



September 14, 2021

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U.S. Citizenship and Immigration Services
Department of Homeland Security

Submitted via www.regulations.gov

Re: CIS No. 2507-11; DHS Docket No. USCIS-2011-0010; Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status

Dear Ms. Deshommes:

Below please find comments submitted in response to USCIS-2011-0010 Reopening of the comment period for the interim final rule at 81 FR 92266, published December 19, 2016, on behalf of the Asian Pacific Institute on Gender-Based Violence (API-GBV). The API-GBV is a national resource center on domestic violence, sexual violence, human trafficking, and other forms of gender-based violence in Asian and Pacific Islander and immigrant communities, and serves a national network of advocates, community-based victim services programs, federal agencies, national and state organizations, legal, health, and mental health professionals, researchers and policy advocates.

API-GBV co-chairs the Alliance for Immigrant Survivors (AIS), supporting domestic violence and sexual assault victim advocates and their statewide and national coalitions by providing up-to-date information about immigration policy changes and their particular impacts on the safety-planning that survivor advocates engage in with immigrant victims to mitigate risks to their well-being. Based on our work supporting victim advocates and in working directly with Asian and Pacific Islander (API) and immigrant survivors of domestic violence, sexual

assault, and human trafficking, API-GBV submits the following comments, focused on USCIS processes on immigrant survivors and their ability to escape and overcome trafficking and abuse, such as those available Trafficking Victims Protection Act and subsequent reauthorizations,¹ as well as the Violence Against Women Act (VAWA) and related reauthorizations.²

Members of immigrant communities with uncertain immigration status are particularly vulnerable to crimes such as human trafficking because, if they fear they will be deported for contacting law enforcement, they are unlikely to report abuse, sexual assault, and other crimes.³ We commend USCIS for reopening the interim final rule to examine the impacts the rule has had on trafficking survivors, and to remove some of the barriers placing survivors at risk of ongoing harm. We additionally make note of the following clarifications and guidance which improve access to the T-visa for vulnerable trafficking survivors:

- Expanding the definition of Law Enforcement Agency (LEA) to include State and local agencies, and clarifying that agencies that detect and investigate human trafficking although they may not prosecute trafficking are also included in the definition;
- Recognizing no statutory requirement for a deadline and permitting the filing of applications for survivors whose trafficking took place prior to October 28, 2000,

1 The Victims of Trafficking Protection Act of 2000, Pub. L. No. 106-386 (2000); Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), Public Law 108-193, 117 Stat. 2875 (Dec. 19, 2003); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Public Law 110-457, 122 Stat. 5044 (Dec. 23, 2008); Justice for Victims of Trafficking Act of 2015 (JVTA), Public Law 114-22, 129 Stat. 227 (May 29, 2015).

2 P.L. No. 103-322, 108 Stat. 1902-1955 (1994); Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Public Law 109-162, 119 Stat. 2960 (Jan. 5, 2006); Violence Against Women Act of 2013 (VAWA 2013), Public Law 113-4 (Mar. 7, 2013).

3 See Stacey Ivie et al., Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims, Int'l Ass'n Of Chiefs of Police (Apr. 2018), Retrieved from https://www.policchiefmagazine.org/wp-content/uploads/PoliceChief_April-2018_F2_Web.pdf; Lindsey Bever, Hispanics "Are Going Further into the Shadows" Amid Chilling Immigration Debate, Police Say, Wash. Post (May 12, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/05/12-immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say>.

- Clarifying that if a T Visa holder is unable to file within the 4-year filing deadline to adjust status, there may be exceptional circumstances that allow them to adjust later;
- Reducing the burden on principle and derivative T-visa applicants by eliminating the three passport-photographs requirements for T Visa applications;
- Discontinuing the practice of delineation between primary and secondary evidence, and instead, using the “any credible evidence” standard;
- Providing guidance on how victims of attempted human trafficking can apply for a T Visa in situations when they have not actually been forced, tricked into, or coerced to engage in labor, services, or sex acts; and
- Reinforcing that the confidentiality provisions found at 8 U.S.C. § 1367(a)(2) and (b) apply to human trafficking survivors.

