

IMMIGRATION RIGHTS OF VICTIMS OF HUMAN TRAFFICKING

DEFINITION OF TRAFFICKING IN PERSONS

Under U.S. Federal law:

Sex trafficking is defined as the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, 22 U.S.C. 7102(9).

The term "severe forms of trafficking in persons" means:

- Sex trafficking in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age, 22 U.S.C. 7102 (8)(A); or
- The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery, 22 U.S.C. 7102(8)(B).

The term "coercion" is defined in 22 U.S.C. 7102 (2) as:

- Threats of serious harm to or physical restraint against any person;
- Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- The abuse or threatened abuse of the legal process.

There is no definition of "fraud" in 22 U.S.C. 7102, but the Federal crime of fraud is defined in 18 U.S.C. 1001 as, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully:

- Falsifying, concealing, or covering up by any trick, scheme, or device a material fact;
- Making any materially false, fictitious, or fraudulent statement or representation; or
- Making or using any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

Generally under state law, fraud is defined as the intentional and knowing concealment or false representation of fact by words or conduct to induce another to act to his or her legal detriment.

IDENTIFYING TRAFFICKING VICTIMS

Human trafficking can involve trafficking both for commercial sex and for labor, either domestic or commercial. The following are ways in which a trafficking victim might come before the courts:

- The circumstance in which a trafficked person is most likely to come before the courts, both adult and juvenile, is in the context of a prosecution for prostitution. Distinguishing between a prostitute and a victim of human trafficking can be difficult, and many judges may not even be aware of the possibility.
- A trafficking victim might be identified in the process of determining conditions for probation, juvenile diversion, or other forms of alternative to detention if the offender is asked pertinent questions about his or her living conditions or details of employment.
- Sometimes trafficked girls will also engage in other illegal activities for their traffickers, such as selling drugs or recruiting other girls for prostitution.
- Labor trafficking victims may appear in a variety of criminal or civil cases, including wage disputes, municipal ordinance enforcement, illegal peddling, and others. They may also be susceptible to victimization, particularly if they are in the country illegally, as criminals will assume that they will not report thefts or other crimes committed against them.

Identifying human trafficking cases in the justice system is difficult. The burden falls on officials from across the entire justice system, including on law enforcement officers, prosecutors, defense attorneys representing possible trafficking victims who are charged as criminals, judges, and probation officers. Justice system officials should also be alert to human trafficking issues in the investigation and prosecution of child protection and juvenile delinquency cases, particularly as juvenile detention facilities sometimes serve as fertile recruiting ground for traffickers, and even some foster parents have engaged in trafficking. Traffickers have also tried to obtain guardianship over juvenile trafficking victims. Further, trafficking victims may not view themselves as such. They may have become dependent on the trafficker or believe that the trafficker is a boyfriend, so they may actually run away from a foster home or other placement to rejoin a trafficker.

One critical issue with regard to understanding and assessing human trafficking cases is that potential human trafficking cases are often prosecuted under lesser charges that are easier to prove and carry similar penalties. Crimes that may be used as surrogates for a human trafficking charge include, among others, compelling prostitution, promoting prostitution, kidnapping, unlawful imprisonment, assault, and family violence. This may make it difficult to identify the victim of the crime as a human trafficking victim, as nobody in the justice system may be looking for a trafficking victim in those cases.

CONTINUED PRESENCE

A Federal law enforcement official may request a grant of Continued Presence for an alien by application to the Law Enforcement Parole Branch (PEPB) of ICE stating that the alien is a victim of a severe form of trafficking and may be a potential witness to such trafficking. The application may be filed by a Federal law enforcement official on behalf of a state or local law enforcement official. Continued Presence is initially granted for one year and may be renewed in one-year increments.

T VISAS

The T visa is a non-immigrant visa available for individuals who have been the victims of human trafficking and meet the following requirements. The person:

- Is or has been the victim of severe trafficking, as is defined above;
- Is physically present in the United States or its territories as a result of the trafficking;
- If 18 years of age or above, is complying with any reasonable request for assistance in the investigation or prosecution of traffickers; and
- Would suffer extreme hardship involving unusual and severe harm upon removal.

