



**To:** United States Citizenship and Immigration Services, Department of Homeland Security

**Date:** September 13, 2021

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**RE:** [CIS No. 2507-11; DHS Docket No. USCIS-2011-0010] RIN 1615-AA59: Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status]

National Immigrant Women's Advocacy Project (NIWAP), was founded in April of 2012 at American University, Washington College of Law. NIWAP's Director has 38 years and NIWAP's Deputy Director has 14 years of experience advocating for immigrant victims of violence against immigrant women and children. NIWAP is designed to protect and expand the rights of immigrant women and their children. NIWAP seeks to create a legal, institutional, and policy framework that helps immigrant victims of violence against women end the destructive role that violence has played in their lives and the lives of their children, and that supports all immigrant women in their struggles to care for and nurture their children, attain legal immigration status, and build safe, economically secure families and communities in which they and their children can thrive.

The National Immigrant Women's Advocacy Project (NIWAP), American University Washington College of Law is writing to thank DHS for reopening the comment period for the Interim Final T Visa Rule to provide those in the field serving human trafficking victims the opportunity to identify areas for improvement in the regulations that will help ensure that noncitizen victims of severe forms of human trafficking (sex and labor trafficking) are fully able to obtain T visa protections. NIWAP also appreciates the decision to extend the comment period to a full 60 days. We commend you for issuing this important guidance and providing vital instruction to USCIS on the eligibility for T visa applicants.

We incorporate by reference comments submitted by the Freedom Network USA and Texas RioGrande Legal Aid (TRLA). NIWAP fully supports their comments and recommendations on the T visa regulations. We write to address more fully two issues of importance to human trafficking survivors that NIWAP believes need more discussion for the record.

We respectfully submit our comments to provide further clarification and instruction regarding the T visa Trauma Exception. These comments explain why defining "trauma" will help T visa applicants know if they qualify for the physical and psychological trauma exception to the law enforcement cooperation requirement. These comments further explain why immigrant victims eligible for T visas, U Visas, VAWA self-petitions, and for VAWA cancellation of removal and VAWA suspension of deportation should, by default, not be subject to reinstatement of removal proceedings, unless certain qualifications are met. These regulations provide USCIS an opportunity to also address the ongoing problems being caused for all immigration relief eligible victims by ending DHS's 17-year delay to implement VAWA 2005's Congressional instruction that DHS exercise its discretion to not reinstate removal against T visa,

U visa, VAWA self-petitioner, VAWA cancellation and VAWA suspension applicants and eligible victims.

## INTRODUCTION

The main reasons immigrant victims do not call law enforcement for help, file, or follow through with a court case are fear of deportation, fear that the perpetrator will retaliate by calling immigration enforcement officials, or fear of immigration enforcement in a courthouse.<sup>1</sup> Sixty-five percent (65%) of all immigrant victims report some form of immigration-related abuse.<sup>2</sup> For example, abusers may use constant threats to deport spouses and children to prevent battered immigrant women from seeking help and to coerce victims into staying in violent relationships.”<sup>3</sup>

The Violence Against Women Act (VAWA) has improved criminal, legal, and community-based responses to domestic violence, dating violence, sexual assault, and stalking in the United States.<sup>4</sup> VAWA 1994 contained immigration relief that allowed battered immigrants to petition for legal status without relying on the sponsorship of a legal permanent resident spouse or a United States citizen abuser.<sup>5</sup> VAWA 2000 expanded protections for battered immigrant, victims of human trafficking, and other mostly violent crimes through the T and U visa programs.<sup>6</sup> VAWA was reauthorized in 2000, 2005, and 2013.<sup>7</sup> Several important statutory provisions in VAWA have never been fully implemented through regulation or policy by the U.S. Department of Homeland Security.<sup>8</sup> When DHS fails to implement VAWA’s and/or the

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<sup>1</sup> Rafaela Rodrigues et al., *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* 1, 98–9 (2018), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf> (finding that thirty-seven percent of individuals surveyed reported being fearful of deportation, twenty-five percent feared that the perpetrator would retaliate by calling immigration enforcement officials, and sixteen percent feared immigration enforcement in a courthouse).

<sup>2</sup> Mary Ann Dutton et al., *Evidence of Coercive Control: Proof of Extreme Cruelty in Immigration Cases and Power and Control Dynamics in Family Law Cases* 1, 34 (July 30, 2015), <http://library.niwap.org/wp-content/uploads/Powerpoint-Evidence-of-Coercive-Control-Proof-of-Extreme-Cruelty-in-Immigration-Cases-and-Power-and-Control-Dynamics-in-Family-Law-Cases.pdf>.

<sup>3</sup> Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 99 (2001).

<sup>4</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (1994); LISA N. SACCO, CONG. RSCH. SERV., R45410, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization* 1, 1 (2019) (discussing what VAWA 1994 sought to accomplish).

<sup>5</sup> See Pub. L. No. 103–322, § 40701, 108 Stat. 1796 (1994); *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL 1, 1 (Nov. 23, 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/violence\\_against\\_women\\_act\\_provides\\_protections\\_for\\_noncitizen\\_women\\_and\\_victims\\_of\\_crime.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/violence_against_women_act_provides_protections_for_noncitizen_women_and_victims_of_crime.pdf) (describing VAWA 1994’s immigration relief).

<sup>6</sup> Violence Against Women Act of 2000, tit. V, Pub. L. No. 106–386, § 107, 114 Stat. 1464 (2000); Immigration Nationality Act (INA) § 101 (a)(15)(T)–(U); 8 U.S.C. § 1101 (a)(15)(T)–(U).