These clarifications and guidance help ameliorate the significant barriers in the immigration process that served to undermine the purpose and intent of the TVPA to protect victims during the last several years.

To build on these provisions, to improve access to the T-visa program, API-GBV makes the following recommendations:

I. Definitions: 8 CFR 214.11(a)

A. Law Enforcement Agency

API-GBV recommends that that the list of Federal LEAs in the definition of “*law enforcement agency*” should be expanded to explicitly include agencies who are likely to identify labor trafficking including tribal law enforcement agencies, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). While API-GBV acknowledges that the list provided in the definition is not exhaustive, explicitly including tribal authorities recognizes the function that they play in addressing human trafficking on tribal land. Likewise, the EEOC and NLRB inform victims and victim-advocates of these agencies that

have been continuously engaged in investigating and pursuing remedies for trafficking victims and have already been endorsing LEA certification for T-Visas.

For example, the EEOC has aggressively pursued human trafficking cases under anti-discrimination laws, particularly cases discriminating on the basis of race, national origin, and sex, including sexual harassment, including in such cases involving trafficked workers including cases against Signal International, LLC, Henry's Turkey Services, Global Horizons, Marine Services Company, and Del Monte Fresh Produce.

Similarly, the NLRB has already taken steps to begin providing LEA T-visa endorsements. By expanding the explicit list of Federal agencies, victims will be better informed of where they can report their victimization. Additionally, the more expansive list will reduce confusion as to which LEA agencies can endorse LEA certifications for T-Visas. In API-GBV's experience, employees of EEOC and NLRB have expressed confusion on whether they have the authority to provide T-visa certifications because their organization is not explicitly listed in the regulations, but are explicitly listed in the U-Visa regulations. The explicit list will serve to benefit not only victim-applicants but also federal agencies in providing clarity on which agencies can investigate and detect human trafficking.

API-GBV recommends that the definition of *Law Enforcement Agency (LEA)* be amended by adding "*tribal,*" following State, and "*Equal Employment Opportunity Commission (EEOC); and National Labor Relations Board (NLRB)*" following "Department of Labor" in the current rule.

B. Involuntary Servitude

API-GBV recommends that the definition of *Involuntary Servitude* be expanded to further define *serious harm* and *abuse or threatened abuse of legal process*. We applaud DHS

for clarifying the definition of involuntary servitude to encompass the broader understanding of the definition of “severe form of trafficking in persons.” We further recommend that DHS mirror the definition of “forced labor” pursuant to 18 USC §1589 and “sex trafficking” pursuant to 18 USC §1591, which were amended in the TVPRA of 2008 to include the two aforementioned terms, which provide clarifying legal definitions important to include in the new updated regulations. Adding these definitions to 8 CFR 214.11(a) will help to clarify that the definitions of “serious harm” and “abuse or threatened abuse of the legal process,” show that “involuntary servitude” should be interpreted broadly to consider all surrounding circumstances and could include financial injury and harm to one’s reputation.

Similarly, including the legal definition of “abuse or threatened abuse of legal process” will also provide further clarification of the definition of involuntary servitude. From our experience as national technical assistance providers, we frequently receive comments from practitioners that they did not realize the inclusiveness of legal definition of “abuse or threatened abuse of legal process” included administrative and civil processes.

API-GBV recommends the following two additional definitions be included to better support the definition of “Involuntary Servitude”:

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

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

II. Application: 8 CFR 214.11(d)

A. Law Enforcement Disavowed or Revoked Endorsement. 8 CFR 214.11(d)(3)(ii)

API-GBV acknowledges that the law enforcement certification is a tool for the criminal legal system to combat and prosecute human trafficking and can choose to provide or not provide a certification to an applicant. However, API-GBV is concerned with DHS's intention to no longer use the certification as evidence if it is revoked or disavowed, which was not included in previous regulations. Even if the LEA certification is disavowed or revoked, this certification should be considered as one portion of evidence when evaluating the totality of circumstances. The regulatory language stating that the disavowment or revocation of the LEA certification will automatically not be considered contradicts a review of all evidence considering the totality of circumstances. API-GBV recommends that a T-Visa application not be rejected based solely on one factor or piece of evidence. In prior T-Visa regulations, DHS considered the withdrawal or disavowment of the certification as grounds for notice of intent to deny. See previous 8 CFR 214.11(s)(1)(v), which provided applicants the opportunity to respond to LEA's claims and rehabilitate their application should law enforcement provide allegations that negatively impacted the applicant's application.