The T visa requires application to the United States Citizenship and Immigration Services (USCIS). There is no specific requirement in federal immigration law that the applicant for a T visa obtain a certification from a state court judge that the person is a victim of human trafficking. Such a certification, however, is recommended by USCIS and may serve as primary evidence that the applicant is a victim of trafficking and has complied with reasonable requests from law enforcement, to support a determination that the applicant meets the requirements to be eligible for a T visa. It may be particularly important if the trafficker is being prosecuted under a lesser charge.

To be eligible for a T visa, the applicant must also meet the requirements of admissibility. The requirements for admissibility are discussed later in this chapter. Federal immigration law permits USCIS to waive most of the requirements of admissibility, and in particular requirements based on criminal convictions rendering the person inadmissible that were caused by or related to victimization as a result of the trafficking. See 8 U.S.C. § 1182(d)(13). Some requirements may not be waived, including the security and related grounds, international abduction, and renunciation of citizenship by a former citizen to avoid taxation.

The T Visa also allows certain family members accompanying or following to join the victim to enter as well, including parents if the victim is under the age of 21 years.

Under the Trafficking Victims Protection Act, a person under the age of 18 years who is induced to perform a commercial sex act is considered a victim of severe trafficking.

The maximum length of stay under the T visa status is four years unless extended. The holder of a T visa is eligible to apply for lawful permanent resident status if he or she has been continuously in the U.S. in T visa status for three years, is admissible and of good moral character, has suffered extreme hardship, and is complying with requests for help from law enforcement. See 8 U.S.C. § 1255(l)(1)(B).

U VISAS

A victim of human trafficking may qualify for U non-immigrant status, also referred to as a U visa, in some circumstances, on application to USCIS. The U visa is a non-immigrant visa available to undocumented individuals who meet the following requirements.

- The individual has suffered severe physical or mental abuse as a result of being a victim of certain enumerated criminal activity;
- The individual has information about the criminal activity and has been, is being, or is likely to be of help to a federal, state, or local investigation or prosecution of the criminal activity; and
- The individual has certification from a federal, state, or local judge, prosecutor, law enforcement officer, or other justice system official involved in investigating or prosecuting the criminal activity that he or she has been, is being, or is likely to be of help to the investigation or prosecution of the criminal activity. State court judges should be particularly aware that they can provide the certification.

To be eligible for a U visa, the applicant must also meet the requirements of admissibility. Federal immigration law permits USCIS to waive most of the requirements of admissibility in determining eligibility for the U visa, and the waiver is not limited to convictions for crimes related to victimization from human traf-

ficking. See 8 U.S.C. § 1182(d)(14). Some requirements may not be waived, including the security and related grounds, international abduction, and renunciation of citizenship by a former citizen to avoid taxation.

The rights of the U visa holder include the following.

- The maximum length of the U visa is four years unless extended.
- The U visa holder may apply for any other immigration benefit or status for which he or she is eligible.
- The holder of a U visa is eligible to apply for lawful permanent resident status after three years of continuous residence in U visa status. To be eligible for a change in status to lawful permanent resident, a U visa holder must also meet the requirements for admissibility under federal immigration law, not refuse to cooperate with reasonable requests for assistance by law enforcement, and the change must be justifiable on humanitarian grounds. A variety of criminal convictions can make a person inadmissible.
- The U visa holder may apply for certain qualifying family members to obtain U visa status as well.

The U visa applies to the following specified list of crimes, many of which could be involved with human trafficking: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; stalking; fraud in foreign labor contracting; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

VAWA SELF-PETITIONER AND HUMAN TRAFFICKING

Immigration law provides that an immigrant married to an abusive U.S. citizen or lawful permanent resident (LPR), a child of an abusive U.S. citizen or LPR, or the parent of an abusive U.S. citizen son or daughter may self-petition for LPR status without the cooperation of the U.S. citizen or LPR spouse, parent, son or daughter if:

- The spouse has been battered or subjected to extreme cruelty by citizen or lawful permanent resident spouse;
- The child has been battered or subjected to extreme cruelty by citizen or lawful permanent resident parent;
- The child (whether abused or not) of a parent who was abused by a U.S. citizen or permanent resident spouse; or
- The parent has been battered or subjected to extreme cruelty by a U.S. citizen son or daughter.

