers of grounds of inadmissibility free of charge.

Additionally, due to the nature of trafficking situations, it is likely that most, if not all, victims will need to apply for waivers of one or more grounds of inadmissibility. For example, a victim who was smuggled into the country in order to work in prostitution, and as a result contracted a sexually transmitted disease, would be subject to at least three grounds of inadmissibility, for illegal entry, prostitution and health grounds. In enacting the TVPA, Congress expressly found that victims should not be penalized "for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documents, or working without documentation."<sup>8</sup>

In the TVPA, Congress also directed that victims of trafficking be eligible for public benefits to the same extent as refugees.<sup>9</sup> As the supplementary information to the Interim Rule notes, "[r]efugees are provided with special humanitarian benefits because of their vulnerable circumstances, and are exempt from virtually every aspect of the public charge determination. For the purposes of receipt of public benefits, Congress has recognized that victims of severe forms of trafficking are in a very similar position as refugees, and thus provided specific authority for the INS to exempt them from the ground of inadmissibility for aliens who are likely to become a public charge."

Given such clear congressional intent, INS should not only process waivers of inadmissibility free of charge for victims of trafficking, but it should also develop a simpler procedure for granting waivers for those grounds of inadmissibility that are likely to commonly arise in the trafficking situation. At a minimum, these include health grounds, public charge, and being present without admission or parole or due to other immigration violations. With respect to these grounds, INS could easily provide space in the T visa application allowing victims to explain the reasons why they engaged in particular acts that may be grounds of inadmissibility. It could then summarily waive these grounds without the added administrative burden to the applicant or to itself of tracking a separate form.

### **Waivers for criminal grounds – "Exceptional Circumstances"**

The Interim Rules provide that in the case of applicants inadmissible on criminal and related grounds under INA § 212(a)(2), the INS will exercise its discretion only in exceptional cases, unless the criminal activities rendering the alien inadmissible were caused by or were incident to the trafficking victimization.<sup>10</sup> This provision imposes a requirement beyond those contained in the statute on nonimmigrant waivers other than the INA § 212(d)(13). The § 212(d)(13) waiver, aside from health or public charge grounds, is available only where the activities resulting in inadmissibility were caused by or incident to the trafficking victimization. By indicating that a waiver of inadmissibility based on criminal grounds can be granted only in exceptional cases, where the criminal activities were not caused by or incident to the trafficking victimization, the INS envisions two types of nonimmigrant waivers for criminal grounds: one, where the criminal ground was caused by or incident to the trafficking, and, two, exceptional cases. INA §

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<sup>8</sup> TVPA § 102(b)(19).

<sup>9</sup> TVPA § 107(b)(1).

<sup>10</sup> Proposed regulation 8 CFR § 212.16(b)(2).

212(d)(13)(B), however, specifically provides that applicants for T nonimmigrant visas may also benefit from any other waiver available under INA § 212. This would include the INA § 212(d)(3) nonimmigrant waiver, under which the Attorney General, in his or her discretion, may waive all of the inadmissibility grounds for nonimmigrants, other than certain security and related grounds.

There is no “exceptional case” requirement under the § 212(d)(3) waiver. Rather, that waiver is granted in the exercise of discretion, involving a balancing of the favorable and unfavorable factors in the applicant’s case. The Board of Immigration Appeals has set forth three of the factors to be weighed in this balancing: (1) the risk of harm to society if the applicant is admitted, (2) the seriousness of the applicant’s prior immigration law or criminal law violations, if any, and (3) the applicant’s reasons for wishing to enter the United States. *Matter of Hranka*, 16 I & N Dec. 491 (BIA 1976).

To impose a requirement of an “exceptional case” on the § 212(d)(3) waiver and any other nonimmigrant waivers available to the T visa applicant would in effect replace the exercise of discretion with the element of “exceptional case.” This additional element is beyond the requirements of the statute and beyond INS’s authority to impose.

The provision also fails to distinguish between the many types of criminal activity that can give rise to inadmissibility under INA § 212(a)(2). Among the criminal grounds of inadmissibility, for example, are crimes involving moral turpitude, which include offenses ranging from shoplifting to rape or murder. While the INS might, in the exercise of discretion, grant a nonimmigrant waiver of a very serious crime only in an exceptional case, a valid exercise of discretion in the case of less serious offenses could result in the granting of the waiver.

While it is understandable and commendable that INS is concerned about public safety issues arising from criminal background of applicants, this goal does not require denial of all waiver applications that do not meet the requirements of either being an exceptional case or being caused by or incident to the trafficking. We recommend that the “exceptional case” requirement in Interim Rule 8 CFR § 212.16(b)(2) be deleted, allowing waiver applications other than those under § 212(d)(13) to be adjudicated in the exercise of discretion.

### **Waivers at time of adjustment of status**

Our second concern under Interim Rule 8 CFR § 212.16 lies with the provision that, where an inadmissibility ground would prevent or limit an applicant from adjusting to lawful permanent residence, INS will waive the inadmissibility ground (other than INA § 212(a)(6)) only in exceptional cases.<sup>11</sup> This fails to take into account the purposes of the TVPA, which are to protect and provide services to the victims of trafficking, as well as to end trafficking through preventive measures and prosecution of trafficking crimes.<sup>12</sup> A victim of trafficking may not meet all the requirements for adjustment of status, but may well need the protection and services that may be provided even during a temporary stay in the United States. Similarly, a trafficking victim may be of great assistance in the prosecution of trafficking crimes even if that person is never able to adjust to permanent residence.

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<sup>11</sup> Proposed regulation 8 CFR § 212.16(b)(3).

<sup>12</sup> TVTPA § 102.

Moreover, this provision fails to take into account the immigrant waiver provided to T nonimmigrants adjusting to permanent resident status, found at INA §245(1)(2). This immigrant waiver for T nonimmigrants is worded identically to the nonimmigrant T waiver found at INA §212(d)(13). Thus, an inadmissible T nonimmigrant may be eligible for a waiver of the inadmissibility both as a nonimmigrant and as an immigrant. It is at least possible that if the INS determines that the T nonimmigrant is eligible for a nonimmigrant waiver, it may also find the person eligible for the counterpart immigrant waiver.

Last, one must consider the trauma experienced by victims of trafficking when developing application procedures for various immigration benefits. Victims who have been subjected to exceptional physical and mental abuse by traffickers frequently develop Post-Traumatic Stress Disorder (PTSD),<sup>13</sup> a condition that is likely to impede some T visa holders from applying to adjust their status. Persistent avoidance of stimuli that provide memories or flashbacks of traumatic events is a characteristic feature of PTSD. Many victims of trafficking may fail to submit waivers at the time of adjustment because of their fear of flashbacks and their strong aversion to any process or even reminiscent of the abuse they have endured. We fear that some otherwise eligible trafficking victims may fail to adjust their status if they are required to go through the process of applying for a waiver of inadmissibility all over again.

- **8 CFR §214.11(a) – Definitions**

- Involuntary servitude**

- The proposed definition of involuntary servitude is improperly restricted with the citation of *US v. Kozminski*, 108 S.Ct. 2751, 487 U.S. 931, 101 L.Ed.2d 778 (1988). The citation should be stricken. In the TVPA §§102(b)(13)–(14), *Kozminski* is accurately cited for its restrictive definition of involuntary servitude, which excludes psychological coercion. The statute goes on to explain that existing law is inadequate to bring traffickers to justice, which is a main reason why TVPA was enacted. It is intended that the TVPA definition of involuntary servitude goes well beyond *Kozminski* and include psychological coercion.

- Reasonable request for assistance**

- The regulations are vague regarding what factors need to be considered when assessing the “nature of the victimization and the specific circumstances of the victim” in order to determine whether the victim is complying with all reasonable requests for assistance.

