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Fact Sheet for Adjustment of Status For Trafficking Victims Who Were Awarded T-Visas[1]

This fact sheet is to assist attorneys and immigration practitioners in summarizing the interim final rule on *Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant* Status, issued on December 12, 2008 that becomes effective on January 12, 2009. This analysis is intended to amplify your reading of the regulations and statute. It is not a substitute for reading the regulation and the preamble to the regulation in which DHS provides supplementary information. It is also not intended to provide guidance where the rule is silent. You may find the regulations at http://edocket.access.gpo.gov/2008/E8-29277.htm. This document is a summary of the rule and subsequent guidance on a USCIS Question and Answer teleconference held on December 11, 2008 (USCIS expects to publish these notes shortly). This document is intended for those with an immigration practice background. If you are an advocate or filing this petition on your own behalf, we recommend you consult with an attorney or accredited representative who has experience working with immigrant victims and who is familiar with the statute and regulations. If you don't know such a person, the Network may be able to connect you with someone. If you qualify for technical assistance from our agencies, you may consult with one of our attorneys. Technical assistance is available though ASISTA and Legal Momentum's Immigrant Women Program using the contact information above. If you are a member of the National Immigration Project of the National Lawyers Guild, you may also obtain technical assistance by emailing ellen@nationalimmigrationproject.org. If you are an affiliate of Catholic Immigration Network (CLINIC), you may obtain technical assistance by calling the immigration information support line.

There are several statutory amendments to INA §245(l) and (m) in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which passed the House and Senate two days after USCIS sent this rule to the Federal Register. Trafficking victims may face obstacles in applying if they rely upon only the prior version of the statute. This fact sheet is based on the above-referenced rule and does not address the statutory changes from the TVPRA. We expect that USCIS will provide guidance that will address the new statutory changes in the TVPRA including how this new legislation affects the interim T and U adjustment of status rule. Until then, to the extent that a victim can meet the requirements of this rule, make all efforts to apply this rule as currently written. If you encounter unavoidable challenges that are solved through the TVPRA,

[1] This fact sheet was prepared by Kavitha Sreeharsha, Senior Staff Attorney at Legal Momentum's Immigrant Women Program, on behalf of the National Network to End Violence Against Immigrant Women.

argue the new statutory provisions in your filing. This may expedite any forthcoming guidance.

Statutory Requirements for T-1 Principal visa holders to adjust their status to lawful permanent residency:

I. Admission and Current Status as a T nonimmigrant

- All applicants adjusting status under 245(l) must have been admitted as a T nonimmigrant and continue to hold such status. (8 CFR 245.23(a)(2), 8 CFR 245.23(b)(2)).
- Applicant's with expired T-visas who have not filed and I-485 must do so by has expired under a transition rule, those with expired T-visas prior to the promulgation of this rule, who have not yet filed an I-485 must filed within 90 days of the promulgation of this rule. (March 12, 2008) (8 CFR 245.23(a)(2)(ii))

II. Continuous Physical Presence for 3 years OR less if an investigation or prosecution is complete, exempting any individual absence of 90 days or less or an aggregate of 180 days or less. (8 CFR 235.23(a)(3))

