

October 22, 2001

Immigration and Naturalization Service
Policy Directive and Instructions Branch
Attention: TVPA Implementation Team
425 I Street, NW, Room 4034
Washington, DC 20536

Re: Comments on Interim Rule, 28 CFR Part 1100, INS No. 2133-01

The undersigned organizations submit the following comments to the Interim rules, 28 CFR Part 1100, dated July 24, 2001. The comments contain the concerns and suggestions of a number of organizations in addition to the organizations signing below. All of the organizations contributing to this effort have direct experience in working with, or advocating on behalf of, trafficked persons.

We are very pleased with the direction taken by the Departments of Justice and State in the proposed Interim Rule; however, we believe it can be improved and have provided some suggested language.

If you would like to discuss any of our comments or proposed language changes, please do not hesitate to contact any of the organizations listed below. If you have any immediate questions, please contact the undersigned at 202,822-4600, ext. 27.

We look forward to working cooperatively with both Departments in combating trafficking and protecting the rights of trafficked persons. We also hope that you will seriously consider our comments and recommendations.

Sincerely,

Ann Jordan
Director, Initiative Against Trafficking in Persons

Signing on:

Campaign for Migrant Domestic Worker Rights, Institute for Policy Studies
Member of the Freedom Network (USA) to Empower Trafficked and Enslaved Persons
Washington, DC

Center for Human Rights and Constitutional Law
Los Angeles, Calif.

Coalition to Abolish Slavery and Trafficking
Member of the Freedom Network (USA) to Empower Trafficked and Enslaved Persons
Los Angeles, California

Coalition of Immokalee Workers
Member of the Freedom Network (USA) to Empower Trafficked and Enslaved Persons
Immokalee, Florida

Heartland Alliance for Human Needs & Human Rights
Member of the Freedom Network (USA) to Empower Trafficked and Enslaved Persons
Chicago, Illinois

Safe Horizon
New York, NY

COMMENTS AND PROPOSED LANGUAGE
INTERIM RULE, 28 CFR Part 1100
INS No. 2133-01

§1100.27 Purpose and scope.

Interim Rule (a)(1):

Trafficking victims are to be “housed in a manner appropriate to their status as crime victims, afforded *proper* medical care and other assistance....”

Comment: The above language alters the language of the TVPA, which states, at Article 107(c)(1), that victims “shall (A) not be detained in facilities inappropriate to their status as crime victims; [and] (B) receive *necessary* medical care and other assistance;...” This section should be rewritten in a manner that is consistent with the TVPA, preferably by repeating the exact wording of the statute.

Interim Rule (a)(4):

“Training of appropriate DOJ and DOS personnel in identifying victims of severe forms of trafficking in persons, in understanding the particular needs common to victims of severe forms of trafficking in persons,...”

Comment: These provisions are essential in order to ensure that government officials are trained in detecting trafficking cases and sensitive to the needs of victims. It would be appropriate also to recognize that not all victims suffer from the same form or extent of victimization and, consequently, have different, as well as common, needs. Children’s victimization and needs are different from adults and women’s are different from men’s. Also, women who have been sexually assaulted have needs that differ from women who have not been sexually assaulted.

Recommended language:

Training of appropriate DOJ and DOS personnel in identifying victims of severe forms of trafficking in persons, in understanding the common, as well as the particular, needs of women, men and children who have been subjected to the various forms of severe forms of trafficking in persons,...”

Interim Rule (c), third sentence:

“This subpart will ensure that these victims are identified as early as possible in the investigation and prosecution process, so that services and protections available to them under the laws of the United States are provided.”

Comment: Many persons who are trafficked into the country are intercepted by the INS and certainly will not be discovered unless INS, Labor Department and other federal personnel are trained to distinguish between undocumented migrants in general and trafficked persons in particular. Just as the INS presently has established protocols for identifying asylum seekers, federal agencies should also have protocols to identify trafficked persons. The proposed Interim Rule assumes that victims will be uncovered in the investigation and/or prosecution stage, which means that the government already has identified a possible trafficking case. However, if the victim(s) are in INS detention, the government will not learn about the case unless and until the victims are identified. They will never be identified if they are deported due to a lack of trained INS personnel.