- Specifically, INS should consider any fears the trafficking victim has of retribution against family members outside the United States and for whom U.S. law enforcement can offer no protection. For some victims, cooperation with law enforcement may necessarily fall short of testimony in court or participation in the discovery phase of a trial.

- The regulations are similarly vague regarding how much time a trafficking victim has to comply with reasonable requests for assistance. Trafficking victims fear disclosure when a likelihood exists that family members may be subjected to retribution, or when perpetrators are still at large and the victim’s safety cannot be assured. Trafficking victims vary greatly in their response to

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<sup>13</sup> *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (1994) American Psychological Association 424 / 309.81.

violence and trauma. Some otherwise eligible T visa applicants will have developed PTSD or major depression as a result of their abuse, rendering them temporarily unable to fully cooperate in all reasonable requests for assistance from an LEA. Accordingly, the INS should take into consideration all reasonable delays required to provide safety, access to social services including, if required, medical and mental health services, and the time required to establish a relationship of trust with the victim. In order to build this trust, INS should refer suspected trafficking victims to appropriate social service providers *before* making a determination about whether the potential trafficking victim is in compliance with all eligibility requirements for a T visa.

### **Determining Reasonableness: Totality of the Circumstances**

We commend the Department of Justice for adopting the totality of the circumstances test when determining the reasonableness of a law enforcement request and offer suggestions for its application.<sup>14</sup> The two-fold purpose of the TVPA is to “ensure just and effective punishment of traffickers, and to protect their victims.” In order to be eligible for a T visa, victims are required to assist law enforcement, but only to the extent that a request for assistance is reasonable.<sup>15</sup> To determine the reasonableness of a law enforcement request in trafficking cases, a totality of the circumstances test requires balancing the protection of trafficking victims with law enforcement’s investigation and prosecution of traffickers; thus, balancing the interests comprising the two-fold purpose of the TVPA.

The totality of the circumstances test is sufficiently broad to help ensure that victims will be protected because it allows consideration of a variety of factors. A narrow construction or test would only serve to unnecessarily deny victims access to a protection desperately needed, which would, in effect, punish them and thwart the TVPA’s major purpose of protection. Further, in applying the totality of circumstances test, we recommend that a subjective trafficked person standard be applied. The use of any other standard other than that of a subjective trafficked person would ignore the unique situation of a trafficking victim.

Beyond stating that a totality of the circumstances test will be used, the regulations should include a non-exhaustive list of factors to consider when engaged in the balancing test. Such factors include, but are not limited to:

- whether the victim suffered severe trauma;
- whether the victim has access to psychological support and services;
- whether the request would re-traumatize the victim;
- whether the request would put the victim’s life or liberty in jeopardy;<sup>16</sup>
- whether the possibility exists of retribution against the victim or family members;
- whether law enforcement in the victim’s country of origin could or would be willing to adequately protect the victim’s family from retribution if the victim testifies;
- whether physical protection is provided;
- whether trust has been established with law enforcement;

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<sup>14</sup> 67 FR 4796 (Jan. 31, 2002).

<sup>15</sup> 8 U.S.C.A. § 1101(T)(i)(III)(aa) (requiring that an alien “has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking”).

<sup>16</sup> NOW Legal Defense and Education Fund received a technical assistance call from a trafficking victim who was asked by law enforcement to confront her trafficker wearing a wiretap.

- whether the victim has already complied with other requests;
- whether the request would yield superfluous rather than essential information;
- whether the information could be obtained independently without the assistance of the victim;
- whether an interpreter was used to communicate with non-English speaking victims, ensuring that the victim understood what was asked of her or him;
- whether an attorney or advocate was present who was able to communicate with non-English speaking victims;
- whether the request would raise cultural, religious or moral objections from the victim; and
- whether the victim had sufficient time to consider the request for assistance.

### **Reasonableness of requests for children 15 and older**

The TVPA states that persons under the age of 15 do not have to comply with all reasonable requests for assistance. However, when determining compliance in cases of minors who are 15 years of age or older, INS should consider both the actual age of the trafficking victim and any trafficking-related developmental delays or pre-existing conditions which would adversely affect the minor's ability to cooperate with law enforcement.

Many trafficked children have been severely victimized long before arriving in the United States. INS should assess the duration and severity of abuse, and the effects of that abuse on the victim, when determining how much compliance is enough for a child between the ages of 15 and 18 to meet the threshold for eligibility. A wide range of factors can influence a child's development, emotional maturity and ability to trust law enforcement sufficiently to permit adequate cooperation. Such factors may include but are not limited to psychological trauma, child sexual abuse whether related to trafficking or not, separation from family or constraints placed on normal social interaction, malnutrition, and pre-existing disabilities or medical conditions.

In particular, children and teenagers have a much more varied and unpredictable response to psychological trauma than adults. These differences are compounded if the trauma was of long duration or occurred at a young age. Response to trauma differs in children depending on gender and culture, the age when the abuse began, the identity of the perpetrator, the nature of the abuse, and whether the abuse was intermittent or continuous. Children with identical histories of abuse may differ greatly in their response to trauma and thus their capacity to cooperate, offer reliable testimony, and provide all reasonable assistance to law enforcement.

Not all teenagers are equally able to assess risks and benefits of cooperation, especially if they have been threatened not to cooperate by the perpetrator. Teenagers between the ages of 15 and 18 may have great difficulty distancing themselves sufficiently from traffickers who may, in some circumstances, be relatives or persons who are perceived to function in a parental or familial role.

In all cases of suspected trafficking of minors, INS should permit independent psychological evaluation by a qualified expert with prior experience working with immigrant children and teenagers, prior to making a final determination of eligibility.



## **Regulations ought to adhere to the reasonable request standard according to the legislation**

Under the TVPA, a victim of a severe form of trafficking in persons must comply with “any reasonable request for assistance” in the investigation or prosecution of acts of trafficking in person, unless the victim is under the age of 15.<sup>17</sup> The test set out in the statute is whether the request was reasonable and not whether the applicant’s refusal to assist the law enforcement agency was reasonable. The standard, however, is misstated in three sections in the regulations.

The standard set forth in the legislation must be consistent throughout the regulations. Consistency helps ensure standard evaluation of all applications and helps eliminates confusion about what the standard is. The misstated sections include:

### a. Preamble, page 4788

The standard is misstated in the preamble under the section entitled “What is the Law Enforcement Agency Endorsement?” The third sentence of the second full paragraph reads: “The LEA endorsement serves as primary evidence that the alien is a victim of severe form of trafficking in persons, and *has not unreasonably refused to assist* in the investigation or prosecution of trafficking in persons.” The emphasized portion should be replaced with the proper statutory language “has complied with reasonable requests.”

### b. § 214.11(s)(1)(iv), page 4802

This subsection under “Grounds for notice of intent to revoke” reads “In the case of a T-1 principal alien, an LEA with jurisdiction to detect or investigate the acts of severe forms of trafficking in persons by which the alien was victimized notifies the INS that *the alien has unreasonably refused to cooperate* with the investigation or prosecution of the trafficking in persons and provides the INS with a detailed explanation of its assertions in writing.” The emphasized portion should be replaced with the proper statutory language “the alien has refused to comply with a reasonable request.”

### c. Insert the word “reasonable” on the law enforcement declaration<sup>18</sup>, page 4820

Part C of the Declaration of Law Enforcement Officer for Victim of trafficking in Persons is entitled “Cooperation of Victim.” The law enforcement officer must check one of five boxes that explain the victim’s level of cooperation with law enforcement. The first two boxes refer to whether the victim complied with “requests for assistance;” however, the word “reasonable” should be inserted before “requests.” The lines would therefore read that the applicant 1) “has complied with *reasonable* requests for assistance...” and 2) has failed to comply with *reasonable* requests to assist...” [Emphasis added].