<sup>7</sup> See Violence Against Women Act of 2000, tit. V, Pub. L. No. 106–386, 114 Stat. 1464 (2000); Violence Against Women Act of 2005, Pub. L. No. 109–271, 120 Stat. 750 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54 (2013); LISA N. SACCO, CONG. RSCH. SERV., R45410, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization* 1, 1 (2019).

<sup>8</sup> Leslye E. Orloff & Benish Anver, *Current State of Violence Against Women Act and Trafficking Victim Protection Act Implementing Regulations and Policies* (Jan. 8, 2015), [https://niwaplibrary.wcl.american.edu/wp-content/uploads/17-Statute-and-Regs-List\\_FINAL.pdf](https://niwaplibrary.wcl.american.edu/wp-content/uploads/17-Statute-and-Regs-List_FINAL.pdf) (listing VAWA statutory provisions where DHS has failed to issue implementing regulations or policies, VAWA and Trafficking Victim Protection Act regulations that were

Trafficking Victim’s Protection Act’s (TVPA) statutory immigration protections, aimed at helping human trafficking victims, battered immigrants, and other crime victims, or implements the protections in a manner that cut off immigration relief for Congress’s intended beneficiaries, DHS harms victims, and undermines community safety.<sup>9</sup>

DHS needs to take action to implement all of VAWA’s and TVPA’s statutory protections so that victims can have the full protection of the law as intended by Congress. Two examples highlight shortcomings in DHS’s implementation of VAWA and TVPA that have consequences for thousands of women and children who were victims of human trafficking and other abuse and criminal activity perpetrated against them in the United States. First, “physical and psychological trauma” has not been defined by DHS, leaving trafficking victims whom Congress sought to protect without the guidance they need to be able to apply for a T visa when they cannot cooperate with an investigation due to physical or psychological trauma. Next, DHS continues to remove immigrant survivors of human trafficking, domestic violence, and other crimes whom Congress directed DHS to protect from reinstatement of removal to allow victims to apply for crime victim related forms of immigration relief. NIWAP’s comments focus on these important protections for human trafficking victims that DHS has failed to fully implement.

## **THE TRAUMA EXCEPTION FROM T VISA COOPERATION REQUIREMENTS**

It can be difficult for trafficking victims who have faced trauma to be required to cooperate with reasonable requests to help law enforcement in criminal investigations or prosecutions of their traffickers when applying for a T visa.<sup>10</sup> The trauma exception that passed in VAWA 2005 allows a victim to obtain a T visa and lawful permanent residency as a T visa holder without having to comply with requests from law enforcement or prosecutors to assist in a criminal investigation or prosecution of their trafficker if they can show that their trauma would make compliance too painful.<sup>11</sup> The exception has not been implemented by either policy or regulation by DHS. Without guidance from DHS, immigration benefits adjudicators are left to define and interpret the type and extent of trauma that is sufficient for trauma survivors to qualify for the exception. This leads to inconsistent adjudication outcomes in T visa cases.

### *a. The T Visa Reasonable Request Requirement*

A T visa applicant must comply with a “reasonable request” from law enforcement or prosecutors for assistance in the investigation or prosecution of acts of the trafficker.<sup>12</sup> A

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overruled by statute, and “regulations that do not reflect expansions of VAWA or TVPA protections that became law subsequent to the issuance of the regulations”).

<sup>9</sup> Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* (June 8, 2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf>.

<sup>10</sup> See INA §101(a)(15)(T)(III)(aa); 8 U.S.C. §1101(a)(15)(T) (requiring T visa applicants to help law enforcement); see also TRAFFICKING IN PERSONS REPORT, U.S. DEPT. OF STATE 21 (2008) (highlighting that the symptoms of psychological reactions to trauma include “depression, anxiety, hostility and irritability, recurring nightmares and memories of abuse, difficulty concentrating and sleeping, and feelings of apathy or emotional detachment”).

<sup>11</sup> Trauma Exception, 81 Fed. Reg. 92266, 92277 (Dec. 19, 2016) (amending 8 C.F.R. § 214).

<sup>12</sup> 8 C.F.R. § 214.11(a)(3) (2020) (explaining that a severe form of trafficking in persons means “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or the recruitment, harboring, transportation, provision, or obtaining of a person for

“reasonable request” is a request made by a law enforcement or prosecution agency to a victim to “assist in the investigation or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime.”<sup>13</sup> The VAWA “any credible evidence” rules allow victims to present any credible evidence to prove each eligibility requirement for their immigration case.<sup>14</sup> The T visa rules provided that trafficking victims may submit any credible evidence such as trial transcripts, court documents, police reports, news articles, affidavits, or copies of reimbursement forms for travel to and from court.<sup>15</sup> The regulations do not give direction to applicants or adjudicators regarding the examples of any credible evidence that may qualify a victim for the trauma exception.

*b. Psychological or Physical Trauma Exception*

Congress amended the INA in VAWA 2005 to assist victims who may be unable to help law enforcement because it would cause further trauma.<sup>16</sup> The amendment states, “if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance . . . the request is unreasonable.”<sup>17</sup>

DHS amended its T visa regulations by issuing an interim final rule on December 19, 2016.<sup>18</sup> In the rule, DHS said that a T visa applicant can show the requisite trauma to bypass the law enforcement cooperation requirement by submitting a statement describing the trauma and “any other credible evidence.”<sup>19</sup> Applying VAWA’s “any credible evidence” rules, the 2016 regulations allow victims to submit “any other credible evidence” which includes “a signed statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim’s mental state, and medical, psychological, or other records which are relevant to the trauma.”<sup>20</sup> In the 2016 interim final trafficking regulations, DHS explained that, although a victim’s affidavit alone can satisfy the victim’s evidentiary burden, applicants are encouraged to submit additional evidence that will assist them in establishing the

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labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery”); *see also* INA § 101(a)(15)(T)(III)(aa); 8 U.S.C. § 1101(a)(15)(T)(III)(aa).