- The act or threatened act was one of extreme cruelty, including physical violence, sexual abuse, forced detention, emotional abuse, or psychological abuse against the petitioner;
- The abused family member lived at some point in time with the abuser, in or out of the United States;
- If the petitioner is self-petitioning based on abuse by a spouse, the marriage must have been legal and valid in the location in which it took place;
- For abused children, they must be unmarried and under the age 21, although certain exceptions are available for abused children to self-petition up to age 25; and
- The petitioner is of good moral character.

VAWA protection can apply to an immigrant human trafficking victim if the extreme cruelty is due to being a victim of human trafficking.

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)

A trafficked juvenile who is also an undocumented immigrant may be eligible for lawful permanent residence through Special Immigrant Juvenile status (SIJS) under certain conditions specified by Federal immigration law. The juvenile must file an application with the United States Citizenship and Immigration Services (USCIS) for the grant of SIJS, and the granting of status is discretionary with USCIS. Any unmarried person under the age of 21 who meets the conditions listed below may apply for SIJS.

For eligibility for SIJS, there must be findings entered and signed by a court in the United States with juvenile jurisdiction that:

- The juvenile is declared dependent on the court or is legally placed in the custody of an agency or department of a state or is legally committed to the care of an individual or entity appointed by the state or a juvenile court located in the United States;
- Reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis found under state law; and
- It would not be in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence.

The law defines a juvenile court as a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles. This means that a variety of courts can fit this definition including courts that handle dependency, delinquency, guardianship, and adoption proceedings.

A juvenile applying for SIJS must also apply for adjustment to lawful permanent resident status, so most of the grounds for inadmissibility also apply. An immigrant juvenile who engages in any of the following areas of conduct may be ineligible for adjustment of status:

- Known or reasonably believed to have engaged in drug trafficking, unless coerced;
- Being a drug addict or abuser;
- Having engaged in prostitution;
- Violation of a protection order;
- False claim to U.S. citizenship; or
- Behavior showing a physical or mental condition that poses a current threat to self or others.

Most of these grounds, however, may be waived. Other conduct such as violent offenses, sex offenses, and gang activity are particularly problematical, as they often can lead to discretionary denial of SIJS and other immigration protections.

Because traffickers may force the victims into committing these and other crimes, including selling drugs for the trafficker, stealing, or even assisting the trafficker in recruiting other victims, it turns the trafficking victim into a trafficker as well. This makes it difficult to recognize juvenile criminal behavior that is the result of victimization rather than criminal intent. If a trafficked girl also engages in other illegal activities for her traffickers, such as selling drugs or recruiting other girls for prostitution, that additional criminal behavior, if admitted to in a delinquency hearing, could also make the victim ineligible for SIJS or discretionary immigration benefits, including naturalization after the juvenile attains the age of eighteen.

The above eligibility requirements for adjustment of status can become especially problematical in circumstances where the state court is unable to provide services to a juvenile offender unless the court has an adjudication on which to justify requiring the juvenile to enter a treatment program. For example, there may be no secure housing available for a juvenile victim of sex trafficking unless the juvenile is adjudicated for prostitution and sentenced to a juvenile detention facility. The adjudication, which is aimed at protecting the juvenile, may end up making an immigrant juvenile ineligible for SIJS or other discretionary immigration benefits, including naturalization after the juvenile attains the age of eighteen.

Some states have options for certain juveniles charged with prostitution to be classified as sexually exploited juveniles and sent to diversion programs rather than being adjudicated delinquent of prostitution. New Jersey, for example, makes it an affirmative defense to a charge of prostitution that the defendant was either a victim of human trafficking or under the age of 18 at the time of commission of the act.

ISSUES OF SAFETY FOR TRAFFICKING VICTIMS

Judges need to be aware of some issues relating to the safety and protection of trafficking victims, particularly those who are charged with crimes committed on behalf of or at the direction of a trafficker.

- Judges need to be aware of indicators of trafficking and conversant with the screening tools used by service providers, probation officers, and others, as there may be occasions when a judge may want to take steps to protect someone who shows signs of possibly being a trafficking victim.
- The trafficker may be in the courtroom, so the judge must be careful in framing questions to a potential trafficking victim.
- A guilty plea by a trafficking victim charged with a crime, such as prostitution, may give the trafficker more control over the victim.
- There may be a need for a protocol with prosecutors and defense attorneys to identify a potential trafficking victim before the victim has to testify in open court.
- Judges need to be aware of local resources to assist trafficking victims.