Although the current regulations allow for a similar process of affording the applicant an ability to respond to the LEA's withdrawal through 8 CFR 214.11(m)(2), current regulatory language is confusing and may have an unintended negative impact for survivors of trafficking. In many LEA offices, officers change jobs or otherwise turn over. If a newer officer disagrees with the previous officer, they can disavow the certification, eliminating a significant piece of evidence for the applicant without further explanation for the revocation. Further, the current regulatory language fails to consider instances where law enforcement acts in bad faith to use the

revocation or threat of revocation of the LEA certification against the survivor of trafficking.

API-GBV respectfully requests that the recommended language be accepted to align with DHS's ability to use discretion in evaluating "any credible evidence" as part of the totality of the evidence submitted in the adjudication of the T-Visa application.

API-GBV recommends that 8 CFR 214.11(d)(3)(ii) reads as follows:

"Disavowed or revoked LEA endorsement. An LEA may revoke or disavow the contents of a previously submitted endorsement in writing. ~~After revocation or disavowal, the LEA endorsement will no longer be considered as evidence.~~"

B. Burden of Proof: 8 CFR 214.11(d)(5)

API-GBV's partners have noted a marked increase in the issuances of Request for Additional Evidence (RFE) asking applicants to explain inconsistencies that adjudicators have stated that they found in the applicant's administrative record that the applicant is unaware of. These inconsistent statements often arise from agencies who do not provide full records through Freedom of Information Act (FOIA) requests. As a result, many survivors of trafficking have been placed in a situation which requires them to blindly defend themselves from alleged inconsistent statements that may detrimentally impact their ability to obtain immigration relief. For example, in some cases, trafficking survivors who have detained by Customs and Border Patrol (CBP) are interviewed by CBP officers seeking to identify potential victims of trafficking, among other responsibilities. Many of our colleagues have reported that CBP's interview practices have not been trauma-informed, and thus have failed to garner accurate identification of trafficking victims. For example, in many instances, victims have been treated like criminals or have been interviewed within close proximity of their traffickers, making it unsafe for them to share information candidly about their trafficking victimization. The statements made during these interviews then appear to be inconsistent statements in the administrative record. When the

records from these CBP interviews are not released in provided in response to FOIA requests, the applicant has opportunity to respond to provide further context (e.g., the location of the trafficker during the interview, trauma, fear) about potentially adverse evidence. The adjudicator is also disadvantaged because they would never obtain this critical information from the applicant before having to make a determination of granting T nonimmigrant status.

API-GBV recommends the following language to provide due process protections for applicants and to recognize the authority of USCIS to consider all evidence contained in the administrative record. API-GBV recommends that **8 CFR 214.11(d)(5)** read as follows:

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

III. 8 CFR 214.11(e) Bona Fide Determination

API-GBV urges USCIS to simplify the regulations and processes regarding bona fide determinations for T visa applications, by establishing a process parallel to the process recently implemented for a bona fide determination of U nonimmigrant status.⁴ The current T visa regulations contemplate a process for making bona fide determinations of eligibility for T nonimmigrant status, though it has never been implemented.⁵ The process currently outlined in

⁴ <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf>.

⁵ 8 C.F.R. § 214.11(e).

the regulations, sets forth a heightened standard of review, essentially making the process a complete adjudication of the application.