The two-fold purpose of the TVPA is to “ensure just and effective punishment of the traffickers, and to protect their victims.”<sup>19</sup> However, the proposed regulations do not provide adequate recognition of second prong. The proposed regulations over-emphasize control of victim-witnesses by law enforcement agencies (LEAs) and has the potential to harm trafficked persons.

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<sup>17</sup> TVPA § 107(e)(1)(C), 8 U.S.C.A. § 1101(T)(i)(III)(aa).

<sup>18</sup> 67 FR 4820 (Jan. 31, 2002).

<sup>19</sup> TVPA § 102(a).

It establishes a system whereby federal LEAs will have the ability to manipulate the entire T nonimmigrant status, rendering trafficked persons vulnerable to coercion from those agencies.

▪ **8 CFR §214.11(d)(4) - Filing deadline in cases in which victimization occurred prior to October 28, 2000**

The proposed regulations require anyone victimized by trafficking prior to October 28, 2000 to apply for a T visa by January 31, 2003 (the effective date of the published rule). The TVPA states that a person who the Attorney General determines “is or *has been* a victim of a severe form of trafficking in persons”<sup>20</sup> [emphasis added] may be eligible to receive T nonimmigrant status.

The plain reading of the statute indicates that two groups of trafficking victims are eligible for the T visa: applicants who *are currently victims* of a severe form of trafficking and applicants *who have been victims* of a severe form of trafficking. The INS recognizes the two groups of applicants and tries to establish a process for victims prior to the enactment to apply for the T visa.

However, no statutory basis exists for imposing a deadline for applicants who were victimized prior to the enactment of the TVPA. Had Congress wanted to limit the number of applicants for a T visa, Congress would have purposely crafted a deadline that would deny eligibility to applicants victimized prior to the date of enactment. Instead, Congress built into the statute other mechanisms into the statute that would limit the number of eligible applicants, such as the extreme hardship requirement. An example of Congress’s ability to intentionally impose a deadline can be found in the asylum context. Under INA § 208(a)(2)(B), asylum applicants are subject to a one-year filing requirement after the date of the applicant’s arrival in the U.S. In the asylum context, Congress specifically included statutory time limits. Thus, under the TVPA, any attempt to impose a deadline through regulations is without statutory authority.

Additionally, the deadline thwarts the TVPA’s purpose of protecting victims of trafficking by arbitrarily restricting the number of applicants. Congress recognized that trafficking is a serious offense by “protecting rather than punishing victims of such offenses.”<sup>21</sup> Any imposition of a deadline to apply for a T visa would undermine Congress’s intent to protect victims of trafficking.

Moreover, there are other practical reasons why a deadline should not be imposed:

- there is no statute of limitations prohibiting the prosecution of trafficking cases prior to October 28, 2000 that would suggest the need for a deadline;
- the deadline artificially limits the number of cases that can be prosecuted because fewer victims will come forward to report trafficking situations;
- traffickers are typically organized crime syndicates that have enduring operations, therefore they could still be located and prosecuted even after an extended period of time;
- the deadline does not take into account the tremendous task of identifying, contacting and notifying the hundreds of victims from already prosecuted cases; and

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<sup>20</sup> TVPA § 107(e)(1), 8 U.S.C.A. § 1101(T)(i)(I).

<sup>21</sup> TVPA § 102(b)(24).

- the deadline does not take into account the tremendous task of notifying the thousands of people victimized before October 28, 2000

### **Exceptional circumstances preventing a timely application**

Trafficking victims are among the most vulnerable members of the immigrant community. In particular, children and people with preexisting disabilities are among those most easily victimized. “Exceptional circumstances” should not be limited to psychological trauma, but should also include the existence of developmental disabilities as well as any physical or mental illnesses which may result in the victim being unable to adequately advocate on his or her own behalf. The INS should take into consideration objective, independent assessments by qualified experts of any medical or psychological factors compromising an applicant’s ability to file a timely application. Here and elsewhere in these comments, “qualified expert” should be interpreted to mean a licensed medical or mental health professional with previous experience working with recent immigrants, trained in working with interpreters, and experienced in forensic evaluation.

#### **▪ 8 CFR §214.11(d)(8) – Applicants in pending immigration proceedings**

According to the regulations, persons eligible for T visas may request that proceedings be administratively closed if the INS trial attorney concurs. In the interest of administrative efficiency, the regulations should indicate that the trial attorney should concur to close the case unless there is a compelling reason to withhold consent. Immigration judges have the authority to administratively close proceedings regardless of what the trial attorney does, so the regulations should acknowledge that immigration judges may do so and not require but, perhaps, encourage trial attorney concurrence. Doing so frees up valuable time, and lightens the court docket, as any motion for consent would require extensive trial attorney review and response. Additionally, as the VAWA experience teaches, trial attorneys receive little or no training on relief for victims of crimes and often are completely uneducated about such laws or extremely antagonistic toward the laws and their beneficiaries. Requiring trafficking victims to prove their case on two fronts, let alone navigating the system that brought their case to the fore, will only create additional trauma for the victim. This trauma was recognized in the TVPA and the mechanism to effectuate its alleviation should not inadvertently cause multiple hardships. This is especially true for victims who have not secured representation.

#### **▪ 8 CFR §214.11(d)(9) – T visa applicants with final orders of exclusion, deportation, or removal**

According to the proposed regulations, persons with final orders of exclusion, deportation or removal, receive automatic stays if the INS Service Center in Vermont makes a bona fide finding. Thus, there seems to be a gap for those persons without final orders who receive bona fide approvals. As those with final orders receive automatic stays when the INS Service Center in Vermont makes a bona fide finding, presumably immigration judges could administratively close the cases of any applicant with a bona fide finding, regardless of the INS trial attorney’s position. The regulations should advise immigration judges to administratively close the cases of any T visa applicant who has received a bona fide finding.

#### **▪ 8 CFR §214.11(e) – Dissemination of information**

We are troubled by those provisions of the proposed Rule and other Department of Justice (DOJ) releases that suggest that any information included in a T visa application is not only subject to review by federal agencies investigating and prosecuting traffickers but also may be turned over to defendants in pending criminal proceedings. Similarly, we are troubled by the language used in the T visa application, Form I-914, which indicates that any information contained in a T visa application can be used to remove an unsuccessful applicant. We believe that these provisions and pronouncements are likely to have a severe chilling effect on persons eligible for T visas and on the successful prosecution of trafficking cases. Rather than cooperating with government authorities, victims of trafficking may be reluctant to come forward if they believe that the INS will turn this information over to their traffickers or use it to have them removed. These provisions are contrary to similar confidentiality provisions in other statutes and regulations, including U.S. asylum law, remedies for abused spouses under the Violence Against Women Act, and legalization under INA § 245A. Nor does federal criminal procedure or U.S. Supreme Court precedent mandate them.

One of the central purposes of the TVPA is to encourage immigrant victims of trafficking to report the crimes committed against them and to assist in the investigation or prosecution of such crimes.<sup>22</sup> Congress recognized that victims of trafficking are frequently unfamiliar with the laws, cultures and languages of the countries to which they have been trafficked and are often subjected to coercion and intimidation and fear retribution and forcible removal to countries in which they will face retribution and other hardship. *Id.* TVPA §107(c) specifically calls on the Attorney General and Secretary of State to adopt regulations to provide for the protection of victims of trafficking, including measures to protect the victim's safety from traffickers, as well as measures to ensure "that the names and identifying information of trafficked persons and their family members are not disclosed to the public."