<sup>13</sup> 8 C.F.R. § 214.11(a)(3) (2020) (explaining that factors to consider include but are not limited to: general law enforcement and prosecutorial practices, the nature of the victimization, the specific circumstances of the victim, severity of trauma suffered (both mental and physical) or whether the request would cause further trauma and access to support services).

<sup>14</sup> *See generally* Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules - A Call for Consistency*, 11 GEO. J. GENDER & L. 619 (2010) (describing the legislative history and purpose of VAWA’s any credible evidence rules).

<sup>15</sup> 8 C.F.R. § 214.11(f)(1)(iii) (2020).

<sup>16</sup> Violence Against Women Act of 2005, Pub. L. No. 109–162, 119 Stat. 2960, 3053–58 (Jan. 5, 2006) (amending 8 U.S.C. § 1101(a)(15)(T); INA § 101(a)(15)(T)).

<sup>17</sup> Pub. L. No. 109–162, § 801(a)(3)(iii), 119 Stat. at 3053–54.

<sup>18</sup> Trauma Exception, 81 Fed. Reg. 92266, 92277 (Dec. 19, 2016).

<sup>19</sup> *Id.* at 92277 (explaining how an individual can satisfy the law enforcement cooperation requirement under 8 C.F.R. § 214.11(h)(4)(i) (2020)).

<sup>20</sup> INA § 101(a)(15)(T)(i)(III)(bb); 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb).

trauma exception.<sup>21</sup> DHS did not provide trafficking victims further direction or examples of what factors DHS would consider in granting trafficking victims' trauma exception requests.<sup>22</sup>

DHS sought comments on how to analyze whether an applicant can comply with the request, but failed to define what constitutes psychological and physical trauma.<sup>23</sup> The failure to clarify what physical or psychological trauma entails leaves adjudicators to impose their own views of trauma that may or may not be based upon or be consistent with evidence-based social science research. Further, without regulations providing direction to both applicants and adjudicators regarding the types of evidence that victims might provide to document trauma or a definition of trauma in the regulations, victims who have endured severe trauma must navigate applying for a T visa without guidance on how to qualify for the cooperation exception.<sup>24</sup>

How USCIS defines “physical or psychological trauma” in the regulations and the list of examples of the types of evidence a victim might provide to prove eligibility for the “physical or psychological trauma” exception from the T visa cooperation requirement should be based upon evidence-based research on the impact of trauma on survivors. The regulations should further the Congressional goal of the trauma exception to recognize that the criminal investigation and prosecution process can trigger, re-traumatize and endanger victims. Congress understood based on emerging research that a victim's trauma interferes with the quality of information that victims can provide in the criminal investigation or prosecution. In recognizing this and protecting traumatized victims from having to cooperate to qualify for T visa and lawful permanent residency based on the T visa, Congress sought to protect traumatized human trafficking victims from additional and ongoing trauma that is simultaneously harmful to both the victim and to successful prosecution of human traffickers.

Congress decided to create the physical or psychological trauma exception to cooperation for T visa victims and the U visa exception, which allows immigrant victims to refuse to cooperate so long as their refusal to cooperate is not unreasonable. Research published since Congress created this exception has found that, by providing immigrant victims the ability to apply for victim based immigration relief that does not require or includes cooperation exceptions, victims can access the protection from deportation and work authorization that they need to heal, rebuild their lives and thrive. Once victims attain protection from deportation and work authorization, they become more able and more willing to make police reports and cooperate in criminal investigations and prosecutions.<sup>25</sup>

DHS should follow the lead of and rely upon the definitions of trauma used by other Federal government agencies. The National Institute of Health (NIH) divides “physical trauma” into two categories: blunt force trauma and penetrating trauma.<sup>26</sup> Blunt force trauma occurs

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<sup>21</sup> Trauma Exception, 81 Fed. Reg. 92266, 92277 (Dec. 19, 2016) (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 81 Fed. Reg. at 92277; INA §101(a)(15)(T); 8 U.S.C. §1101(a)(15)(T).

<sup>25</sup> Leslye E. Orloff et al., *Executive Summary*, Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/exec-summarytransforming-lives>.

<sup>26</sup> National Institute of General Medical Sciences, *What is Physical Trauma?*, NAT'L INSTS. OF HEALTH, <https://www.nigms.nih.gov/education/fact-sheets/Pages/physical-trauma.aspx> (last updated July 13, 2020).

when an object or force strikes the body, frequently causing concussions, deep cuts, or broken bones. Penetrating trauma is when an object pierces the skin or body.<sup>27</sup>

NIH defines psychological trauma as an “emotional or psychological injury that “usually results from an extremely stressful or life-threatening situation.”<sup>28</sup> The Substance Abuse and Mental Health Services Administration (SAMHSA) describes individual trauma as resulting from an “event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.”<sup>29</sup>

These definitions show that, because physical and psychological trauma can come from a range of events and circumstances perpetrated by human traffickers and/or experienced by human trafficking victims, the DHS definition that lists examples of evidence that can be used to prove trauma needs to encompass the full range of traumatic experiences. Providing more complete definitions and lists of examples in the regulations will improve the consistency and efficiency of adjudications, reduce Requests for Further Evidence and provide much needed clarity so that T visa applicants who qualify for the exception can have their T visas and lawful permanent residency applications approved. Applicants need to be able to determine whether their individual experience constitutes trauma under the exception.