When processing times ranged from 4-9 months, these bona fide determinations may have seemed less urgent.⁶ In the May 22, 2009 USCIS memo Michael Aytes, Acting Deputy Director wrote, “USCIS does not currently have a backlog of I-914 cases; therefore, focusing on issuing interim EADs is not necessary. USCIS believes it is more efficient to adjudicate the entire I-914 and grant the T status, which produces work authorization for the applicant, rather than to touch the application twice in order to make a bona fide determination. However, in the event that processing times should exceed 90 days, USCIS will conduct bona fide determinations for the purpose of issuing employment authorization.”⁷

No longer are the days of applications taking 4-9 months to process. As of August 2021, processing times for T nonimmigrant status ranged from 20 to 43.5 months.⁸ These processing delays compromises the safety and well-being of T visa applicants and their families. Such long waits for the adjudication of their cases, coupled with other barriers (such as a lack of access to work authorization or other financial support) harms victim safety and well-being

The intent of Congress in creating a bona fide determination standard was to ensure that victims can have access to a streamlined process for securing access to benefits and employment.⁹ A bona fide determination process, similar to the one recently established for the

⁶ In FY2015 T visa applications took 6.4 months to adjudicate. See USCIS. “Historic National Average Processing Times for All USCIS Offices” (captured March 12, 2019) available at <https://web.archive.org/web/20190312202427/https://egov.uscis.gov/processing-times/historic-pt>

⁷ Memorandum, “Response to Recommendation 39: ‘Improving the Process for Victims of Trafficking and Certain Criminal Activity: The T and U Visas.’” USCIS (May 22, 2009).

⁸ <https://egov.uscis.gov/processing-times/>.

⁹ See 22 USC §7105(b)(1)(E)(II)(aa) (indicating that certification for federal benefits can be granted if an applicant has made a bona fide application for a visa under INA §101(a)(15)(T)).

U visa program, would provide much needed protection for trafficking survivors by allowing them to seek administrative closure of their cases if they are placed in removal proceedings court—or possibly a motion to dismiss proceedings—pending USCIS’s adjudication of their petitions. Such a streamlined process would also further the victim-centered approach ICE has currently adopted.¹⁰

API-GBV recommends the following language at 8 CFR 214.11(e)(2) that mirrors the application of the prima facie evidence guidelines in the context of VAWA self-petitions:

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

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

IV. Victim of a Severe Form of Trafficking- 8 CFR 214.11(f)

API-GBV applauds DHS for the regulatory language recognizing that actual performance of labor, services, or commercial sex is not required to be a victim of a severe form of trafficking in persons, including such situations where a victim has escaped, or removed from the trafficking situation or by law enforcement. API-GBV believes this clarification is consistent with the legislative intent and statutory language of the TVPA.

Further, API-GBV appreciates that 8 CFR 214.11(f)(1) provides helpful examples of evidence that may be submitted to demonstrate the trafficker’s purpose even if no commercial sex or forced labor actually occurred, and that such list USCIS is not “all inclusive.” However,

¹⁰ See ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at: <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf>.

API-GBV recommends that the language provide additional examples of evidence that could be proffered. In API-GBV's experience, many trafficking victims face extreme barriers in producing evidence, as most trafficking cases are not prosecuted, victims do not have law enforcement or other court documents as support, have no media articles covering them, have no witnesses to the harm, and have no written proof from their traffickers. Given the reality of the underground nature of trafficking, the regulations should emphasize the types of different affidavits that victims can use as evidence of attempted trafficking. API-GBV also believes, based on its experience with the evidence often available to victims, that the update regulations should clarify that a statement from the victim is sufficient if deemed credible.

API-GBV proposes the language at 8 CFR 214.11(f)(1) be modified at the end by adding the following language after "affidavits":

"from case managers, therapists, medical professionals, victim, witnesses, other victims in the same trafficking scheme, or correspondence with and from the trafficker. Additionally, if deemed credible, the victim's statement alone can be sufficient evidence to prove victimization."

(iv) In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should describe what the alien has done to report the crime to an LEA and indicate whether criminal records relating to the trafficking crime are available."

V. 8 CFR 214.11(g) Physical Presence

API-GBV strongly recommends that USCIS's narrow interpretation of "physical presence on account of trafficking" should be modified to eliminate barriers to individuals applying for T nonimmigrant status. 8 U.S.C. § 1101(a)(15)(T)(i)(II) requires that a successful T applicant must be "physically present in the United States ... on account of ... trafficking." While the 2016 T- visa regulations addressed this issue, they continue narrow that language significantly in a manner that the statute does not mandate. 8 CFR 214.11(g)(1) &(2), create a

presumption that those individuals whose trafficking occurred outside of the U.S. or who traveled outside of the U.S. after their trafficking situation and subsequently returned, are not physically present in the U.S. on account of trafficking in persons. This presumption is not included in the statute at 8 USC §1101(a)(15)(T)(i)(II).

