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WASHINGTON COLLEGE of LAW
WASHINGTON, D.C.

NIWAP

**Community of Practice for Family Law
Attorneys Representing Immigrant Survivors**

**DHS changes to the regulations governing
T nonimmigrant status and
T-based adjustment of status**

Effective August 28, 2024

May 16, 2024

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The following slides are intended to be a guide to lead our discussion on this topic and to provide substantive material for your future reference.



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T Visa (Nonimmigrant) Status

According to USCIS, "T nonimmigrant status offers protection to victims and strengthens the ability of law enforcement agencies to detect, investigate, and prosecute human trafficking. This final rule clarifies T nonimmigrant status eligibility and application requirements and includes provisions to reduce potential barriers to victims and enable USCIS officers to adjudicate victims' applications more efficiently."

<https://www.uscis.gov/newsroom/news-releases/uscis-strengthens-t-nonimmigrant-visa-program-and-protections-for-trafficking-victims>

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Definition of Human Trafficking

As per the Trafficking Victims Protection Act (TVPA) of 2000, severe forms of trafficking in persons is defined as:

- (A) Sex trafficking, where a commercial sex act is induced through force, fraud, or coercion, or when the person induced to perform such an act is under 18 years of age; OR
- (B) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, accomplished through force, fraud, or coercion with the intention of subjecting the person to involuntary servitude, peonage, debt bondage, or slavery.

22 USC § 7102(11)

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Definition Includes “Attempted Trafficking”

- The preamble to the 2024 T Visa Rule and DHS policy Manual include protections for victims of attempted trafficking
 - Cases where the applicant has not performed labor or services or a commercial sex act
 - When the victim can prove they are otherwise eligible for a T visa and
 - But/for some intervention or victim’s escape the perpetrator would have trafficked them
- 2016 Preamble: 81 Fed. Reg. 92266, at 92271



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Bona fide Determinations

Conducting a bona fide determination (BFD) for a T application will be “routine” for applications filed after Aug. 28, 2024, and will also be considered for applications already pending on that date. The T-BFD process has been streamlined to more closely mirror the U-BFD process, focusing on completion of the application and an initial background check, and not dependent on an application for a waiver of inadmissibility.

See new 8 CFR § 214.205



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Determination of Bona Fide Application

- USCIS will deem an application bona fide if:
 - The I-914 is properly filed and complete;
 - The applicant has included a signed personal statement; and
 - Initial background check results are complete and do not present national security concerns. 8 C.F.R. § 214.205(a)(2)
- After T applicant is deemed bona fide
 - USCIS will conduct a bona fide review of family member’s applications. 8 C.F.R. § 214.240(m)



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What do bona fide determinations mean for trafficking victims and their family members?

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Swifter Access to Employment Authorization Document (EAD)

- A new EAD category, (c)(40), has been added for applicants receiving T-BFDs (same category for both principals and derivatives).
- They can request the (c)(40) EAD with their I-914 filing and need not wait to file for a category (c)(14) EAD based on deferred action.
- BFD recipients can be granted deferred action

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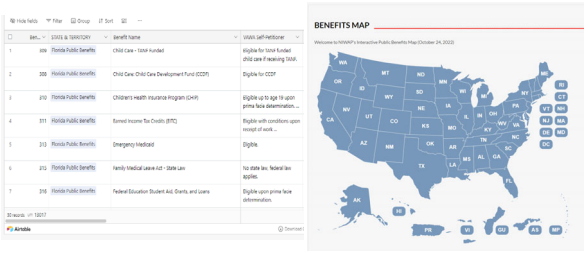
T Visa Applicants With Bona Fide Determinations are Qualified Immigrants

- Bona Fide Determination comes with automatic referral to HHS Office on Trafficking in Persons (OTIP)
- Eligible for state and federal public benefits to the same extent as refugees
- TANF/TANF childcare, Medicaid, Food Stamps, SSI – No 5-year bar
- Direct access to
 - FAFSA, public & assisted housing, REAL ID driver's licenses, healthcare exchanges, income tax credits, LIHEAP, All FEMA assistance, unemployment insurance

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Interactive Public Benefits Map: State-By-State



<https://niwaplibrary.wcl.american.edu/benefits-map>

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Victims With T Visa Bona Fide Determinations or Continued Presence

- Able to access more public benefits faster than
 - VAWA self petitioners
 - U visa victims
 - SIJS children
- Battered immigrants have greater economic stability when their children can have access to benefits