- Continuous presence begins on the date of admission NOT any date of reentry even if there is a subsequent reentry and a different date on the I-94 from reentry. (8 CFR 235.23(a)(3), 235.23(e)(2)(i))
- There is no exception for absences greater than one single absence of 90 days or an aggregate of a 180 days even if the absence was to assist in an investigation or prosecution. (INA §245(l))
- Proof of continuous physical presence:
  - Documents submitted to prove continuous presence should ensure continuity but do not necessarily have to provide presence on every single day. (73 Fed. Reg. 75,543 (2008-12-12))
  - Any government-issued documents must include a seal or other authenticating instrument normally contained in documents from the issuing authority. (8 CFR 245.23(e)(2)(i))
  - Non-government documents may include college transcripts, employment records, state or federal tax returns showing school attendance or employment, or installment period documents like rent receipts or utility bills. (8 CFR 245.22)
  - Any documents already in the applicant's DHS file do not need to be refiled but adjustment packet should include a list of the documents described by type and date. (73 Fed. Reg. 75,544 (2008-12-12))
    - Examples of prior filed documents could include: written copy of a sworn statement to a DHS officer, law enforcement agency documents, hearing transcripts, or a record of deportable/inadmissible alien form I-213. (73 Fed. Reg. 75,543 (2008-12-12))
  - Evidence must also include a passport copy or alternative travel document showing entries and departures into the United States. (8 CFR 245.23(e)(2)(i))
- A signed statement alone is insufficient to prove this requirement. (8 CFR 245.23(e)(2)(i))
- If no documentation is available, applicants should submit an affidavit explaining why and also submit additional affidavits of others who can attest to the physical presence. (8 CFR 245.23(e)(2)(i))
- If the applicant files in less than three years based on a complete investigation, the applicant must submit a DOJ representative signed form I-485E. (Note: there is currently no DOJ guidance on protocols related to T or U adjustments although they may issue some policy

guiding the field on these issues). (8 CFR 245.23(e)(2)(i)(B))

III. Admissible unless waived

- A T nonimmigrant must be admissible at the time of examination for adjustment. (8 CFR 245(1)(4), (b)(4), (c)(2) and (3))
- The rule suggests that if an applicant was originally admissible when the filing was submitted but during the course of time awaiting the rule became inadmissible, the applicant will still have to have to be eligible for and apply for a waiver.
- Form I-601 requires a fee or may be submitted with a fee waiver. (8 CFR 212.18(a), 8 CFR 103.7(1), 8 CFR 103.7(b)(1))
- If the T nonimmigrant received refugee benefits as a certified trafficking victim, this is not conclusive proof of the likelihood of public charge. If this is the only fact triggering public charge inadmissibility, USCIS will not expect an I-601 filing.
- Unlawful presence does not require an I-601 if caused by or incident to trafficking. (8 CFR 245.23(c)(3))
- The following grounds are not waivable (8 CFR 245.23(c)(1)):
  - INA §212(a)(3) Security-related grounds,
  - INA §212(10)(C) International Child Abduction, and
  - INA §212(10)(E) Renouncing citizenship to avoid taxation.
- The following grounds are waivable if in the national interests (INA §245(l)(2)(A)):
  - INA §212(a)(1) Health-related grounds,
  - INA §212(a)(4) Public Charge.
- The remaining grounds are all waivable if in the national interests and the inadmissible activities were caused by, or were incident to, the victimization. (8 CFR 212.18(b)(3))
- The unlawful presence ground is exempted if the applicant establishes that his or her unlawful presence was at least once central reason for the inadmissibility. It need not be the sole reason but the nexus must be more than tangential, incidental, or superficial. Under this exemption, no I-601 is required. (8 CFR 245.23(c)(3))
- If there is no unlawful presence nexus, then an I-601 appears to be required.
- For derivatives, the grounds should be caused by or incident to the principal's victimization.
- USCIS may revoke its approval of a waiver of inadmissibility. (8 CFR 103.5)

IV. Good Moral Character during continuous presence (8 CFR 245.23(g))

- An applicant must have good moral character from the time of the T nonimmigrant grant to the time of examination for adjustment. (8 CFR 245.23(a)(5))
- By statute, INA §101(f) establishes enumerated categories precluding good moral character but this list is not exclusive and an act falling outside the enumerated categories could still preclude good moral character.
- Any T nonimmigrant who engaged in prostitution or commercialized vice <u>after</u> obtaining such status is statutorily precluded from adjustment of status under INA §245(l) but eligible if prostitution was <u>before</u> lawful admission as a T-visa holder. (8 CFR 245.23(g)(5))
- To establish good moral character, applicants must attest to their good moral character and provide police clearance letters from all the jurisdictions where an applicant lived for more than 6 months over the course of the time in continuous presence. (8 CFR 245.23(g))
  - USCIS is reviewing whether or not ongoing proof will be required after the time of original eligibility for those with expired T-visas who have already filed I-485s.
  - However, based on the language in the rule, it is advisable to prepare clearances covering the time from the initial T-visa grant to the time of any filing to supplement the original

I-485 packet.