API-GBV recommends that the regulation account for situations where an individual's trafficking occurred outside the US or if an individual has left the United States but is currently in the United States applying for the T-visa, they should be eligible to apply for the T-visa, as well as remove time-restrictions for application. For example, over the last several years, USCIS has taken the position in many cases that an applicant has failed to demonstrate their physical presence under § 214.11(g) because of the length of time that has transpired between escaping the trafficking situation and filing the I-914, finding instead that the applicant's continuing presence in the U.S. is no longer directly related to the trafficking. This *de facto* temporal limitation is not found in the statute or the legislative history and results in the exclusion of many bona fide victims of trafficking from the protections intended by Congress.

API-GBV's colleagues report that if a survivor's victimization is more than three or four years old, then USCIS will typically send a Request for Evidence (RFE) seeking more information supporting the assertion that the survivor is present in the United States on account of trafficking. API-GBV urges that instead, USCIS adopt a presumption that a trafficking survivor who has not departed the United States is present on account of the trafficking. In the absence of such a presumption, USCIS should deem a survivor present on account of the trafficking if she fears ongoing or revictimization by traffickers or if she is seeking or receiving treatment or services related to trafficking victimization that cannot be provided in her home country.

The agency’s current, narrow interpretation of “on account of” has the additional unintended consequence of causing additional trauma to trafficking survivors. Survivors are often exposed to trauma before, during, and after the trafficking victimization.¹¹ Requiring applicants to provide *additional* evidence of presence on account of trafficking under a narrower standard than required by statute is retraumatizing.¹² This is especially true because a response may often need to be supported by a medical or psychological evaluation or supporting affidavits from the survivor’s community in order to prove that the survivor continues to be impacted by their victimization of trafficking.

Additionally, traumatized trafficking survivors are often unable to promptly apply for relief for various reasons related to their victimization. To apply for immigration relief, trafficking survivors must discuss the details of the harm they’ve experienced as part of their request for relief, which will necessarily take time following the impacts of trauma.¹³ In addition, trafficking survivors may have limited access to social services, mental health resources, and legal advocacy¹⁴—the type of support required to enable them to quickly process their trafficking and prepare an application for T nonimmigrant status.

API-GBV recommends modifying the regulatory language at 8 CFR 214.11(g) by modifying subclause (iv) as follows:

¹¹ Chic Dabby, *Considerations and Recommendations on Trauma-Informed Advocacy for Trafficking Survivors*, Asian Pacific Institute on Gender-Based Violence, (2017), at 3-4; National Organizational Advocacy Roundtable, *Intersections of Human Trafficking, Domestic Violence, and Sexual Assault* (2016), at 5 (traffickers target vulnerable individuals, including those “fleeing violent social or familial environments”)

¹² Heather J. Clawson, Ph.D., Amy Salomon, Ph.D., & Lisa Goldblatt Grace, LICSW, *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recover for Victims of Human Trafficking*, U.S. Dep’t of Health and Human Services Office of the Assistance Secretary for Planning and Evaluation (Mar. 14, 2008).

¹³ *Id.*, (describing the difficulty service providers and law enforcement face in establishing trusting relationships with survivors).

¹⁴ Kathryn Marburger and Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, *The Professional Counselor* 10:1, at 13-24 (Mar. 2020) (“survivors are often met with substantial challenges while seeking basic services”).

“(iv) Was subject to a severe form of trafficking in persons at some point in the past and whose continuing *current* presence in the United States is directly related to the original trafficking in persons.”

At minimum, API-GBV recommends that the regulation DHS clarify that re-entry into the United States is presumed to be a result of “continued victimization” required by 214.11(g)(2)(i) when the victim: (1) returns to the United States because of current fear of their traffickers in their country or last place of residence; (2) seeks treatment for victimization from trafficking which cannot be provided their home country or last place of residence; or (3) seeks to pursue civil and criminal remedies against their trafficker in their home country or last place of residence.