Interim regulations published on July 24, 2001 were intended to provide guidance on measures to protect and assist victims of trafficking. Those regulations, however, did not specifically address the issue of confidentiality but merely reiterated the statutory language in the TVPA requiring government officials to ensure that the names and identifying information regarding trafficking victims and family members are not disclosed to the public.<sup>23</sup> The preamble to the January 31, 2002 interim regulations includes a brief statement that a victim's confidentiality and safety will be considered "to the extent that the law allows." After giving a brief reference to confidentiality requirements, the preamble goes on to suggest that federal authorities may have a constitutional obligation to turn information in a T visa application over to the defendant traffickers. It states that the government has a duty to disclose exculpatory evidence and impeachment material in order for the defendant to prepare his or her defense, and suggests that anything in a T visa application is fair game. Not only is this statement misleading but it is contrary to actual federal practice and is likely to discourage those victims of the most severe forms of trafficking from coming forward. Such individuals may be terrified of their abusers seeking retribution against them or their families. A statement that material in their T visa application may be turned over to the defense, without further discussion of the appropriate legal standard, will deter many from seeking relief.

The Department of Justice has attempted to insulate itself from criticism by immigrant advocates with the mantle of the Fifth Amendment. It suggests that if prosecutors do not make certain

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<sup>22</sup> TVPA, § 102 (b)(20).

<sup>23</sup> Interim Regulation 28 CFR § 1100.31(d).

information provided by victims available to defendants, they will have violated criminal defendants' due process guaranties, including the right to a fair trial. As the Department of Justice is well aware, under U.S. Supreme Court precedent, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. *Moore v. Illinois*, 408 U.S. 786, 795 (1972). The prosecutor will not have violated his or her constitutional duty of disclosure unless the omission is of sufficient significance to result in the denial of defendant's right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 108 (1976). The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense. *Id.* at 109. If, however, the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *Id.* at 112. The omitted evidence must, however, be examined in the context of the entire record. Where, as in *Agurs*, there was overwhelming evidence of the respondent's guilt, the Court held that the prosecution's failure to submit evidence of the victim's prior criminal record did not deprive the respondent of a fair trial, especially where there already was sufficient evidence in the record regarding the victim's violent character. *Id.* at 114.

The case for not disclosing information from T visa applications submitted by victims of trafficking is even more compelling, especially where the victim will not be testifying at the trafficker's trial. Federal Rule of Criminal Procedure 16 requires that the government

permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects [etc.] which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense.

FRCP 16(a)(1)(C). The same rule clearly indicates, however, that

this rule does not authorize . . . the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. Sec. 3500.

Title 18 U.S.C. § 3500 indicates that

[i]n any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena [sic], discovery or inspection until said witness has testified on direct examination in the trial of the case.

Arguably, a T visa application prepared by a victim of trafficking is a "report" that only becomes discoverable by the defense once the T visa applicant has testified against the defendant. There may be many situations where statements provided by a victim of trafficking are used to investigate trafficking offenses, but where the victim is not required to testify and where information provided by the victim is not needed to convict. Where the victim does not testify, information in the T visa application is not needed for impeachment purposes. Under the constitutional standard discussed above, the prosecution is not under an obligation to disclose such information unless it is probative of the defendant's innocence and create a reasonable doubt that did not otherwise exist. The Department of Justice routinely withholds statements by

witnesses that it does not consider exculpatory. It is unclear why in this context it is so concerned about the threat of reversible error that it is willing to disregard the safety, security and confidentiality of immigrant victims of trafficking.

Finally, it is worth mentioning that in several other contexts, immigration laws and regulations specifically guaranty the confidentiality of applicants for relief. For example, in the context of asylum, Department of Justice regulations provide for non-disclosure to third parties. 8 CFR §208.6 provides:

The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum . . . shall be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

Similarly, in the context of VAWA, IIRAIRA §384 prohibits use by or disclosure to anyone of any information that relates to a VAWA self-petition, application for cancellation of removal or suspension of deportation or a battered spouse waiver by a conditional resident.<sup>24</sup> Furthermore, anyone who willfully permits information to be disclosed under that section is subject to a civil monetary penalty of up to \$5,000.<sup>25</sup> This confidentiality provision clearly recognizes the dangers VAWA applicants face if information in their applications is released to their abusers.

Finally, the legalization provisions contained a series of guaranties to prevent information in a legalization application from being disclosed to other units of the immigration service. See INA §245A(c)(5); 8 CFR §245a.2(t). The legalization statute prevents the Attorney General from using the information furnished by the applicant for any other purpose than to make a determination of the applicant's eligibility for legalization. INA §245A(c)(5)(A)(i). The statute did, however, include provisions that allowed the Attorney General to release certain information to law enforcement entities in connection with a criminal investigation or prosecution when such information was requested in writing by such entity. INA § 245A(c)(5)(B).

In conclusion, the Interim Rules suggest that INS adjudicators have broad authority to turn over information in a T visa application to federal prosecutors, who in turn, have broad authority to release the information to criminal defendants. These provisions are overly broad. Consistent with confidentiality provisions in other statutes and federal guidelines for the protection of victims, and in order to ensure the safety and confidentiality concerns of victims of trafficking without violating the defendants' constitutional right to a fair trial, it would appear that an appropriate standard would be one similar to the standard set forth in the legalization statute. Where federal prosecutors request certain information from the INS *in writing* in connection with a trafficking investigation or prosecution, the INS may release the information to federal prosecutors. The INS should not, however, volunteer this information unilaterally, unless pursuant to an investigation to determine whether the applicant meets the eligibility requirements for a T visa. In turn, prosecutors should be prohibited from releasing any information provided by the INS to trafficking defendants unless the information in the T visa application creates reasonable doubt of the defendant's guilt or the information is needed for impeachment purposes,

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<sup>24</sup> IIRAIRA § 384(a)(2).

<sup>25</sup> IIRAIRA § 384(c).

such as where the T visa applicant will be testifying at the trafficking defendant's trial. Furthermore, where the prosecution determines *sua sponte* that evidence in its files may be exculpatory, in order to protect victims of trafficking against retribution by trafficking defendants, before turning the evidence over to defense counsel, it should request that the presiding judge review the information and rule on its exculpatory value, taking into account both the weight of the evidence and the danger its disclosure may pose to the victims. In the event the presiding judge rules in favor of disclosure, proper notice should be given to the victim of trafficking and proper precautions to ensure her safety taken.

▪ **8 CFR §214.11(g) – Physical presence on account of trafficking in persons**

The TVPA provides that in order to be eligible for a T visa an alien must be:

... physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking. INA §101(a)(15)(T)(i)(II)

The INS has interpreted this requirement in its Interim Rules to reach an alien who<sup>26</sup>:

- 1 is present because he or she is being subjected to a severe form of trafficking in persons;
2. was recently liberated from a severe form of trafficking in persons; or
3. was subject to a severe forms of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the trafficking in persons.

However, the second and third requirements to prove physical presence go well beyond the language of the statute. The statute does not require victim of trafficking to try to leave the United States nor does it state that their presence after liberation or escape be directly related to the trafficking. The statute simply requires one to be in the country 'on account of' the trafficking and anyone who is in or has been in such a situation should qualify. These provisions, as proposed, particularly disadvantage individuals who may have been trafficked a few years ago but have fled the situation and remained in the United States. Even though these individuals are eligible to apply for a T visa according to 8 CFR §214.11(d)(4), the physical presence and opportunity to depart provisions render this eligibility virtually meaningless.

We therefore propose that requirements 2 and 3 for physical presence be eliminated. Instead, the word "or" should be added after the first requirement, and the following requirement should also be added:

"2. Was liberated or escaped from a severe form of trafficking in persons."

These requirements adhere to the spirit of the TVPA and ensure that all of the individuals who Congress intended to protect are able to access T visas and other benefits.