*c. Incorporating and Expanding on the U visa Substantial Harm*

DHS needs to define what constitutes physical or psychological trauma to help current and future applicants determine what evidence to submit when invoking the exception. Since proof of physical or psychological trauma will as a matter of law require a lower burden of proof than the U visa’s “substantial physical or mental abuse” requirement, all of the factors USCIS articulated in defining substantial physical or mental abuse should also be acceptable as any credible evidence of trauma.<sup>30</sup> USCIS should also expand the non-exclusive list of factors considered in defining “physical or psychological trauma” based on the social science research about the experience of trauma and how it effects survivors.<sup>31</sup>

In the regulatory history discussion in the preamble to the U visa regulations, USCIS clarified what “substantial physical or mental abuse” meant.<sup>32</sup> USCIS did not want to limit the ability of victims to prove that the harm they suffered was “substantial,” so it provided several factors to consider whether an individual’s physical or mental abuse at issue qualifies as substantial.<sup>33</sup> These factors include the “nature of the injury inflicted or suffered; the severity of

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Trauma and Violence*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., (Aug. 2, 2019), <https://www.samhsa.gov/trauma-violence>.

<sup>30</sup> *See* New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007) (discussing how to interpret “substantial physical or mental abuse” in 8 C.F.R. § 214.14(a)(8) (2005)).

<sup>31</sup> 8 U.S.C. § 1101(a)(15)(U)(i)(I); INA § 101(a)(15)(U)(i)(I).

<sup>32</sup> 72 Fed. Reg. at 53018.

<sup>33</sup> *See id.* (amending 8 C.F.R. § 214.14(b)(1) by explaining that the “statutory provision does not make clear, however, whether the standard of ‘substantial’ physical or mental abuse is intended to address the severity of the injury suffered by the victim, or the severity of the abuse inflicted by the perpetrator”).

the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim."<sup>34</sup> By evaluating these factors and the others discussed below, USCIS will be able to determine the kind and degree of harm suffered by the applicant based upon that applicant's individual experience.<sup>35</sup>

d. *Social Science Research on Trauma*

While the Federal government definitions in the mental health context and U visa substantial harm factors provide a starting place for the guidance DHS must include in the final T visa regulations, social science research on trauma and its impact on victims provide additional factors that must be included to provide much needed direction to both T visa adjudicators and applicants on how victims can meet the T visa cooperation exception. Three important indicators of trauma that DHS should include among the listed examples in the regulations are: inconsistent memory and/or statements, refusal to provide statements, and demeanor.

When a trafficking victim demonstrates that they are unable to recall a traumatic event, their memory difficulties provide evidence that is consistent with and contributed to documenting the presence of physical and/or psychological trauma, which provides evidence that helps provide eligibility for the T visa cooperation exception. Victims often have difficulty recalling specific details as the trauma of their experiences, "inhibit processing of and memory for peripheral details."<sup>36</sup> Memory loss, or psychogenic amnesia, caused by the psychological trauma, can lead the victim to completely forget or struggle to remember details of the events law enforcement are investigating.<sup>37</sup>

If the victim is required to cooperate, this can force the victim to relive "the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person's ordinary memories a sense of logical and chronological coherence."<sup>38</sup> The complete reliving of the traumatic event interferes with the victim's ability to cooperate with law enforcement or prosecutors. In addition, this can cause inconsistencies within the victim's statement that intersect with the victim's memory that is impeded as victims adopt a "survival mode" to protect themselves from reliving the trauma.<sup>39</sup> In this survival mode, it is unreasonable to expect a victim to cooperate as they are incapacitated by their physical and/or psychological trauma. Therefore, the list of types of evidence that T visa victims may provide to qualify for the T visa cooperation exception must include inconsistent memory and/or statements as evidence of trauma.

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<sup>34</sup> *Id.*

<sup>35</sup> New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007).

<sup>36</sup> Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR L. & COM. 1421, 1432-33 (2001).

<sup>37</sup> *Id.*

<sup>38</sup> Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 487 (2016).

<sup>39</sup> Hannah Rogers et al., *The importance of looking credible: the impact of the behavioural sequelae of post-traumatic stress disorder on the credibility of asylum seekers*, 21 PSYCH., CRIME & L. 139, 140 (2015).

Next, refusal or hesitation by the victim to describe their experiences can also provide evidence of symptoms of psychological and/or physical trauma. Victims feel a “burden of guilt and shame, which makes it too painful and humiliating to tell the outside world about the torture”<sup>40</sup> This burden is a symptom of trauma. The trauma exception to the T visa cooperation requirement was developed to give trafficking victims time to heal instead of forcing them to cooperate and trigger additional trauma. Trafficking victims forced to cooperate with law enforcement could suffer from the anxiety of reliving the experience as they “don’t want to talk about the torture” they’ve experienced.<sup>41</sup> If victims are forced to cooperate rather than respect their refusal, the shame survivors suffer may lead to the survivor relaying incomplete stories. The trauma exception gives victims the time that they need to heal, which can lead to a trafficking victim being able to share details later in the process rather than at the initial or earlier interactions.<sup>42</sup> Congress created the trauma exception to keep law enforcement and prosecutors from forcing victims to relive trauma before they are ready to do so, which creates inconsistencies and credibility issues that undermine successful prosecutions of human traffickers.

The victim’s demeanor during interactions provides important information to law enforcement and prosecutors about whether their requests for cooperation from a trafficking victim is reasonable. Survivors may “hesitate” or “waver” when describing their experiences.<sup>43</sup> On the other hand, survivors can have “glazed eyes with a monotonous voice, differing from common speech patterns or appear uncertain.”<sup>44</sup> They can also appear detached as they attempt to dissociate from the trauma.<sup>45</sup> While these responses demonstrate a removed state, victims can also experience increased trauma effects, including psychological distress from recounting details.<sup>46</sup> The re-traumatization from remembering their stories “constitutes new trauma.”<sup>47</sup>

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<sup>40</sup> David S. Gangsei & Ana C. Deutsch, *Psychological evaluation of asylum seekers as a therapeutic process*, 17 *TORTURE* 79, 80 (2007).