- If police clearances are unavailable, applicants should submit additional evidence as an affidavit explaining the unavailability and alternative evidence. (8 CFR 245.23(g))
- If a T nonimmigrant is under 14, s/he is presumed to have good moral character and need not submit proof of good moral character. If USCIS has reason to believe that the applicant does not have good moral character, it may request evidence. (8 CFR 245.23(g)(4))

V. Complied with any reasonable request for assistance during continuous presence (8 CFR 245.23(d), 245.23(f)(1)) OR would suffer extreme hardship (8 CFR 245.23(d), 245.23(f)(2))

- In order to prove compliance, the T nonimmigrant must submit a DOJ-issued document that he or she has complied with any reasonable requests of assistance in an ongoing Federal, State, or local investigation or prosecution in acts of trafficking. (8 CFR 245.23(d)) The rule does not clarify what form should be used.
- In order to prove extreme hardship, use guidelines set forth previously under 8 CFR 214.11(i) of extreme hardship involving unusual and serve harm upon removal. No one piece of evidence guarantees a finding of extreme hardship.
- Extreme hardship may not be based on economic detriment or disruption to social or economic opportunities. (8 CFR 214.11(i))
- Extreme hardship may include serious physical or mental illness necessitating medical or psychological unavailable in the home country, nature of the psychological or physical consequences of the victimization, and the likelihood of harm from the trafficked in the home country. (8 CFR 214.11(i))
- There is no need to resubmit evidence on extreme hardship already submitted with the T-visa application, but the applicant may establish that the hardship is ongoing. (8 CFR 245.23(f)(2))
- USCIS is not bound by any previous extreme hardship determinations made under 8 CFR 214.22(i).
- INA §101(a)(15)(T)(i)(III)(bb) exempts minors from cooperating to obtain a T visa. USCIS will consider this statutory scheme when evaluating whether or not a request to a minor is reasonable. In the alternative, those who obtained T nonimmigrant status as minors may also meet the alternative of proving extreme hardship. (8 CFR 245.23(a)(6)(ii))

VI. Favorable evidence to support USCIS discretion to grant (8 CFR 245.23(e)(3))

- USCIS can exercise discretion in granting adjustment by considering factors of favorability. (8 CFR 245.23(e)(3))
- Favorability facts include family ties, hardship, and length of residence in the United States.
- Applicants may also submit evidence to mitigate unfavorability factors. (8 CFR 245.23(e)(3))
- If there are sufficient unfavorable factors applicants may be required to demonstrate that the denial will result in exceptional and extremely unusual hardship but such a showing may still not overcome unfavorability factors. (8 CFR 245.23(e)(3))
- Examples of unfavorability factors: violent crimes conviction, crime of sexual abuse against a child, multiple drug-related crimes, and security or terrorism concerns. (73 Fed. Reg. 75,545 (2008-12-12))