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Best Practices

- Screen all domestic violence and child abuse cases for human trafficking
- Identify when children have their own path to legal immigration status
- Child trafficking victims should be identified and referred to HHS Office on Trafficking in Persons (OTIP) before the child's 18th birthday

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HHS Child Eligibility Letters

- The Office of Trafficking in Persons (OTIP) at HHS issues:
 - Eligibility letters to foreign national children
 - No DHS application required
- Anyone can file a request for assistance (RFA) on behalf of a child if the child “may be a victim of trafficking”
 - Must file child’s RFA before age 18
 - Applicant child can receive interim assistance for up to 90 days
- Eligibility letters give child trafficking victims access to benefits and services to the same extent as refugees indefinitely and are assigned federal case workers
 - Access to benefits throughout the time the child is applying for continued presence, T visa, or U visa, SIJS



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Updated Involuntary Servitude Definition

- Means a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or a condition of servitude induced by the abuse or threatened abuse of legal process; and
 - Includes a condition of servitude in which the victim is forced to work for the trafficker by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process.
 - This definition encompasses those cases in which the trafficker holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.
- 8 C.F.R. § 214.201



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*What would
involuntary
servitude look like in
your domestic
violence cases?*



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Involuntary Servitude in a Domestic Violence Relationship

- Abuser/Trafficker controls victim's liberty creating conditions of servitude
- Expectation that the victim's life fulfills the trafficker's orders
 - E.g., demand from the trafficker to perform domestic labor at an unreasonable level, including unreasonable working hours, and/or constant availability to labor regardless of health or energy;
- Lack of control over the victim's own wages (or not paid) despite laboring under the trafficker's demands; or
- The imposition of unequal living arrangements as part of a campaign of force, fraud, and coercion
 - E.g., unequal sleeping arrangements, living arrangements, or access to nourishment.

<https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-2>



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New Definitions – Serious Harm

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.

- Relevant to proving *coercion* and *involuntary servitude*

8 C.F.R. § 214.201



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New Definitions – Abuse or threatened abuse of the 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.

- Relevant to proving *coercion* and *involuntary servitude*

8 C.F.R. § 214.201



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Expanded Explanation– Commercial Sex

Commercial sex act means any sex act on account of which *anything of value* is given to or received by any person.

- DHS explains that “[a]nything of value’ does not always have an exact monetary value” and includes but is not limited to:
 - “safety, protection, housing, immigration status, work authorization, or continued employment.”
- 2024 Preamble: 89 Fed. Reg. 34864, at 34872.



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Raise Your Hand:

If you have had family violence cases with involuntary servitude fact patterns.



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What factual findings would you seek in your family law case to help a DV victim prove they were also trafficked?



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Helpful Findings

- Document the labor coerced/forced by
 - Threats, physical restraint, injury, coercion through legal process, fear, control of liberty
 - Level of labor, length of hours, constant availability for labor
- List “anything of value” given or received to obtain a sex act – commercial sex
- Findings regarding the scheme, plan or pattern
- Victim does not control own wages or is not paid
- Harm to victim’s physical/mental health, energy
 - Includes reputational/financial harms



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Helpful Family Court Findings/Orders

- Victim is receiving treatment or services related to her victimization in the U.S. that are not available in her home country
- Document
 - Victim’s contact with law enforcement, prosecutors, courts
 - Trauma suffered due to trafficking
 - Child’s age (under 18) when at least one trafficking act occurred
 - Current or future economic harm



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Law Enforcement Agency (LEA) Definition

Has historically included any federal, state, or local LEA, prosecutor, judge, labor agency, children’s protective services & new rule’s expansions include:

- Tribal authorities
 - Agencies with the responsibility and authority for *detection*, investigation and/or prosecution of trafficking under any administrative, civil, criminal, or Tribal laws.
 - Adds additional examples of federal LEAs, such as the Equal Employment Opportunity Commission (EEOC); the National Labor Relations Board (NLRB); Offices of Inspectors General (OIG); the Bureau of Indian Affairs (BIA) Police, and Offices for Civil Rights and Civil Liberties.
- 8 C.F.R. § 214.201



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Law Enforcement Agency

Qualifying reporting of trafficking now requires that the contact with a law enforcement agency be with an LEA “with proper jurisdiction.”



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Cooperation Exemptions Apply to T Visa and LPR (Green Card) Application

- Minors: Confirms long-standing policy that minors are exempt from the law enforcement cooperation requirement
 - When the applicant was under the age of 18 at the time that at least one act of trafficking occurred (8 C.F.R. § 214.202(c)(1))
- Trauma: Expands examples of evidence to eligibility for physical or psychological trauma exception. (8 C.F.R. § 214.208(e)(1))



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How might you prove your client is eligible for the trauma exception to cooperation?