<sup>41</sup> Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 *U. PA. L. REV.* 399, 410-11 (2019).

<sup>42</sup> Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 *BERKELEY J. GENDER L. & JUST.* 1, 37 (2009).

<sup>43</sup> See Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 *SANTA CLARA L. REV.* 457, 487 (2016); see also Kim Lane Scheppele, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. SCH. L. REV.* 123, 126-27 (1992).

<sup>44</sup> See *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers*, U.S. Dep’t of Justice, Office on Violence Against Women (July 30, 2014), <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>; see also Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 *SANTA CLARA L. REV.* 457, 487 (2016); Kim Lane Scheppele, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. SCH. L. REV.* 123, 126-27 (1992).

<sup>45</sup> See Angela E. Waldrop & Patricia A. Resnick, *Coping Among Adult Female Victims of Domestic Violence*, 19 *J. FAMILY VIOLENCE* 291, 294, 299 (2004); see also *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers*, U.S. Dep’t of Justice, Office on Violence Against Women (July 30, 2014), <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.

<sup>46</sup> David S. Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 *TORTURE* 79, 80 (2007).

<sup>47</sup> Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 *BERKELEY J. GENDER L. & JUST.* 1, 37 (2009).



Since trauma impacts a victim’s physical, social, and/or emotional functioning,<sup>48</sup> one of the effects of the new trauma manifests in a victim’s lack of capacity to manage emotional responses, which constitutes dysregulation.<sup>49</sup> Any credible evidence regarding the victim’s demeanor provides important indications that the victim may not be able to cooperate due to the trauma they’ve experienced. A victim’s demeanor should be incorporated into the T visa regulations as a factor to be considered when victims apply for the cooperation exception. The victim’s demeanor is relevant to adjudicating both the reasonableness of the request and evaluating the existence of trauma based on a victim’s state of mind and the victim’s reaction to the cooperation request.

Victims will not be able to effectively testify and cooperate if they have not fully healed from their trauma. If victims are given sufficient time to heal from their trauma, it is possible that the victims could become more helpful and willing to work with law enforcement and prosecutors. Research among domestic violence and sexual assault immigrant victims (U visa holders and VAWA Self-Petitioners) shows that survivors increase trust of law enforcement, their willingness to call police for help, and their cooperation with prosecutors as victims gain protection from deportation and work authorization through their victim based immigration cases.<sup>50</sup> Allowing time and foregoing law enforcement cooperation allows the victim to heal from the trauma that they experienced and “sets up a process in which the individual can access the suppressed memories and feelings, gain consciousness of the origin and development of his/her current distress, and put words to previously undefined emotions.”<sup>51</sup> During this period of time, victims have the ability to heal and recover from their trauma.

USCIS provided factors on what constitutes substantial physical or mental abuse under the U visa, but failed to provide a similar non-exclusive list of illustrative factors for the T visa’s physical and psychological trauma exception. In contrast to the U visa, the T visa does not require a showing of “substantial” physical or psychological trauma. Thus, the definition of physical and psychological trauma to receive an exception from the T visa cooperation requirement will as a matter of law be include, will be more expansive and will include more factors than those included as examples in the U visa substantial harm regulation.<sup>52</sup>

In the T visa regulations, USCIS only suggests that a medical professional, psychologist, or social worker may define the applicant’s trauma based on their experience with the applicant.<sup>53</sup> Though an individual applicant can provide an affidavit describing their trauma,

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<sup>48</sup> *Trauma and Violence*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., (Aug. 2, 2019), <https://www.samhsa.gov/trauma-violence>.

<sup>49</sup> See Leslye E. Orloff & Rosemary Collins, *Training for Vermont Service Center Adjudicators*, NIWAP (Jul. 29, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/vsc-vawa-21>.

<sup>50</sup> Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* (June 8, 2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf> [hereinafter Orloff, *Transforming Lives*].

<sup>51</sup> David S. Gangsei & Ana C. Deutsch, *Psychological evaluation of asylum seekers as a therapeutic process*, 17 TORTURE 79, 80 (2007).

<sup>52</sup> 81 Fed. Reg. at 92277.

<sup>53</sup> Trauma Exception, 81 Fed. Reg. 92266, 92277 (Dec. 19, 2016).

applicants are not provided guidance as to whether the evidence of trauma they provide will be sufficient because “physical or psychological trauma” is not defined in the T visa regulations.<sup>54</sup>

*e. Recommendation to Define Trauma*

Since the T visa statute does not impose any requirements regarding the magnitude of the trauma suffered, any credible evidence of an individual’s trauma as described in any of the definitions or examples discussed or in the U visa substantial abuse factors could provide sufficient evidence to satisfy the trauma exception from the T visa law enforcement and prosecutor cooperation requirement under any credible evidence rules. Applicants *may*, but should not be required to, submit a statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim's mental state and medical, psychological, or other records which are relevant to documenting the trauma.<sup>55</sup>

DHS should issue regulations that define trauma according to the National Institutes of Health’s and HHS Substance Abuse and Mental Health Services Administration’s definitions of trauma. The regulations should also include a list of factors derived from the U visa substantial harm definition<sup>56</sup> augmented with examples from the social science research on trauma. This will help trafficking victim applicants know if they are eligible for the exception and help DHS ensure consistency in granting trauma exception requests and in issuing requests for further evidence related to trauma exception requests.