Application Procedure

When to file

- The rule takes effect on January 12, 2009
- Under the transition rule, those with expired T-visas prior to the promulgation of this rule, who have not yet filed an I-485 must filed within 90 days of the promulgation of this rule. (8 CFR 245.23(a)(2)(ii))
- In order to avoid the application being kicked back and in anticipation of the filing deadline, review the form and form instructions to make sure the filing is complete. USCIS may deny an application or issue a *Requests for Evidence* if it deems the application incomplete. (8 CFR 103.2(b)(8))
- Vermont Service Center will start processing those who have already filed I-485s. Expect to receive Requests for Additional Evidence for any missing evidence. USCIS will revisit whether those who have already filed I-485s will have to submit ongoing evidence beyond that which was statutorily required at the time the I-485 was originally filed.
- Except for applicants with expired T-visas covered by the transitional rule, all other applicants in order to adjust under INA §245(l), must have T nonimmigrant visa status at the time of application (8 CFR 235.23(a)(2)).
- If a T nonimmigrant fails to apply to extend T nonimmigrant status or to apply for adjustment of status the applicant will lose T nonimmigrant status. This does not apply to applicants with expired T visas covered by the transitional rule.
- Application packets for derivative family members may be submitted with the principal's adjustment packet but may not be submitted any earlier than the principal's packet. 8 CFR 245.23(b)(1)

Fee Waivers

- All fees associated with the adjustment are waivable (form I-485, form I-765, biometrics, I-601)
- Inadmissibility fees (I-192 and I-193) associated with the T-visa filing are now waivable. (8 CFR 103.7(c))

Document List for for T-1 Nonimmigrant Adjustment

- Form I-485 with fee or fee waiver (8 CFR 245.23(a)(1))
- Form I-765 *Application for Employment Authorization* based on category (c)(9) with fee or fee waiver
- Form I-601 if necessary with fee or fee waiver
- Form I-797 proof of T nonimmigrant status (8 CFR 245.23(e)(2)(i))
- Passport/Travel document or reason why passport is unavailable (8 CFR 245.23(e)(2)(i))
- I-94 from T nonimmigrant grant (8 CFR 245.23(e)(2)(i))
- Evidence of continuous presence (8 CFR 245.23(e)(2)(i))
- Evidence of the nexus between victimization and unlawful presence (8 CFR 245.23(c)(3))
- Medical examination
- Evidence of good moral character (police clearance letters and/or other evidence)
- DOJ documentation of continued cooperation or documentation of extreme hardship
- Evidence in support of a favorable exercise of discretion (family ties, hardship, length of US residence; adverse factor may require proof of exceptional and extremely unusual hardship)

Document List for T Nonimmigrant Derivative Adjustment

- Form I-485 with fee or fee waiver (8 CFR 245.23(a)(1))
- Form I-765 *Application for Employment Authorization* based on category (c)(9) with fee or fee waiver

- Form I-601 if necessary with fee or fee waiver
- Form I-797 proof of T nonimmigrant status (8 CFR 245.23(e)(2)(i))
- Passport/Travel document or reason why passport is unavailable (8 CFR 245.23(e)(2)(i))
- I-94 from T nonimmigrant grant (8 CFR 245.23(e)(2)(i))
- Evidence of the nexus between the principal's victimization and unlawful presence (8 CFR 245.23(a)(4))
- Medical examination
- Receipt of T-1 nonimmigrant's I-485's filing if not filed concurrently.
- A derivative may file an I-485 if the principal T visa holder is concurrently filed, pending, or approved. (8 CFR 245.23(b))

USCIS adjudication

- USCIS will grant up to a cap of 5,000 adjustments per year of T-1 holders. Derivatives are not subject to the cap.
- The applications will be adjudicated in the order they are received. Those applications already filed at USCIS have already been established in a queue.
- Any application reached once the cap is reached in any fiscal year will be carried over to the subsequent fiscal year and will be adjudicated in the order received. (8 CFR 245.23(l)(2))
- Any filings received by USCIS once the cap is reached will be reviewed per regular procedure but no grants will be made until the next fiscal year when a number under the cap becomes available. Those applicants will be placed on a waiting list and notified of the placement. (8 CFR 245.23(l)(2))
- USCIS will issue a notice of approval and the notice will instruct the applicant on how to obtain temporary evidence of lawful permanent residency. (8 CFR 245.23(h))
- Once the notice is forwarded, the applicant will be instructed to go to the Applicant Support Center where s/he will complete form I-89 which collects the information necessary to produce Form I-551 (green card). (73 Fed. Reg. 75,546 (2008-12-12))
- For family members abroad, approval will be sent to National Visa Center for Consular Processing.
- If adjustment of status is denied, the applicant will receive in writing the reasons for such denial and the right of appeal to the USCIS AAO. (8 CFR 245.23(i))
- A denial of a T-1 nonimmigrant will result in the automatic denial of any pending I-485 applications of that principal's derivative family members. (8 CFR 245.23(i))
- Admission as an LPR will be recorded as of the date of approval.