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<sup>26</sup> Proposed 8 CFR § 214.11(g)

In this subsection, the Interim Rules also state in the supplementary information that the INS interprets the statute to apply both to those aliens who entered the United States as part of a trafficking scheme, as well as those who were victimized after having entered the United States by other means. We are supportive of this element of the INS's interpretation of the physical presence requirement, although other aspects of this requirement must be broadened to conform to the intent of the law.

- **8 CFR §214.11(g)(2) - Opportunity to depart.**

The Interim Rules create an additional requirement to the statutory requirement that an applicant be physically present on account of the trafficking. Under the Interim Rules the trafficking victim must show, in addition to physical presence on account of trafficking, that he or she did not have a clear chance to leave the United States after escaping his or her traffickers:

If the alien has escaped the traffickers before law enforcement became involved in the matter, he or she must show that he or she did not have a clear chance to leave in light of the individual applicant's circumstances. 8 CFR §214.11(g)(2).

Nothing in the statute supports the creation of this additional burdensome requirement. Under this rule, the trafficking victim would be required to demonstrate a negative, i.e. that he or she did *not* have a clear chance to leave, which is virtually impossible. There is nothing in the law or legislative history to suggest that a trafficking victim has a duty to attempt to leave the United States after escaping traffickers.

Furthermore, such a requirement is contrary to congressional intent to provide protection to trafficking victims and to prosecute traffickers.<sup>27</sup> If trafficking victims must meet this burdensome requirement, they will be deterred from coming forward to law enforcement authorities and identifying their traffickers, for fear of being deported. This will lead to victims of trafficking who escape their traffickers remaining in the United States in an undocumented status facing a high risk of re-victimization. It will also leave their traffickers free to continue to victimize other vulnerable persons. Both outcomes are contrary to Congress' stated intent in the TVPA to punish traffickers and protect victims. *Id.*

The requirement not only undermines prosecutions, but it also places the lives of trafficked persons at risk because it requires victims to leave the country, notwithstanding the possibility for harm. The T nonimmigrant status provision clearly recognizes that persons who would suffer "extreme hardship involving unusual and severe harm" do not have to leave the country. The requirement that the trafficked person be present "on account of such trafficking" should not be interpreted to undermine the clear intention of Congress to provide a safe haven for trafficked persons who would suffer such extreme hardship. It should also not be interpreted to force trafficked persons to give up their rights to compensation from the trafficker and justice in the American courts. Furthermore, the requirement also conflicts with the policy memorandum of September 7, 2001, in which the Executive Associate Commissioner Michael Pearson directed field personnel not to remove possible victims prematurely:

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<sup>27</sup> TVPA § 102(24).



Regardless of the manner of encounter, if the individual is identified as a possible victim, Service personnel should take the necessary steps to ensure that the individual is not prematurely removed. Circumstances will vary from case to case, and INS personnel should keep in mind that it is better to err on the side of caution than to remove a possible victim to a country where he or she may be harmed by the trafficker or abuser, or by their associates.<sup>28</sup>

In apparent recognition of the difficulty of meeting the “clear chance to depart” test, and the myriad factors that would be relevant to such a determination, the INS states in the Interim Rules that it will consider whether an applicant had a clear chance to leave in light of the individual’s circumstances.<sup>29</sup> These circumstances would include, but not be limited to, circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers. Id.

Some of these factors, such as the effects of trauma on a trafficking victim, will be beyond the INS’s expertise to assess. The effects of trauma, as well as other psychological and mental consequences of being a trafficking victim can only be assessed by a mental health professional with expertise in the field. To ask an INS officer who is a layperson to make such an assessment does a disservice to the victim, the INS officer, and the intent of the TVPA, to offer protection to trafficking victims.

Finally, the “clear chance to depart” test is too vague to be applied fairly and uniformly. Does it mean that the trafficking victim had a clear chance to enter another country legally? What if she has a chance to depart but does not believe that she will be safe in the country she is able to depart to? What if a trafficking victim could gain only temporary protection in a third country and chose not to go? Would that person, pass the “clear chance to depart” test? The vagueness of the test opens it up to idiosyncratic and unpredictable application.

The “clear chance to depart” test is burdensome, vague and beyond the authority of the INS to implement. Congress did not impose a duty on trafficking victims to attempt to leave the country after escaping their traffickers. The INS should not impose such a duty by regulation. We recommend that this test not be included in the final regulation. It follows that the personal narrative statement required by Form I-914 should not require the victim to describe why he or she was unable to leave the United States after being separated from the traffickers, as it currently does.

Furthermore, questions regarding what steps the trafficking victim has taken to deal with the consequences of having been trafficked re irrelevant to eligibility for the T visa and should not have a bearing on the physical presence requirement. Therefore, the sentence referring to such questions should be deleted from 8 CFR §214.11(g)(2).

▪ **8 CFR § 214.11(g)(3) - Departure from the United States**

The Interim Rule provides that “an alien who has voluntarily left (or has been removed from) the United States...after the act of a severe form of trafficking...shall be deemed not to be present in

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<sup>28</sup> Victims of Trafficking and Violence Protection Act (VTVPA) Policy Memorandum #2 – U and U Nonimmigrant Visas, from Michael A. Pearson to Regional Directors, HQINV 50/1, Sep. 7, 2001, p. 3.

<sup>29</sup> Proposed 8 CFR § 214.11(g)(2).

the United States as a result of such trafficking unless the alien's reentry was the result of the continued victimization of the alien or a new incident of a severe form of trafficking." 8 CFR §214.11 (g) (3). This provision allows for two exceptions under which an alien who has left voluntarily or has been removed from the United States can be deemed to be present in the United States as a result of trafficking upon his or her reentry. There is at least one other important applicable exception that should be included in this provision.

The Interim Rule should also provide that if an alien has voluntarily left or been removed from the United States, but then the Attorney General authorizes or effectuates the alien's return to the United States to, *inter alia*, assist in the prosecution or investigation of his or her trafficker, that alien shall be deemed to be present in the United States as a result of such trafficking. The Interim Rule's current provisions would exclude a deserving victim of trafficking from T status protection who had been brought back to the U.S. by the Attorney General to, for example, help with prosecuting his or her trafficker.

We recommend changing the above provisions by adding after the words "reentry was" the following phrase: "authorized by the Attorney General to assist in the investigation or prosecution of acts of severe forms of trafficking in persons". This change will ensure that 8 CFR §214.11 (g) (3) is consistent with the purposes of the TVPA, including "to ensure just and effective punishment of traffickers... and to protect their victims." 22 U.S.C. §7101.

▪ **8 CFR §214.11(f)(1)-(4) and (h)(1)-(2). Law Enforcement Agency endorsement; Compliance with reasonable requests from law enforcement**

According to the proposed regulations, only certain LEAs can issue an LEA endorsement, which is practically mandatory for receiving a T nonimmigrant status. They can also trigger revocation of that status. The LEA will be used to establish two criteria: victimization and cooperation with "reasonable requests." This requirement creates an imbalance between the needs of law enforcement and the needs and rights of the trafficked person. It must be reassessed to reflect the statutory mandate to ensure protection of victims. Congress specifically recognizes the need to provide legal status for persons who "would suffer extreme hardship involving unusual and severe harm upon removal."<sup>30</sup> Provisions in the proposed regulations that undermine the ability of a trafficked person to access this protection should be deleted.

First, a LEA endorsement is not required by the TVPA. While a LEA endorsement is, of course, extremely useful, it is not required by the plain language of the statute. If Congress had intended to require a LEA endorsement, it could have done so as it did for the new U nonimmigrant visa<sup>31</sup>, which was adopted at the same time as the T nonimmigrant visa. Applicants for the U nonimmigrant visa must submit a "certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating [certain] criminal activity"<sup>32</sup>, including trafficking. Additionally, Congress did include a certification requirement in the TVPA as a precondition for trafficked persons to access to services.<sup>33</sup> The absence of a similar requirement in the T nonimmigrant visa requirements, particularly when the two new classes of nonimmigrant visas were enacted at the same time indicates the congressional intention not to require such endorsements.