Based on mental health research and the U visa definition of substantial physical or mental abuse, the T visa regulations need to add a definition of “physical or psychological trauma” to the definitions section of the regulations that includes a nonexclusive list of the types of evidence that can be provided to prove eligibility for the exception. The following regulations sections need to be rewritten:

- 8 CFR 214.11(a)
  - *Physical and Psychological Trauma* (Add new definition)
  - *Reasonable request for assistance*
- 8 CFR 214.11(h)(4)(i) *Physical or Psychological Trauma*
- 8 CFR 214.11(h)(2) *Unreasonable requests*

8 CFR 214.11(a) Definition

*Physical or psychological trauma means*

**(1) Trauma:** trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on an individual’s functioning and mental, physical, social, or emotional well-being.<sup>57</sup>

**(A) Physical Trauma**

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<sup>54</sup> INA § 101(a)(15)(T)(i)(III)(bb); 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb).

<sup>55</sup> See 8 C.F.R. § 214.11(h)(4)(i) (2020); Trauma Exception, 81 Fed. Reg. 92266, 92277 (Dec. 19, 2016).

<sup>56</sup> 72 Fed. Reg. at 53018.

<sup>57</sup> *Trauma and Violence*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., (Aug. 2, 2019), <https://www.samhsa.gov/trauma-violence>.

(I) **Blunt force:** occurs when an object or force strikes the body, frequently causing concussions, deep cuts, or broken bones.

(II) **Penetrating:** when an object pierces the skin or body.

(B) **Psychological Trauma:** emotional or psychological injury that results from an extremely stressful or life-threatening situation.<sup>58</sup>

(2) **Factors** that may provide evidence of physical or psychological trauma include but are not limited to:

- (A) Nature of the victimization;
- (B) Nature of the injury inflicted or suffered;
- (C) The severity of the perpetrator's conduct;
- (D) The specific circumstances of the victim;
- (E) The severity of the harm suffered;
- (F) The duration of the infliction of the harm;
- (G) The extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim;
- (H) Kind and degree of harm suffered based on the victim's individual experience;
- (I) The history of abuse or exploitation experienced by the victim;
- (J) Victims medical condition or mental state;
- (K) Inconsistencies in memory or statements can be the result of
  - (i) The impact of memory loss or psychogenic amnesia causing victims to forget or struggle to remember details related to the trauma experienced;
  - (ii) Recall of sensory data (sights, sounds, smells, bodily sensations) without the linguistic narrative structure the give's a person's ordinary memories a sense of logical and chronological coherence;
  - (iii) How memory is impeded as victims adopt a "survival mode" to protect themselves from reliving trauma;
- (L) Victim's fear, hesitation, or refusal to describe traumatic events that are too painful, humiliating, shameful, guilt ridden, triggering or anxiety provoking when recalling or describing the trauma causes victims to relive the traumatic event;
- (M) Victim's demeanor when recalling or describing traumatic events:
  - (i) Hesitation/wavering in describing traumatic experiences;
  - (ii) Glazed eyes with monotone voice;
  - (iii) Differing from victim's common speech patterns;
  - (iv) Appearing uncertain;
  - (v) Appearing detached as victims disassociate from the trauma;
  - (vi) Reliving the trauma;
  - (vii) Inability to regulate emotional responses;
- (N) Any other credible evidence of physical or psychological trauma.

#### 8 CFR 214.11(a) Definitions

*Reasonable request for assistance* means a request made by a federal, state, local or Tribal LEA to a victim to assist in the investigation or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime.

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<sup>58</sup> National Institute of General Medical Sciences, *What is Physical Trauma?*, NAT'L INSTS. OF HEALTH, <https://www.nigms.nih.gov/education/fact-sheets/Pages/physical-trauma.aspx> (last updated July 13, 2020).

- (1) When an applicant is found to have satisfied this exemption, the applicant is not required to have had any contact with an LEA, including reporting the trafficking.
- (2) The “reasonableness” of the request depends on the totality of the circumstances considering any credible evidence. Factors to consider include, but are not limited to:
  - (i) General law enforcement and prosecutorial practices;
  - (ii) The nature of the victimization;
  - (iii) The specific circumstances of the victim when the trauma was experienced;
  - (iv) Applicant’s current ability to cooperate with law enforcement;
  - (v) The nature and/or severity of the physical or psychological trauma suffered as defined in 8 CFR 214.11(a);
  - (vi) Whether the request would cause further trauma as defined in 8 CFR 214.11(a);
  - (vii) Access to support services;
  - (viii) The safety of the victim or the victim's family;
  - (ix) Compliance with other LEA requests and the extent of such compliance;
  - (x) Whether the request would yield essential information;
  - (xi) Whether the information could be obtained without the victim's compliance;
  - (xii) Whether a qualified interpreter was provided by the LEA to ensure the victim understood the request;
  - (xiii) Cultural, religious, or moral objections to the request;
  - (xiv) The time and circumstance in which the victim had to comply with the request;
  - (xv) The age, ability, health, and maturity of the victim;
  - (xvi) The victim’s history of abuse or exploitation;
  - (xvii) The circumstances in which the request was made; or
  - (xviii) Any other credible evidence.
- (3) When an applicant is found to have satisfied this exemption, the applicant is not required to have had any contact with an LEA, including reporting the trafficking.
- (4) USCIS reserves the authority and discretion to contact the LEA involved in cases where the applicant has already contacted LEA but was unable to comply with reasonable requests due to trauma, if appropriate.