Advance Parole:

- T nonimmigrant may travel outside of the United States on their T-visa for 4 years. T nonimmigrants should still proceed with caution and legal counsel if traveling as they could still trigger inadmissibility grounds upon reentry. (*As of December 3, 2008, the USCIS U-Visa Policy Liaison reported that the Department of State is still finalizing guidance on U visa holders and that U visa holders cannot yet obtain re-entry visas from US embassies and consulates abroad.)*
- A T nonimmigrant's T-visa status may expire after their adjustment of status application has been filed but before adjustment has been granted. T non-immigrants with expired T-visas and pending adjustment of status applications must obtain advance parole in order to travel outside the United States. If an applicant does not obtain advance parole, the adjustment of status application will be abandoned from when the applicant leaves the United States. (8

CFR 245.23(j))

- Admission as a lawful permanent resident will be recorded as the date of approval.
- If adjustment of status is subsequently denied to someone who obtains advance parole before departing from the United States, the individual will be subject to admission pursuant to INA §212 and §235 upon reentry. (8 CFR 245.23(j))
- Obtaining advance parole will not overcome three and ten year bar issues. (8 CFR 245.23(j))
- If a T nonimmigrant with a pending adjustment of status in removal, exclusion, or deportation proceedings leaves the U.S. without advance parole being granted, USCIS will treat the adjustment of status as abandoned from the time of departure from the U.S. (8 CFR 245.23(j))
- Applicants should file form I-131, *Application for Travel Document*, before departing the U.S. (8 CFR 245.23(j))
- Adjustment applicants who re-enter on advance parole may negatively affect the nonimmigrant visa status of derivative family members.[2]
- Anyone who travels, whether it be on the nonimmigrant visa or on the advance parole, will have to show admissibility every time they re-enter. Even with a waiver for prior acts, admissibility may be challenged at a port of entry. In addition, applicants may have become inadmissible after having received the waiver. Finally, being paroled into the U.S. on advance parole versus being admitted on a non-immigrant visa may have significant legal repercussions for derivatives and for the types of immigration relief available to the principal.

Extension of T nonimmigrant status

- If a trafficking victim is for some reason not eligible to adjust status, a victim may extend his or her T-visa status if the victim's continued presence in the U.S. is necessary for an investigation or prosecution.
- Such extension requires a certification of eligibility. (8 CFR 214.11(p)(1))

Removal Proceedings

- USCIS has sole jurisdiction over INA §245(l) adjustments of status. An Immigrant judge may not adjust status in removal proceedings under INA §245(l).
- An Immigration Judge may not review denials under INA §245(l). All appeals should be filed with USCIS Administrative Appeals Office as outlined above.
- Those in removal proceedings or with a final order of removal will need to file the appropriate motions (motion to reopen, motion to terminate) if necessary.
- An Immigration Judge could require an I-485 receipt in order to consider a motion. In anticipation of this requirement, file the I-485 first with USCIS, Vermont Service Center.
- USCIS does not have jurisdiction to intercede if a trial attorney fails to join in a motion.

Miscellaneous Adjustment Issues

- INA §245(l) is a stand-alone provision for T nonimmigrants to adjust status to lawful permanent residence. It is not a variation of INA §245(a) or any other provision of that section.

[2] Review the section on advance parole in *Kurzban's Immigration Law Sourcebook, 11th ed.*