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<sup>30</sup> TVPA § 107(e)(1)(C).

<sup>31</sup> TVPA § § 1513(b)(3), 214.11(h)(2).

<sup>32</sup> TVPA § 1513(c).

<sup>33</sup> TVPA § 107(b)(1)(E).

It follows, then, that there is also no statutory basis for the provision expressly denying T nonimmigrant visas to applicants who never had any contact with a federal LEA prior to filing an application or who failed to show “good faith attempts” to obtain a federal LEA endorsement.<sup>34</sup> In a letter to the INS in February 2001, Senators Wellstone and Brownback and Representative Chris Smith, who are three of the four principal sponsors of the new law, specifically stated that this was not intended as a grounds for denial. “Indeed, a victim may be eligible for the visa even though she has never come to the attention of a law enforcement agency or any other prospective gatekeeper.... We believe that a ‘gatekeeper’ provision would result in denial of protection to victims who, although they met all the statutory criteria for eligibility for the ‘T’ visa, had not come to the attention of the gatekeeper agency.”<sup>35</sup> This provision prejudices and rejects a certain category of applicants who are otherwise qualified to receive the T nonimmigrant status.

An applicant should be able to apply for the T nonimmigrant visa without LEA endorsement and provide other evidence demonstrating that she or he is a victim of trafficking and is willing to comply with “any reasonable request”. The evidence could consist, for example, of sworn statements from the applicant as to the circumstances of her/his victimization and a willingness to cooperate, sworn statements from other witnesses and experienced service providers, medical evidence or newspaper articles about the crime.

Second, the underlying reason for requiring a federal LEA endorsement is to ensure that trafficked persons contact a federal agency to report the crime. However, one of the LEAs named in the proposed regulations that will be able to provide the endorsement is the INS. Thus, the application itself is contact with an appropriate federal LEA, rendering the LEA endorsement superfluous. In fact, the INS is *required* to “make information from applications for T-1 nonimmigrant statute available to other” LEAs and to “coordinate” with Justice “to ensure that the Department of Justice component responsible for prosecution has access to all witness statements provided by the applicant.”<sup>36</sup> So the application itself can trigger a federal response that, in turn, satisfies the need for law enforcement access to the information about the crime.<sup>37</sup>

Third, any federal, state or local law enforcement agency should be able to provide a LEA endorsement and all should be given equal weight. In order to avoid the anomalous situation in which a trafficked person can submit a local LEA endorsement for the U nonimmigrant status but not for the T nonimmigrant status. The proposed regulations should be amended to permit the same type of LEA as is required for the U nonimmigrant status. In some cases, the trafficked person may have contacted local law enforcement officials or made a 911 call but, for a variety of reasons, has not followed up with any federal authorities.

Fourth, reliance upon a few federal agencies to provide endorsements has the potential of limiting the number of qualified trafficked persons who will be able to apply. INS appears to base its decision on the fact that the crime of trafficking can only be prosecuted at federal level. However, this ignores the instances in which the trafficker is not prosecuted for trafficking but

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<sup>34</sup> 67 FR 4784, 4799; proposed 8 CFR § 214.11(h)(2).

<sup>35</sup> *Letter to The Honorable Mary Ann Wyrsh, Acting Commissioner, INS*, dated February 22, 2001.

<sup>36</sup> 67 FR 4784, 4797; proposed 8 CFR § 214.11(e).

<sup>37</sup> We encourage the INS not to share information about a T visa application with other law enforcement agencies in our comments on 8 CFR § 214.11(e). Nonetheless, if those regulations are not changed, we believe that the INS should consider an application for a T visa as proof of cooperation with law enforcement since the INS would be able to initiate an investigation and submit the LEA endorsement.

for a lesser offense or is not prosecuted at the federal level at all. Some cases may even end up in state or local courts. This can happen for various reasons, the main ones being the lack of evidence to meet the high burden of proof in criminal trafficking cases and exercise of prosecutorial discretion.

Because the Attorney General has sole discretion to determine whether or not an applicant is a victim of a severe form of trafficking and also controls the primary LEAs named in the proposed regulations, the Attorney General effectively controls both the application and the decision making process. This can severely curtail the ability of bona fide trafficked persons from accessing the statutorily authorized legal status.

At a minimum, additional provisions should be added to ensure that federal LEAs issue endorsements, without undue delay, if the Attorney General decides not to prosecute anyone in the case, decides to prosecute for a lesser offense, or agrees to a state or local level prosecution. The disposition of the case by the prosecutor should not be dispositive of whether or not a particular person was trafficked. The person claiming to have been a victim of trafficking should be given the opportunity to present evidence before INS and should not be prevented from applying simply because a prosecutor decided not to prosecute for trafficking. The INS has an independent duty to make a determination of victimization and cooperation, which can only occur if it receives an application.

Additionally, the burden of proof to satisfy the T nonimmigrant visa requirements is lower than the criminal burden of proof and so, while the government may not be able to obtain a conviction for trafficking, the victims may still be able to prove that they were victims of trafficking who are eligible for T nonimmigrant visas.

▪ **8 CFR § 214.11(i) - Extreme hardship involving unusual and severe harm upon removal**

The TVPA provides that in order to be eligible for a T visa, an alien who is less than 15 years of age, must demonstrate that he/she would:

...suffer extreme hardship involving unusual and severe harm upon removal. INA § 101(a)(15)(T)(i)

The INS interpreted this requirement in its Interim Rules to mean that extreme hardship involving unusual and severe harm is a higher standard than that of extreme hardship as described in 8 CFR §240.58. The regulations state that the factors to be considered in evaluating extreme hardship involving unusual and severe harm are to take into account both traditional extreme hardship factors as well as those factors associated with having been a victim of a severe form of trafficking in persons. The regulations proceed to list factors that may be considered in totality and state that this form of hardship should not be based upon current or future economic detriment. The INS has interpreted that the factors to be considered include but are not limited to, the following:

- (i) The age and personal circumstances of the applicant;
- (ii) Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country;
- (iii) The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons;

- (iv) The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;
- (v) The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;
- (vi) The likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the applicant;
- (vii) The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would severely harm the applicant; and
- (viii) The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict as demonstrated by the designation of Temporary Protected Status, under section 244 of the Act, or the granting of other relevant protections.

While these factors may be of valid consideration in the case of adult trafficked victims, our concern is that these factors require extraneous evidence and are inherently satisfied in cases involving children, under the age of 15, who are victims of trafficking. We ask that the INS offer a *per se* assumption that child victims of trafficking would “suffer extreme hardship involving unusual and severe harm upon removal.” Due to both the psycho-social impact trafficking has on children as well as the inability of children to comprehend or articulate the issues concerning the harm they may face, it is our request that INS not impose this burden on child victims. In many trafficking cases, these children could be smuggled back into the U.S. or punished by the smugglers in their home countries. It would be unconscionable to expect traumatized children to articulate “extreme, unusual and severe” hardship in a way that would convey that they have satisfied that burden for INS purposes. We believe that the congressional intent of the TVPA is to protect trafficked victims, especially vulnerable child victims, and not to create hurdles that essentially exclude children from protections under this law.

- **8 CFR § 214.11(l)(2) - Waiting list.**

Once the cap of 5,000 is reached for issuance of the T-1 nonimmigrant status, eligible applicants will be placed on a waiting list. The proposed regulation states that the applicant “shall maintain his or her current means to prevent removal” but does not consider the situation in which the applicant may not have any “current means to prevent removal.” The regulation should include a provision to ensure that all eligible applicants are provided with the legal means to remain in the country in the interim.