In addition, while it is essential that appropriate federal personnel are trained to identify actual and potential victims of trafficking, the training should be done in a non-discriminatory manner. The Conference Committee report on the TVPA states that “[t]he conferees also believe that training provided to State Department and Justice Department

personnel should include methods for achieving antitrafficking objectives through nondiscriminatory application of immigration laws and other laws.” (Joint Explanatory Statement of the Committee of the Conference, HR 3244).

Trafficking involves women, men and children; nonetheless, discriminatory practices are often directed against women between the ages of 18-30 or women from particular countries. These women denied visas and detained and subjected to humiliating interrogations and deportation.

None of these actions will prevent trafficking. Young women who cannot enter legally may be deprived of the opportunity to attend universities abroad or to find jobs and so they are more likely to turn to smugglers to help them travel abroad in search of work. This, in turn, can lead to them becoming victims of trafficking if they are unfortunate enough to fall into the wrong hands during their clandestine movement.

Recommended language:

“This subpart will ensure that these victims are identified, through the application of non-discriminatory techniques, as soon as officials encounter circumstances giving rise to a suspicion that trafficking may be involved and as early as possible in the investigation and prosecution process, so that services and protections available to them under the laws of the United States are provided.”

§ 1100.29 Roles and responsibilities of federal law enforcement, immigration, and Department of State officials under the Trafficking Victims Protection Act (TVPA)

Interim Rule (a), second sentence:

“The goals of section 107(c) are to identify victims of severe forms of trafficking in persons as early as possible in the investigation and prosecution process,…”

Proposed language: The immediately preceding comments also apply to this Rule; therefore, we propose the following language:

“The goals of section 107(c) are to identify victims of severe forms of trafficking in persons, through the application of non-discriminatory techniques, as soon as officials encounter circumstances giving rise to a suspicion that trafficking may be involved and as early as possible in the investigation and prosecution process,…”

Interim Rule (b), first three sentences:

“Department of State missions throughout the world are often the initial contact for aliens in foreign countries who wish to come to the United States. Appropriate DOS personnel should be trained in identifying victims of severe forms of trafficking in persons. Furthermore, considering the international nature of trafficking in persons, appropriate DOS personnel, upon encountering victims of severe forms of trafficking in persons in foreign countries, should consider referrals to local law enforcement or service providers in the host country, but only if the local host country conditions support such actions.”

Comment: DOS officials, as the initial contact for aliens wishing to come to the United States, have a unique and valuable opportunity to help prevent trafficking by informing visa applicants of their rights in the United States. DOS officials should take advantage of this opportunity by providing important information along with visas.

In addition, once DOS missions identify potential or actual victims of trafficking, the proposed Rule correctly notes the need to ensure that “local host country conditions support” reporting of the crime to the local authorities. The most important concern here is for the safety of the victim. In many countries, corruption is rampant and government officials are either directly involved in trafficking or are willing to take bribes, both of which render the reporting of the possible crime risky. It would be advisable, then, mention the potential risk to victims as a paramount concern in determining whether or not to report the case.

Recommended language:

“When issuing fiancée, student, tourist and employer-based visas, DOS officials should provide aliens with verbal and written information, in a language the aliens understand, regarding the rights and protections available to persons under the TVPA, relevant U.S. labor, employment and other federal laws.

Department of State missions throughout the world are often the initial contact for aliens in foreign countries who wish to come to the United States. Appropriate DOS personnel should be trained to employ non-discriminatory means to identify [DELETE: in identifying] victims of all forms of severe forms of trafficking in persons. Furthermore, considering the international nature of trafficking in persons, appropriate DOS personnel, upon encountering victims of severe forms of trafficking in persons in foreign countries, should consider referrals to local law enforcement or service providers in the host country, but only if the local host country conditions support such actions and only if they are satisfied that such referral will not endanger the life of the identified victim(s) or their families.”

Interim Rule (c) states that federal law enforcement officers should bring victims of trafficking “to the attention of those federal law enforcement officials primarily responsible for enforcing trafficking laws, specifically INS or FBI.”