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Trauma Exception Evidence

- A personal statement describing the trauma and explaining the circumstances surrounding the trauma the applicant experienced, including their age, background, maturity, health, disability, and any history of abuse or exploitation;
- A signed statement from a qualified professional, such as a medical professional, mental health professional, social worker, or victim advocate, who attests to the victim's mental state or medical condition;
- Medical or psychological records documenting the trauma or its impact;



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Trauma Exception Evidence cont.

- Witness statements;
- Photographs;
- Police reports;
- Court records and court orders;
- Disability determinations;
- Government agency findings;
- Any Credible evidence.

8 C.F.R. § 214.208(e)(1)



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Extreme hardship to others

- In proving that the applicant would suffer extreme hardship involving unusual and severe harm
 - Extreme hardship to others besides the T-1 applicant may now be considered
 - But only if the T-1 applicant shows they themselves would also suffer hardship because of the third party's extreme hardship.

8 CFR § 214.209(c)(2)



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Age-out Protections for Derivative Children

- Age-out protections for derivative children of T-1 applicants may now only protect the child if they age out while the T-1 application is pending, and not after.
- The regulation is not entirely clear on this point. Such a limitation would offer fewer protections than under recent interpretations, although it would mirror the limited protections for derivative children of U-1 applicants.



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Protections for New Children of Applicant

The new rule clarifies that if the T-1 principal applicant establishes they have become a parent of a child after filing the application, the child will be deemed an eligible family member.

§ 214.211(e)(1)



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Marriage and Step-Relationships

- The new rule amends the T visa regulations to reflect current USCIS policy that a T-1 principal who marries while his I-914 is pending but before it is adjudicated may file an I-914A for his spouse.
- The amendment also clarifies that a T-1 may file an I-914A for a stepparent or stepchild where the relationship was created after the I-914 was filed but before the I-914 was approved.
- Applies the *Medina Tovar v. Zuchowski*, 982 F.3d 631, 637 (9th Cir. 2020) factors to T visa applicants.

§§ 214.211(e)(4)(ii)-(iii)



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Removal Protections

- Regulations state the ICE should
 - Take a victim centered approach
 - Exercise prosecutorial discretion when victims have pending T visa applications
 - ICE will refrain from taking enforcement actions against victims until USCIS adjudicates the victim's application
 - Generally, not remove and not refer T visa applicants for removal
- VAWA 8 U.S.C. § 1367 confidentiality rules apply to T visa cases



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VAWA Confidentiality Protections

- Cannot disclose information about a T visa case's existence, actions taken, or file contents with limited exceptions
 - In trafficking cases this can include Homeland Security Investigations (HSI) to facilitate investigations, continued presence and expedite requests. *See* 2024 Preamble: 89 Fed. Reg. 34864, at 34890.
 - Upon T visa approval DHS
 - Will notify HHS –OTIP for Certification Letter victim needs for public benefits
 - DHS may notify law enforcement who signed declaration of T visa approval
 - No discovery in state court cases
 - Possible discovery in federal prosecution
 - Should be limited to what is in the prosecutor's files
 - Any agency receiving information obligated to continue to maintain its confidentiality
- 8 U.S.C. § 1367; 8 C.F.R. § 214.216; 8 C.F.R. 214.204(e)



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Waitlist Process

The waiting list process has also been further explained, in anticipation of the statutory cap being reached. Applicants will not accrue unlawful presence while on the waiting list. Highest priority for processing will go to the oldest applications. *New* 8 CFR § 214.210(b).



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Advance Parole

T recipients must obtain advance parole under INA § 212(d)(5) to travel internationally and afterwards resume T status.



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Leaving the United States

A trafficking victim who may have left the United States after the trafficking may now be deemed present on account of trafficking if they "returned to the United States and received treatment or services related to their victimization that cannot be provided in their home country or last place of residence outside the United States." *New 8 CFR § 214.207(b)(5).*



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Questions and Answers



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Resources

- 2024 T visa regulations
- CAST
 - Overview of 2024 T Final Rule
 - Definition of Human Trafficking Advisory
 - Common Hurdles in Distinguishing Domestic Violence and Sexual Assault from Human Trafficking
- NIWAP/NJN Webinars with OTIP
- NIWAP
 - Public benefits map & VAWA confidentiality resources
 - T visa and public benefits manual chapters
 - Immigration relief comparison charts
 - Inadmissibility comparison chart



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Thank You!



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