- **8 CFR § 214.11(o) - Admission of T-1 applicant’s immediate family members**

The TVPA provides that an alien who has applied for or been granted T-1 nonimmigrant status may apply for admission of an immediate family member.” The regulations state that: “in the case of a T-1 principal applicant who is a child, the child’s parent (T-4) may accompany or follow to join the child.” While we commend the INS for recognizing the need for family unity in trafficking cases, we believe that this provision has an unintended negative consequence on child victims of trafficking. Based on the language in this regulation, if a child turns 21 years old before the derivative beneficiary can arrive in the U.S., the child’s parent cannot join him/her in

the U.S. We would recommend that the INS allow the date of T visa application to control the process for applying for derivative beneficiaries. If the date of application controls or locks the child into the derivative beneficiary option then children who turn 21 years old prior to their parents arrive into the U.S., can still be reunited with their parents and have a better chance of survival in the U.S. Without such an interpretation, children would unfairly be penalized for aging out and would be unable to start their post-trafficking lives with their family in the U.S. In many cases these children would not be able to apply for other family such as spouses or children because they wouldn't yet have had the opportunity to have begun traditional families of their own. In many of those cases, these trafficked children would have no family but their parents. Yet, under these Interim Rules, these children would essentially be denied the right to reunite with their family. These circumstances could lead children back into the hands of traffickers.

In addition, if children cannot be assured that their parents who live abroad will be protected, they will be hesitant to comply with requests for assistance to law enforcement since they know that their parents may be harmed by traffickers abroad. Both of these consequences go against the basic tenet of the TVPA and would be counter-productive to the effectiveness of the Act.

▪ **8 CFR §214.11(p)(1)-(2) - Alien victims of severe forms of trafficking in persons – Duration of T nonimmigrant status – Information pertaining to adjustment of status**

We are pleased to see that the proposed regulations grant T visa recipients nonimmigrant status for a three-year period and provide a mechanism, as prescribed in the statute, by which T visa recipients can apply to adjust status to lawful permanent resident after three years of continuous presence. We are concerned, however, by certain procedural requirements imposed in the regulations that are not prescribed by the statute and would unduly burden T visa nonimmigrants attempting to adjust status. Specifically, the regulations provide that T visas are nonrenewable and that a T visa applicant must apply for adjustment to lawful permanent residency within the 90-day period preceding the expiration of the three-year period.

TVPA §107 provides for adjustment of status of T visa nonimmigrants if they can demonstrate the following:

1. Physical presence for a continuous period of at least three years since the date of admission as a nonimmigrant under Sec. 101(a)(15)(T)(i);
2. Good moral character;
3. Compliance during the three-year period with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or extreme hardship if removed; and
4. Admissibility, unless the ground has been waived or is waivable.

We note that there is nothing in the statutory language that makes a T visa nonrenewable. In fact, the investigation and prosecution of traffickers may drag on for years. The federal government may in fact have a compelling interest in ensuring that a T nonimmigrant be available to testify or provide evidence. In certain cases, it may be in the government's interest for a T nonimmigrant to remain in such status, in order to ensure that he or she complies with reasonable requests for assistance. Moreover, there may be situations in which the person is eligible for T status but will not be eligible to adjust status to lawful permanent residence. For

these reasons, it is preferable to allow T nonimmigrants to renew their status at the end of the three-year period.

The 90-day period is too short and should be expanded. The INS does not consider the fact that many applicants for T-status may be children who should, at the very least, be given until the age of majority, to adjust their status. There are myriad of reasons why applicants may be unable to meet the 90-day deadline and may be left without legal status. Such reasons may include lingering psychological scars that remain as a result of the individual's victimization. The INS could easily accommodate such individuals by expanding the period of time for adjustment to one year. Such treatment would be more consistent with Congress' humanitarian interests in enacting the statute.

Even if the INS retains the requirement that the nonimmigrant apply to adjust status to lawful permanent residency within the 90 day period before the three year grant expires, we believe it is appropriate to allow an exception to the 90-day rule for good cause shown. Current T visa regulations provide for no such exception. Such an exception would parallel the law and regulations applicable to conditional residents, who must file an I-751 joint petition or waiver to remove the conditions on residency within the 90 days prior to the expiration of conditional residency. Failure to file within the 90-day period results in automatic termination of the alien's residency status and the initiation of proceedings. The regulations governing conditional residents specifically allow, however, for an exception for persons who do not file within the 90 days if they can demonstrate in writing, to the satisfaction of the district director, good cause for their failure to file.<sup>38</sup> If the I-751 petition is filed before jurisdiction vests with the immigration court and the late filing is excused and the petition granted, the director will restore the alien's residency status and cancel any outstanding Notice to Appear. If jurisdiction vests before the late petition is granted, the Court can terminate proceedings upon a motion by the applicant and the INS.<sup>39</sup>

Similarly, although in the case of T nonimmigrants, failure to file within the 90-day period may result in automatic termination of T status, the applicant should be eligible to apply for adjustment beyond the 90-day period if she or he can demonstrate good cause for the failure to file in a timely fashion. The good cause exception should be liberally construed in such cases, in light of the fact that T visa applicants, by definition, have suffered severe hardship; in adjudicating such requests, the Director should apply the "any credible evidence" standard. As the TVPA recognizes in its findings, many victims of trafficking are women and girls disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination and the lack of economic opportunities.<sup>40</sup> Victims of trafficking are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape, sexual abuse, torture, starvation, imprisonment, threats, psychological abuse and coercion.<sup>41</sup> Victims of trafficking may continue to suffer the psychological consequences of abuse many years after being granted nonimmigrant status and may be in need of ongoing counseling. It would be unduly harsh to bar them from adjusting status merely because they failed to file within this narrow 90-day window of opportunity. We emphasize that the good cause exception should be liberally construed in light of the vulnerable status of many victims of trafficking.

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<sup>38</sup> 8 CFR § 216.4(a)(6).

<sup>39</sup> 8 CFR § 216.4(a)(6).

<sup>40</sup> TVPA § 102(b)(4).

<sup>41</sup> TVPA § 102(b)(6).

In the event the late filing is excused, the director should restore the applicant's T visa status pending adjudication of the I-485 adjustment application and cancel any outstanding Notice to Appear. If jurisdiction already has vested in the immigration court, the Court should have authority to terminate proceedings upon joint motion by the applicant and the INS or retain jurisdiction and consider the applicant's eligibility for relief, including eligibility for adjustment of status pursuant to INA § 245(l).

As an alternative, the INS could adopt the proposal made by Senators Wellstone and Brownback and Representative Chris Smith in their February 22, 2001 letter to the INS, that "the 'T' visa remains valid for a period of at least four years."<sup>42</sup> They explain that: "[t]his would allow sufficient time for the lawful permanent resident application to be filed and either approved or denied." It is unclear why this proposal was not adopted as it would solve two major concerns, namely, the short time period proposed for T nonimmigrants to apply for permanent residence and the need for some sort of residence status during the period in which the application for permanent residence status is being considered.

▪ **8 CFR §214.11(s) – Revocation of approved T nonimmigrant status**

The only grounds provided in the TVPA for revoking the T nonimmigrant are for "conduct committed after the alien's admission into the United States, or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 101(a)(15)(T)(i)(6). Other grounds may be applicable but a relevant statute must also require them. We are concerned about two of the revocation grounds stated in the proposed regulations.