Comment: The Criminal Section of the Civil Rights Division at the Department of Justice has a number of staff attorneys who are specifically tasked to handle trafficking cases. These attorneys are among the most experienced and well-versed personnel in government on the trafficking phenomenon, the law and the special needs of victims. We believe they should also be notified whenever any cases of trafficking arise.

Recommended language:

“to the attention of those federal law enforcement officials primarily responsible for enforcing trafficking laws, specifically the DOJ Criminal Section of the Civil Rights Division and the INS or FBI.”

§ 1100.31 Procedures for protecting and providing services to victims of severe forms of trafficking in persons in federal custody.

Interim Rule (b):

“To the extent practicable and allowed by law, alternatives to formal detention of victims of severe forms of trafficking in persons should be considered in every case. However, if detention is required, victims of severe forms of trafficking in persons in federal custody, to the extent practicable, shall not be detained in facilities inappropriate to their status as crime victims. The responsible official shall make all efforts, where appropriate and practicable, to house those victims separately from those areas in which criminal are detained.”

Comment: TVPA § 107(c)(1)(A) is worded slightly differently, with a different focus:

“Victims of severe forms of trafficking, while in the custody of the Federal Government and to the extent practicable, shall (A) not be detained in facilities inappropriate to their status as crime victims;...”

The statute *requires* the federal government to house trafficking victims in facilities that are appropriate for victims, to the extent practicable, rather than to house them with criminals or undocumented migrants. The statute emphasizes the obligation of the government to seek alternatives first and only consider formal detention facilities as a last resort.

The use of the phrase “alternatives to formal detention...should be considered” does not capture the meaning of the statute. Rather than requiring government officials to use their *best efforts* to find appropriate facilities, it merely requires the government to *consider* alternatives to formal detention. After *considering* and rejecting alternatives to

formal detention, rather than making best efforts to find appropriate alternatives, the Rule then permits formal detention in lock up facilities.

Detention facilities should only be used after all other practicable possibilities have been exhausted. The statute does not contain the word “appropriate”, only the term “practicable” and so the only qualifier that should be used in implementing the statutory language is the word “practicable”. The word “appropriate” should be removed.

On the rare occasion in which detention facilities are the only practicable alternative available, victims should absolutely be separated from criminals. It is difficult to imagine any circumstances under which it would be *appropriate or* practicable to house victims with criminals. Trafficked persons must also be separated from suspected traffickers. We know of cases in which victims have been held in INS detention facilities together with their traffickers. This is totally unacceptable and contrary to the statutory language.

Recommended language:

“To the extent practicable and allowed by law, federal government officials shall use their best efforts to locate alternatives to formal detention of victims of severe forms of trafficking in persons [DELETE: should be considered in every case]. However, if, despite using best efforts, such alternatives are not available and the only practicable alternative is formal detention, [DELETE: detention is required,] then victims of severe forms of trafficking in persons in federal custody [DELETE: , to the extent practicable,] shall not be detained in facilities inappropriate to their status as crime victims. The responsible official shall [DELETE: make all efforts, where appropriate and practicable, to] house those victims separately from those areas in which criminal are detained and from those areas in which suspected traffickers are detained.”

Interim Rule (c):

“Victims of severe forms of trafficking in persons in federal custody shall receive necessary medical care and other assistance. This care should include free optional testing for HIV and other sexually transmitted diseases in cases involving sexual assault or trafficking into the sex industry, as well as a counseling session by a medically-trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim.”

Comment: Almost all trafficked persons require medical attention. Traffickers typically do not take their victims to doctors and, in fact, some may even forcibly medicate their victims. Thus, medical care is an absolute necessity. Testing for HIV and other sexually transmitted diseases must be conducted in an appropriate, gender-sensitive and culturally-sensitive manner. Trafficked persons must be provided with full disclosure, in a language s/he fully understands, of the manner in which all tests will be conducted, how the results will be used and who will have access to the results, as well as the type of treatment that will be provided if the trafficked person is ill with any type of disease. Fully-informed consent must be obtained prior to any testing or treatment and confidentiality of records must be ensured.