8 CFR 214.11(h)(4)(i) *Physical or Psychological Trauma*

(4)An applicant who has not had contact with an LEA or who has not complied with any reasonable request may be exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution if either of the following two circumstances applies:

- **Physical or Psychological Trauma** –The applicant is unable to cooperate with a reasonable request for assistance in a Federal, States, local or Tribal investigation or prosecution of acts of trafficking in persons due to physical or psychological trauma as defined in 8 CFR 214.11(a).
  - (i) **Evidence of physical or psychological trauma** -- Applicants may submit any credible evidence to prove physical or psychological trauma defined in subsection (a) (1)-(3) applying VAWA’s any credible evidence rules. Evidence may include but not limited to:
    - (A) Victim’s affidavit

- (B)** Statement from a qualified professional such as a
  - Medical professional
  - Mental health professional
  - Social worker
  - Victim advocate
- (C)** Witness statements
- (D)** Medical records
- (E)** Mental health records
- (F)** Photographs
- (G)** Police reports
- (H)** Court records and court orders
- (I)** Disability determinations
- (J)** Government agency findings
- (K)** Records documenting the physical or psychological trauma or its impact
- (L)** Evidence may include information about the traumatic impact based on all of the surrounding circumstances, the totality of the circumstances, and the background and experiences of the applicant
- (M)** Any other credible evidence

8 CFR 214.11(h)(2) *Unreasonable requests*. An applicant need only show compliance with reasonable requests made by an LEA for assistance in the investigation or prosecution of the acts of trafficking in persons. The “reasonableness” of the request depends on the totality of the circumstances considering any credible evidence. Factors to consider include, but are not limited to:

- (i) General law enforcement and prosecutorial practices;
- (ii) The nature of the victimization;
- (iii) The specific circumstances of the victim when the trauma was experienced;
- (iv) Applicant’s current ability to cooperate with law enforcement;
- (v) The nature and/or severity of the physical or emotional trauma suffered as defined in 8 CFR 214.11(a);
- (vi) Whether the request would cause further trauma as defined in 8 CFR 214.11(a);
- (vii) Access to support services;
- (viii) The safety of the victim or the victim's family;
- (ix) Compliance with other LEA requests and the extent of such compliance;
- (x) Whether the request would yield essential information;
- (xi) Whether the information could be obtained without the victim's compliance;
- (xii) Whether a qualified interpreter was provided by the LEA to ensure the victim understood the request;
- (xiii) Cultural, religious, or moral objections to the request;
- (xiv) The time and circumstance in which the victim had to comply with the request;
- (xv) The age, ability, health, and maturity of the victim;
- (xvi) The victim’s history of abuse or exploitation;
- (xvii) The circumstances in which the request was made; or
- (xviii) Any other credible evidence.

## PROTECTING T VISA, U VISA, AND VAWA ELIGIBLE VICTIMS FROM REINSTATEMENT OF REMOVAL

### *a. VAWA 2005 Directed DHS to Exercise Discretion Not to Reinstate Removal Against VAWA, T and U Visa Victims*

Reinstatement of removal<sup>59</sup> is used by DHS to swiftly remove non-citizens who return to the United States “without authorization after having been removed under a prior order of deportation, exclusion, or removal.”<sup>60</sup> Reinstatement of removal can take place anywhere in the U.S. and can be executed against immigrants who are victims of crime, abuse, and human trafficking who are eligible for T visa, U visa, and VAWA protections that victims are eligible for despite prior removal orders that were issued against them. When eligible immigrant victims’ removal is reinstated, they are cut off from VAWA, T visa, and U visa immigration relief and their ability to access the immigration protections and special waivers Congress created for them is undermined.<sup>61</sup> Congress understood the real dangers and harsh consequences that immigrant crime victims and battered immigrants faced when they are removed from the United States to countries where their abusers and traffickers could retaliate against them after DHS reinstated a victim’s removal.<sup>62</sup>

To address the problem that reinstatement of removal poses for the immigrant crime, abuse, and human trafficking victims, VAWA 2005 gave the Secretary of Homeland Security, the Attorney General, and the Secretary of State, in cases of immigrants who are eligible to apply for VAWA, T visa, or U visa immigration relief, the authority to exercise their “discretion to consent to an alien’s reapplication for admission after a previous order of removal, deportation, or exclusion.”<sup>63</sup>

DHS’s failure to create a process through which victims applying for T visas, U visas, and VAWA self-petitioners can easily apply or to obtain this important exercise of discretion results in trafficking victims and other immigrant victims of crime and abuse being summarily removed or deported from the U.S. and explains why prosecutors report to NIWAP about cases where immigrant victims are cooperating in state prosecutions of their perpetrators who disappear and were immediately deported before state and local prosecutors could intervene with DHS on their behalf.

These T visa regulations provide an opportunity for DHS to resolve this problem for human trafficking and other VAWA, T and U visa eligible victims. By implementing VAWA 2005’s reinstatement protections for victims, DHS not only furthers Congressional directives, but also helps ensure that reinstatement of removal against human trafficking and crime victims does not undermine the series of directives that ICE has recently issued that promote crime victim

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<sup>59</sup> INA § 241(a)(5); 8 U.S.C. § 1231(a)(5).

<sup>60</sup> Trina Realmuto, *Reinstatement of Removal Practice Advisory*, AM. IMMIGR. COUNCIL 1, 1 (May 23, 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/reinstatement\\_of\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf).

<sup>61</sup> John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN, no. 5, at 457, 462 (May 2007).

<sup>62</sup> Leslye E. Orloff et al., *New Dangers for Battered Immigrants, The Untold Effects When Immigrant Victims Have to Leave the U.S. to Obtain Lawful Permanent Residency as VAWA Self-Petitioners*, LEGAL MOMENTUM, <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/CULT-Tkit-NewDangers.pdf>.

<sup>63</sup> Violence Against Women Act of 2005, Pub. L. No. 109–162, § 813(b), 119 Stat. 2960, 3058 (2006).

protections and access to VAWA, T visa, or U visa protections.<sup>64</sup> When all DHS officials have the training they need and the necessary regulations and policies in place, they are able to swiftly identify eligible victims and provide them protection from deportation. Continuing to allow the reinstatement of removal process to remove victims and cut them off from immigration relief that they are eligible to receive effectively strengthens the ability of batterers, child abusers, rapists, and human traffickers to continue to harm victims and operate in communities.