VI. 8 CFR 214.11 (h) Compliance with a Reasonable Request for Assistance in an Investigation or Prosecution

A. Cooperation 8 CFR 214.11 (h)(1)

API-GBV commends the removal of language that described how to obtain an LEA endorsement if the victim has not had contact with LEA, as well as the acknowledgment that formal investigation or prosecution is not required for LEA to issue an endorsement. However, in practice, applicants and USCIS adjudicators often have differing standards on what type of contact with law enforcement is sufficient to meet the eligibility requirement for compliance with law enforcement. The contrast is particularly stark when victims who report to law enforcement receive no response to their initial reports.

API-GBV recommends that 8 CFR 214.11 (h)(1) be modified to clarify that: (1) a single contact with law enforcement documented by the applicant is sufficient to meet the compliance eligibility requirement; and (2) that this contact can be with any law enforcement office that has

the authority to detect, investigate, or prosecute severe form of trafficking in persons. API-GBV recommends that 8 CFR 214.11 (h)(1) read as follows:

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

B. Trauma Exception: 8 CFR 214.11(h)(4)(i)

API-GBV commends the language regarding supporting evidence that may be included to evaluate whether an applicant meets the trauma exception to the LEA cooperation requirement. However, API-GBV recommends additional clarification regarding the language about USCIS’s discretion to contact LEA. We recommend that the language clarify that USCIS will only reach out to LEA if the victim has had initial contact with law enforcement. We further recommend the language state that DHS will not contact a LEA where there is no LEA contact because there will not be a LEA involved with the applicant's case, so as to not discourage applicants whose trauma includes the fear for their safety connected to law enforcement involvement will be discouraged from filing T-visa applications

API-GBV recommends 8 CFR 214.11(h)(4)(i) be modified in the last sentence as follows:

*“USCIS reserves the authority and discretion to contact the LEA involved in **cases where the applicant has contacted LEA but was unable to comply with reasonable requests due to trauma**, if appropriate.”*

C. Age/ Minor exemption 8 CFR 214.11(h)(4)(ii)

API-GBV recommends modifying the regulation at 8 CFR 214.11(h)(4)(ii) regulations to reflect that if an applicant was victimized prior to attaining 18 years, they do not need to cooperate with LEA when applying for a T-visa, to better align with the plain statutory language and the broader interpretation applied by USCIS in years prior. Trafficking victims, especially child victims of trafficking, suffer long-term trauma as a result of their trafficking experience which may inhibit their ability to cooperate with law enforcement at any period. The statute at 8 USC §1101(a)(15)(T)(i)(III) clearly outlines the standard for cooperating with law enforcement and includes a clear exception that a victim of trafficking who *has not attained 18 years* is not required to cooperate with LEA.¹⁵

By requiring the applicant to be under 18 years of age at the time of filing rather than the time of victimization, DHS is narrowing the interpretation of this eligibility requirement beyond the scope of the statute. The statute does not require the applicant to be a minor, only that the victimization occurred prior to attaining 18 years old. The most natural reading of the statute—which never mentions the filing date of the application—is that the survivor must be under 18 *at the time of victimization*. Any other interpretation would exceed the requirements of the statute and inconsistent with USCIS’s current practice. More significantly, it would cause serious harm to young survivors. Survivors of trafficking suffer extensive, long-term trauma, persistent fear of punishment from traffickers, and distrust of law enforcement.¹⁶ Trafficking results in serious impacts on children’s psychological and emotional development.¹⁷ Young survivors in detention

¹⁵ 8 USC §1101(a)(15)(T)(i)(III)(aa-cc).

¹⁶ Kathryn Marburger and Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, *The Professional Counselor* 10:1, at 13-24 (Mar. 2020).

¹⁷ *Id.*, (noting the impact of trafficking of children on their “psychological, spiritual, and emotional development”).

face added barriers of not having sufficient access to legal or social services and may not have an opportunity to report the trafficking before they are released. As a result, the regulation should be clarified to extend to all applicants who were under 18 years of age at the time of the trafficking.