Unaccompanied minors in INS custody should be treated with the utmost care and concern in order to prevent retraumatization. Although the INS has in loco parentis authority to order testing and treatment of minors in its custody, it should consider carefully the manner in which the testing and treatment are carried out. Many trafficked children suffer from severe shock as a result of physical and sexual abuse, isolation, psychological abuse and culture shock. Many children come from countries in which women and girls do not see male doctors or talk about their health concerns with men. Also, children may be too young to understand or know anything about sexually-transmitted diseases and will need counseling by someone who is not only sensitive to the cultural and gender issues but also is trained to work with children. Lastly, confidentiality is also essential in dealing with children, as it is with adults.

Proposed language:

“Victims of severe forms of trafficking in persons in federal custody shall receive necessary medical care and other assistance. Fully-informed consent shall be obtained prior to all medical testing and care. This care should include free optional, voluntary and confidential testing for HIV and other sexually transmitted diseases in cases involving sexual assault or trafficking into the sex industry, as well as a counseling session by a medically-trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim. The testing, care and counseling should be done in a gender-sensitive and culturally-appropriate manner in order to avoid further traumatization of the victim. In addition, in the case of minor victims, special care must be taken to ensure that age-appropriate information, testing, counseling and care are provided. The medical records of a victim shall only be disclosed to the victim’s attorney of record and the child’s legal guardian, unless the victim or legal guardian, upon consultation with an attorney, consents in writing to further disclosure.”

§ 1100.33 Access to information and translation services for victims of severe forms of trafficking in persons.

Interim Rule (a)(3)

Information shall be provided to victims “about their rights and applicable services, including:

- ...
(3) Victim service organizations, including domestic violence and rape crisis centers;...”

Comment: Women, men and children are all trafficked into the United States. They are trafficked into many forms of involuntary servitude, forced labor and slavery. The types of organizations that can and do assist such victims are equally varied. They include organizations providing social and/or legal services to migrant workers, refugees, immigrant women, domestic workers, and children. Thus, the proposed language is too narrow.

Proposed language:

“Information shall be provided to victims “about their rights and applicable services, including:

- (3) Victim service organizations, including. without limitation, domestic violence and rape crisis centers and migrant worker, refugee, immigrant women, domestic worker and children’s rights organizations;...”

Interim Rule (b):

“(b) The federal agencies as defined in paragraph (a) of this section must ensure reasonable access to translation services and/or oral interpreter services in the event the victim is not able to communicate in English.”

Comment: Translators or interpreters offer an essential service enabling victims to understand their rights and the legal procedures of their cases. All translators and interpreters require training on trafficking and the legal framework in order to enable them to carry out their duties in a non-discriminatory and professional manner.

They must be selected carefully in order to protect the privacy and confidentiality of the victim’s identity and experiences as a victim of trafficking and also to ensure that they do not pose any threat to the safety of the victims.

Although the immigrant community speaking the same language as the victim may seem to be the best source for translators or interpreters, this resource can only be tapped with the greatest of care for the safety of the victim. First, the potential translator or interpreter must be investigated to sure that she/he does not have any ties with the trafficker. This is particularly a concern when the language group is one that is not common. For example, in the Reddy case, the victims spoke Telegu, which is not as widely spoken as Hindi, so drawing interpreters from the small pool of Telegu speakers would have been dangerous because of the ties many of them would have had to the traffickers.

Next, the interpreter must be trustworthy and capable of maintaining the confidentiality of the case to ensure that news of the location of the victim, the victim's identity and the victim's testimony is not spread among the immigrant community, where the trafficker may have contacts or even live. Furthermore, it is important to consider the question of whether a member of the immigrant community would be able to work with a victim on a non-judgmental basis. Many victims agree to enter the country illegally and to work without documents in any type of work they could find, including in the sex industry. It is not uncommon to discover that immigrant populations feel humiliated by such actions and view these immigrants as an embarrassment to their nation's reputation.