First, one ground for revocation is that the "T nonimmigrant violated the requirements" in section 214.11(s)(1)(i). The meaning of this provision is unclear. If the applicant has satisfied all four requirements for T nonimmigrant status, then, absent one of the two statutory grounds. An error in granting the status in the first place or revocation of a waiver, the status should not be revocable. It is unclear which of the four preconditions to the T nonimmigrant could violate once the status is granted. At a minimum, this ground should be described in greater detail, along with the statutory basis therefore.

Second, we have an even greater concern regarding the provision permitting any federal LEA to provide the INS with a notice that the alien is no longer cooperating with law enforcement. The apparent basis for this ground of revocation is the requirement that, as a *precondition* to receipt of T nonimmigrant status, an applicant must have "complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking." However, this requirement is written in the past tense, indicating that the intention of Congress was to ensure that, at the time the T immigrant status is granted, the applicant has complied.

The statute does not state that the applicant has an ongoing duty to comply once the T immigrant status is granted. The applicant must have complied with *any* reasonable request received by the time the T nonimmigrant status is granted, not *every* reasonable requests stretching into a future beyond the approval of the application. We agree with the statements by

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<sup>42</sup> Letter to Honorable Mary Ann Wyrsh, Acting Commissioner, Immigration and Naturalization Service, urging the INS to adopt implementing provisions that are "fully consistent with the generous and protective spirit of the Act itself."



Senators Wellstone and Brownback and Representative Chris Smith in their February 2001 letter that the “Trafficking Victims Protection Act contemplates two proceedings, and only two: the application for the ‘T’ visa, and a separate application for lawful permanent resident status”.

Obviously, we hope that all trafficked persons will cooperate, to the extent possible, with reasonable requests from law enforcement. At the same time, law enforcement should not be able to use the T nonimmigrant status as a lever to coerce testimony out of trafficked persons. After all, the purpose of the TVPA is twofold, law enforcement being only one prong.

Additionally, under the proposed regulations, nothing would prevent a federal LEA from using this revocation power to retaliate against a witness. In most instances, the LEA to issue such a non-cooperation notification would be the DOJ while the control of the T nonimmigrant status is also within the control of the DOJ, meaning there would be no independent agency reviewing the appropriateness of the notice.

Also, it is not clear why *any* federal LEA should be authorized to issue such a notice when the primary law enforcement agency would be DOJ. Why should the Diplomatic Security Service or Department of State be empowered to precipitate revocation if DOJ and/or INS are handling the case?

Third, revocation of a valid T nonimmigrant status on the ground of post authorization non-cooperation would place the US government in the position of having to remove a victim of an extremely serious human rights violation after the government has already determined that the victim “would suffer extreme hardship involving unusual and severe harm upon removal.” Would the government be willing to remove a trafficked person to her or his home country if, for example, the likelihood of retaliation by traffickers back home is high?

In their February 2001 letter to the INS, Senators Wellstone and Brownback and Representative Chris Smith, in a discussion about their concerns over ‘periodic review’ of eligibility for the T status, they noted that

even after a trafficking victim had proved to the satisfaction of the INS that she would face ‘extreme hardship involving unusual and severe harm’ if returned to her home country, [...] would nevertheless face deportation unless she could prove this again and again in consecutive proceedings. Such a provision might be appropriate in a case where there were compelling reasons to deport someone who had been granted relief, such as a serious criminal who had been granted a stay of removal under the non-return provisions of the Convention Against Torture. It is totally inappropriate, however, in the case of a person who has been granted protection because she is a crime victim.

During Senate hearings on March 7, 2002, Viet Dinh, Assistant Attorney General, Office of Legal Policy of the Department of Justice, was asked what the government would do if a T nonimmigrant status is revoked. He replied that the INS could grant continued presence or humanitarian parole. However, the first alternative would not occur because continued presence is only available for purposes of permitting victim/witnesses to remain during the investigation and prosecution. It would not be granted by the same Attorney General who had previously decided to revoke the T nonimmigrant status for non-cooperation. Humanitarian parole is also unlikely but would be the only alternative to removal (unless the trafficked person files for

asylum). Again, the Attorney General would be extremely reluctant to grant humanitarian parole for a victim he believes should be more cooperative.

Lastly, the statute recognizes the situation in which a trafficked person will have T nonimmigrant status but will not cooperate. The criteria for adjustment to permanent resident status states that the T nonimmigrant must *either* have “complied with any reasonable request” in the preceding three years *or* “would suffer extreme hardship involving unusual and severe harm upon removal.” Consequently, the statute intentionally creates a framework that recognizes the needs and rights of the victims, as well as the needs of the investigators and prosecutors. Trafficked persons who receive the T nonimmigrant status are highly likely to continue to cooperate with law enforcement, particularly if they are treated fairly and not being threatened with deportation.

In conclusion, if Congress had desired to create an immigration status for trafficked persons that is entirely within the control of, and for the benefit of, federal law enforcement, it could have raised the cap on the S nonimmigrant status or only created the ‘continued presence’ authority for the Attorney General and permitted S nonimmigrants or persons authorized under ‘continued presence’ to access the same benefits as are contained in the TVPA. However, Congress chose instead to develop a new nonimmigrant status that recognizes the difficulties and dangers faced by trafficked persons and provide some of them with a safe haven in the U.S. Unfortunately, the proposed regulations, both in requiring a federal LEA and in revoking a qualified trafficked person’s immigration status, seriously undermine this intent. Both elements are *ultra vires* and should be removed.

- **8 CFR §299.1 – Prescribed forms – T visa application form**

**Part C.**

**Question on victimization**

Question 1 is incorrect. It reads: “I am a victim of a severe form of trafficking in persons.” In order to adhere to the statutory language, it should read: “I am or have been a victim of a severe form of trafficking in persons.”

**Part D.**

**Questions on use of public benefits**

Question 2 asks the applicant whether he or she has ever received public assistance or whether he or she is likely to receive public assistance in the future. Such questions are overly broad and are likely to have a chilling effect on victims who seek essential benefits for themselves and their family members. They therefore contravene congressional intent that such victims be provided such benefits.

The public benefits question on the T visa application is over broad because it encompasses receipt of benefits that are not relevant for public charge determinations. Only cash benefits intended for income maintenance, or institutionalization for long-term care, are relevant to public charge determinations, receipt of non-cash benefits and cash benefits that are directed to a

specific purpose should not be considered in making public charge determinations.<sup>43</sup> In light of the public charge guidelines, the INS should delete this question from the application, as the agency deleted a similar question from the NACARA suspension and cancellation application.<sup>44</sup> Moreover, Congress specifically authorized eligible victims to use public assistance to the same extent as refugees.<sup>45</sup> Congress clearly intended that victims who had been forced to engage in slave-like situations receive government assistance in order to recover from their trauma and be integrated into U.S. society. Including this question on the application will deter victims from seeking needed assistance for themselves and for family members, and contravenes this congressional intent. For all of these reasons, the question should be deleted.

**Adding a SAFE mailing address to the derivative T visa application form and information on free legal services**

The INS should also consider adding a box to enter a SAFE mailing address as it has done for the principal applicant.

**Incomplete forms**

The T visa application states that the INS is not obligated to return a form adjudged to be incomplete or unacceptable. This is contrary to current practice for VAWA self-petitioners and asylum applicants. Incomplete VAWA self-petitions are returned with a rejection notice and applicants are permitted to correct the deficiency and re-file the application. Incomplete asylum applications are returned within 30 days of receipt for correction. It is overly harsh and against the spirit of the act to deny immigration relief to a serious crime victim over a technicality.

**Thank you for your attention to this very important matter.**

**Sincerely,**

**FREEDOM NETWORK (USA) TO EMPOWER TRAFFICKED AND ENSLAVED PERSONS**

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<sup>43</sup> INS Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692-93 (May 26, 1999).

<sup>44</sup> 64 FR 27856, 27873 (May 21, 1999).

<sup>45</sup> TVPA§ 107 (b).