DHS' narrower interpretation requires that an adult applicant who was trafficked as a minor to cooperate with law enforcement simply because they are now over the age of 18 prior to filing the T-visa application. This narrower interpretation will have the effect of disqualifying applicants who are currently detained and thus are unable to report or fully engage with law enforcement. Amending the regulation to make clear that the compliance requirement only applies to those who were at least 18 at the time of the trafficking comports with prior USCIS guidance, reduces trauma to young survivors, and furthers the ameliorative effect of the statute.¹⁸

API-GBV recommends that 8 CFR 214.11(h)(4)(ii) read as follows:

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

VII. 8 CFR 214.11 (j) Annual Cap

API-GBV recommends that qualified trafficking survivors on the waitlist should have access to employment authorization and federal benefits to ensure they do not remain vulnerable

¹⁸ See USCIS. “Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status” (Captured April 27, 2017), available at: <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-of-human-trafficking-t-nonimmigrant-status> (“If under the age of 18 *at the time of the victimization*, or if you are unable to cooperate with a law enforcement request due to physical or psychological trauma, you may qualify for the T nonimmigrant visa without having to assist in investigation or prosecution.”) (emphasis added).

to exploitation and/or trafficking. In the preamble, DHS notes that it will consider providing temporary relief on a case-by-case basis to applicants on the waiting list who are participating in investigations in the United States. DHS should consider further that because T-visa applicants have access to federal benefits once a bona fide determination is made, DHS should take special consideration of making efforts to grant these determinations in a timely manner should the T-visa cap be reached. API-GBV recommends the following language to clarify that being placed on the waitlist will give USCIS the opportunity to make bona fide determinations to ensure that survivors will be able to access public benefits and work authorization while waiting for visas to become available.

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

VIII. 8 CFR 214.11 (k) Eligible Family Members

A. Family members Facing Danger of Retaliation 8 CFR 214.11(k)(iii)

API-GBV recommends that the regulatory language at 8 CFR 214.11(k)(iii) regarding the evidentiary standard for derivatives seeking T status on the basis of present danger of retaliation specifically reference credible evidence standard. The statute states that certain family members are eligible to apply for T nonimmigrant derivative status because they are facing a danger of

retaliation based on the principal's escape from a severe form of trafficking in persons; or because of the principal's cooperation with law enforcement. The determination of LEA to move forward with an investigation, or not, should not inhibit a principal applicant to apply for family members who may be facing present danger as a result of their escape. The regulation should include language indicating that applications of their family members will be considered even if LEA does not decide to move forward with a criminal investigation. API-GBV recommends that 8 CFR 214.11(k)(iii) read as follows:

*“Family member facing danger of retaliation. Regardless of the age of the principal alien, if the eligible family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of trafficking or cooperation with law enforcement, in consultation with the law enforcement officer investigating a severe form of trafficking, eligible family member means a T-4 (parent), T-5 (unmarried sibling under the age of 18), or T-6 (adult or minor child of a derivative of the principal alien). **In cases, where law enforcement has not investigated the trafficking after a victim has reported the crime, USCIS will evaluate any credible evidence demonstrating derivatives' present danger of retaliation. USCIS will expedite processing of these applications within 30 days given the danger a family member is facing.**”*

B. Evidence Demonstrating “Present Danger of Retaliation”- 8 CFR 214.11(k)(6).

API-GBV recommends modifying 8 CFR 214.11(k)(6) to also highlight acceptance of credible evidence. In situations where there is a present danger of retaliation, there is often great difficulty communicating with family members abroad, and requiring specific types of evidence may create additional danger for them. In some circumstances, it may be impossible to collect outside evidence to show a present danger of retaliation in certain cases. As DHS has recognized in other regulatory provisions, evidence to show victimization of trafficking can be extremely difficult for a victim to collect. In those instances, DHS has deemed that a victim's statement alone can be sufficient evidence to demonstrate that the trafficking did occur. API-GBV urges that that this section also capture consideration of the difficulty of collecting evidence and should indicate that a victim's statement alone is sufficient if otherwise credible.