Lastly, the interpreter should be the victim's interpreter and should not be required to interpret for a group of victims, and certainly not for the traffickers. The TVPA states that the victim "shall have access to...translation services." The emphasis is upon the right of victims to have services for the purpose of assisting them in understanding their legal rights in the United States. The objective of this section is not to provide interpreters to assist the government with its case. Thus, the interpreter supplied to the victim should not be translating *for* the government and certainly should not be a paid government employee or contractee. The interpreter should be provided, at government expense, to serve the needs of the victim.

Many victims need interpreters, despite having some English language abilities. They may be able to 'communicate' in English but not be able to understand the complex language of American law or concepts and practices that are entirely foreign but are essential to their understanding of what is happening to them. Other victims may not even be able to read or write in their own language, let alone English, yet may be able to 'communicate' in English. The standard for providing a translator or interpreter should be broadened to ensure that victims are able to 'understand' English well enough to make reasoned judgments about legal rights, legal processes and their options.

Proposed language:

"(b) The federal agencies as defined in paragraph (a) of this section must ensure reasonable access to trained, safe and appropriate translation services and/or oral interpreter services in the event the victim is not able to communicate adequately in English, to fully understand what is being communicated to her or him by government authorities or to communicate complex events and thoughts in English to government authorities. The translators or interpreters shall not be government employees or a contractees; they shall be provided, at government expense, to assist victims in understanding and accessing all of the rights available to them and the legal processes in which they will be involved. To the extent possible, each victim shall have her/his own translation service or oral interpreter in order to avoid any perceived or actual conflict of interest or potential threat to the safety of the victim."

§ 1100.35 Authority to permit continued presence in the United States for victims of severe forms of trafficking in persons.

Interim Rule (a):

"Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the Immigration and Naturalization Service (INS) grant the continued presence of such aliens in the United States."

Comment: The 'continued presence' authority is an important tool in the law enforcement kit. However, it is not the primary or the only means by which trafficked persons may be able to remain in the country and this should be made clear in the Rule. Some trafficked persons will qualify for the T visa and, those who do not, may be authorized to remain under the 'continued presence' authority. We believe it is important to state clearly that the TVPA contains two new means for trafficked persons to remain legally in the country in order to ensure that federal law enforcement officials are not misled by the language of the proposed Rule to believe that 'continued presence' is the only or best alternative.

Proposed language:

“Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking should inform the victims that certain trafficked persons are eligible for a visa under 8 U.S.C. 1101(a)(15)(T), and they may assist the victim in applying for such visa; alternatively, in cases in which such a visa is not available, they may request that the Immigration and Naturalization Service (INS) grant the continued presence of such aliens in the United States.”

Interim Rule (b)(1)

“The alien’s continued presence in the United States under this subpart does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted. In most circumstances, victims granted continued presence will be eligible for temporary employment authorization.”

Comment: Persons who are trafficked into the United States, by definition, need to work for survival but the proposed Rule does not guarantee that all victims granted continued presence will be able to work. Aliens granted deferred action and parole are eligible for work authorization (8 CFR 274a.12). Aliens granted a stay of final order, however, are only eligible for work authorization if they are released on orders of supervision in cases in which they cannot be removed due to a country’s refusal to receive them. Work authorization is also not available in cases of voluntary departure. Trafficking cases can take months or years to complete and victims who are deprived of the ability to work may become reluctant or even disappearing witnesses. The language should be revised.

Proposed language:

“The alien’s continued presence in the United States under this subpart does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted and with the exception that work authorization shall be granted to all trafficking victims whose presence in the U.S. has been ensured according to section 107(c)(3) of the TVPA by the INS through the use of statutory or administrative mechanisms, upon the alien’s demonstration of “economic necessity,” as defined in 8 CFR 274a.12(d). [DELETE: In most circumstances, victims granted continued presence will be eligible for temporary employment authorization.]”

Interim Rule (b)(2), last sentence:

“Aliens granted deferred action based upon section 107(c)(3) are considered to be present in the United States pursuant to a period of stay authorized by the Attorney General for purposes of INA sections 212(a)(9)(B)(i) and (C).”

Comment: The TVPA continued presence language is intended to benefit the government and not harm the trafficked person who has agreed to assist the government. For this reason, the TVPA considers persons who are granted deferred action to be present in the United States pursuant to a period of stay authorized by the Attorney General pursuant to section 107(c)(3). During this period, they do not accrue time unlawfully present for the purpose of bars to readmission. This waiver of accrual is not limited to deferred action but includes all of the types of statutory and administrative mechanisms available and applicable under section 107(c)(3).

Proposed language:

“Aliens granted deferred action or stay of final order based upon section 107(c)(3) are considered to be present in the United States pursuant to a period of stay authorized by the Attorney General for purposes of INA sections 212(a)(9)(B)(i) and (C).”

Interim Rule (c)(1):

“In cases where it is determined that the granting to an alien of continued presence in the United States poses a threat to national security or to the safety and welfare of the public, the INS may require the requesting agency to meet special conditions or requirements prior to approval.”

Comments: Interim Rule (c)(1) refers to “safety and the welfare of the public” and (c)(2)(iv) refers only to “public safety” as considerations in evaluating requests for continued presence. We believe that national security and public safety should be the only criteria for taking additional measures or for rejecting a request for continued presence. The (c)(1) criteria for requiring additional measures and the (c)(2)(iv) criteria for rejecting a request for continued presence should be brought into conformity. The rules would then be consistent with the INS Instructions Governing “Continued Presence” Requests made by Federal Law Enforcement Agencies to the [INS], which only refers to “a threat to public safety or national security” (8/20/01,p. 4).

‘Public welfare’ is a broad term that might be interpreted to permit the isolation or deportation of victims who have contracted contagious diseases while they were victimized on U.S. soil. The term ‘public welfare’ should be removed from the proposed Rule.

Proposed language:

“In cases where it is determined that the granting to an alien of continued presence in the United States poses a threat to national security or to the safety [DELETE: and welfare] of the public, the INS may require the requesting agency to meet special conditions or requirements prior to approval.”

§ 1100.37 Requirements to train appropriate personnel in identifying and protecting victims of severe forms of trafficking in persons.

Interim Rule (a): Trainings for DOJ and DOS personnel will include:

“The TVPA requires that appropriate DOJ and DOS personnel be trained in identifying victims of severe forms of trafficking in persons and providing for the protection of such victims. These federal personnel will be trained to recognize victims and provide services and protections, as appropriate, in accordance with the TVPA, 42 U.S.C. 10606 and 10607, and other applicable victim-assistance laws. Specifically, the training will include, as applicable:

...
(7) Procedures and techniques for dealing with specialized needs of victims who may face cultural, language, and/or other obstacles that impede their ability to request and obtain available services for themselves; and...”

Comment: All training should include instructions, consistent with the Conference Committee Report, that “antitrafficking objectives” must be achieved “through nondiscriminatory application of immigration laws and other laws.”

Trafficked persons are often illiterate in their own language or unable to communicate, even in their own language, the information relating to their ordeal in a words or a format that is used by the more literate members of society. Furthermore, persons become victims of trafficking through different sets of circumstances. The majority start out as voluntary migrant workers, internally displaced people or refugees. Others are abducted and children are often sent away by their families to work. They arrive on our shores with different perspectives and needs. Some are anxious to continue their search for work and others are too traumatized to respond ‘normally’ to others.

It is also important, therefore, for the trainings to include information about the situations abroad that trafficked persons faced prior to leaving home and how those conditions impact their recovery and ability to function in our country. They also need to learn to deal with the specialized needs of illiterates, farmworkers, sex workers, women, and children as well as religious, caste, ethnic and cultural minorities.

Proposed language:

“The TVPA requires that appropriate DOJ and DOS personnel be trained in identifying victims of severe forms of trafficking in persons and providing for the protection of such victims. These federal personnel will be trained to recognize victims and provide services and protections, as appropriate and in a nondiscriminatory manner, in accordance with the TVPA, 42 U.S.C. 10606 and 10607, and other applicable victim-assistance laws. Specifically, the training will include, as applicable:

...

(7) Procedures and techniques for dealing with specialized needs of victims who may face cultural, religious, gender, caste, ethnic, language, literacy, age and/or other obstacles that impede their ability to request and obtain available services for themselves or to communicate effectively with law enforcement officials; and...”