At a minimum, the evidentiary standard should be clear that police reports filed in the home country and affidavits from witnesses from home country meet the evidentiary standard to demonstrate a present danger of retaliation, especially for cases where evidence exist primarily in the applicant's home country. API-GBV recommends that 8 CFR 214.11(k)(6) should be modified as follows in subsections (iii) and (iv):

“(iii) An affirmative statement from the applicant describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement ~~(ordinarily an applicant's statement alone is not sufficient to prove present danger)~~; ***If deemed credible, the victim's statement alone, can be sufficient evidence to prove present danger of retaliation.*** and/or

(iv) Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses. ***This evidence may be from the U.S., home country, or country where applicant's eligible family member is facing present danger of retaliation.***”

C. Employment Authorization 8 CFR 214.11(k)(10)

API-GBV urges DHS to take further steps in addressing the barriers to work authorization for T nonimmigrant applicants. DHS has previously acknowledged the burden of the fees on applicants and has the statutory authority to waive fees pursuant to TVPRA 2008 section 201(d)(3); INA section 245(l)(7), 8 USC 1255(l)(7). API-GBV respectfully requests that DHS extend its exemption of fees to family members of T-1 applicants when they apply for Employment Authorization and remove the burden of requiring an additional fee waiver to be filed on behalf of the derivative family member. At a minimum, API-GBV requests that DHS clarify that a fee waiver may be submitted to DHS in lieu of the fees associated with Employment Authorization application for family members. API-GBV recommends that 8 CFR 214.11(k)(10) read as follows:

“*Employment authorization.* An alien granted derivative T nonimmigrant status may apply for employment authorization by filing an application on the form designated by USCIS ~~with the fee~~

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

IX. 8 CFR 214.11 (p) Restrictions on use and disclosure of information relating to T- visa Applicants

API-GBV urges DHS to strengthen confidentiality protections for T nonimmigrants and add the full list of protections and exceptions under 8 USC §1367. In addition, we recommend language including the following enumerated examples in order to better provide information to victims so that they may make informed decisions about the risks of to applying for T nonimmigrant status.

“8 CFR 214.11(p) *Restrictions on use and disclosure of information relating to applicants for T nonimmigrant classification.* (1) The use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of any of those departments, for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved application for T nonimmigrant status is prohibited unless the disclosure is made in accordance with an exception described in 8 U.S.C. 1367(b). *These circumstances could include, but are not limited to, disclosure of information to law enforcement agencies with the authority to detect, investigate, or prosecute severe forms of trafficking in persons; non-governmental victims’ service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims; and for purposes of national security.*”

X. Waivers 8 CFR 212.16(b)

API-GBV urges that DHS use its discretionary authority to waive the criminal grounds of inadmissibility for T nonimmigrant status applicants if the criminal activities were caused by or

incident to the trafficking under INA §212(d)(13), as current language in 8 CFR 212.16(b)(3) is not statutorily required. API-GBV also believes that this language is unduly restrictive and contravenes the intent of the trafficking statute, as INA 212(d)(3)(B) provides the Attorney General broad discretion to approve a waiver of inadmissibility.

Trafficking survivors commonly have unfavorable criminal histories that may not be directly incident to the trafficking but are often part of the scheme that makes them vulnerable to exploitation or related to a history of trauma. If these criminal acts are viewed with more scrutiny, it could have a chilling effect where applicants who have more lengthy criminal histories will be likely denied and less willing to attempt to file T-visa applications. API-GBV recommends that 8 CFR 212.16(b) read as follows:

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

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

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

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

XI. Conclusion

For the reasons described above, the current regulations fail to adequately further the trafficking statute's goal of protecting trafficking survivors and their families. API-GBV strongly urges that USCIS adopt the aforementioned recommendations to better achieve the ameliorative purpose of the law. Thank you for the opportunity to provide input, and please feel free to contact me at ghuang@api-gbv.org if you have any questions or concerns relating to these comments. Thank you.

Respectfully submitted,

ASIAN PACIFIC INSTITUTE ON
GENDER-BASED VIOLENCE



GRACE HUANG
Director of Policy