*b. VAWA 2005's Reinstatement Protections Were an Important Part of the Overall VAWA and TVPA Statutory Scheme of Deportation Protection for Victims*

Congress created special forms of immigration relief that included numerous inadmissibility waivers<sup>65</sup> open only to VAWA self-petitioners,<sup>66</sup> VAWA cancellation of removal,<sup>67</sup> VAWA suspension of deportation,<sup>68</sup> U visa,<sup>69</sup> and T visa victims.<sup>70</sup> They also created a special domestic violence victim waiver<sup>71</sup> and special motions to reopen procedures for VAWA victims of domestic violence and child abuse.<sup>72</sup> These waivers sought to prevent the removal, deportation, or exclusion of immigrant victims of crime and abuse perpetrated against them in the United States.<sup>73</sup> VAWA 2005 explains that a petitioner seeking cancellation of removal or VAWA suspension as a battered immigrant “is not subject to penalties for failing to depart after agreeing to a voluntary departure order if the battery or extreme cruelty, trafficking,

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<sup>64</sup>See Memorandum from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at [https://niwaplibrary.wcl.american.edu/pubs/021821\\_civil-immigration-enforcement\\_interim-guidance-tae-johnson](https://niwaplibrary.wcl.american.edu/pubs/021821_civil-immigration-enforcement_interim-guidance-tae-johnson); Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>.

<sup>65</sup> See, Limayli Hugueta et al., *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases* 1, 2–6 (2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Comparing-Inadmissibility-Waivers-Available-to-Immigrant-Victims-in-VAWA-Self-Petitioning-U-Visa-T-Visa-and-Special-Immigrant-Juvenile-Status-Cases-1.28.21-.pdf> (summarizing all of the inadmissibility waivers available to VAWA, T and U visa applicants).

<sup>66</sup> INA §§ 204(a)(1)(A)(iii)–(iv), (vii), (a)(1)(B)(ii)–(iii); 8 U.S.C. §§ 1154 (a)(1)(A)(iii)–(iv), (vii), (a)(1)(B)(ii)–(iii).

<sup>67</sup> INA § 240(A)(b)(2); 8 U.S.C. § 1229b.

<sup>68</sup> INA § 244(a)(3) (As in effect on March 31, 1997); 8 U.S.C. § 1254a.

<sup>69</sup> INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U); INA § 212(d)(14); 8 U.S.C. § 1182(d)(14) (waiver for crime victims).

<sup>70</sup> INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T); INA § 212(d)(13); 8 U.S.C. § 1182(d)(13) (waiver for trafficking victims). See Orloff, *Offering a Helping Hand*, *supra* note **Error! Bookmark not defined.**, at 160–62 (explaining the VAWA 2000 special waivers).

<sup>71</sup> John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN, no. 5, at 457, 462 (May 2007).

<sup>72</sup> See e.g., INA §§ 240(c)(7)(C)(iv), 240(e)(1); 8 U.S.C. § 1229a (special motions to reopen).

<sup>73</sup> See Violence Against Women Act of 2000, tit. V, Pub. L. No. 106-386, §§ 1504(a), 1505(a)–(e), 114 Stat. 1464, 1522–27 (2000); see also Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* 1, 160–62 (June 8, 2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf>.

or criminal activity provided at least one central reason related to the immigrant's failure to depart.”<sup>74</sup>

As an important component of the immigration provisions needed to protect victims from removal, Congress needed to resolve the issue of VAWA, T visa and U visa eligible victims for whom immigration protections were designed being subjected to reinstatement of removal. To resolve this problem, Congress in VAWA 2005 issued a Sense of Congress<sup>75</sup> directing DHS, DOJ and the Department of State to exercise its discretion not to reinstate removal against VAWA, T visa, or U visa eligible victims.<sup>76</sup> However, in 2009, when DHS issued a policy memorandum acknowledging that VAWA self-petitioners who qualify for inadmissibility waivers may seek adjustment of status to lawful permanent residency, DHS failed to implement VAWA 2005’s reinstatement protections.<sup>77</sup> Despite Congressional direction to the contrary, DHS confirmed categorically in the memorandum that reinstatement of removal orders *still* apply to VAWA self-petitioners who are inadmissible for reentering illegally after a prior removal order.<sup>78</sup>

### *c. Visa Applicants and VAWA Petitioners Help Law Enforcement*

Removing VAWA, T visa and U visa eligible victims through reinstatement proceedings also has significant consequences to public safety.<sup>79</sup> Congress created VAWA immigration relief, in part, to “encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against [non-citizen]s”<sup>80</sup> When DHS removes crime victims from the U.S. through reinstatement or any other means, DHS makes the removed victims

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<sup>74</sup> See Violence Against Women Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3061 (amending INA § 240(e)(1); 8 U.S.C. § 1229a); see also John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN, no. 5, at 457, 462 (May 2007).

<sup>75</sup> INA §240A(b); Pub. L. No. 109-162, § 813, 119 Stat. 2960, 3058 (2006) (The INA gives the Secretary of Homeland Security, the Attorney General, and the Secretary of State “discretion to consent to an alien’s reapplication for admission after a previous order of removal, deportation, or exclusion.”); Pub. L. No. 109-162, § 813, 119 Stat. 2960, 3058 (2006) (issuing a bipartisan “Sense of Congress” to explain when officials should exercise authority). See Pub. L. No. 109–162, § 813(b)(2), 119 Stat. 2960, 3058 (2006) (Explaining that the victims who should benefit from the exercise of discretion not to reinstate removal are VAWA self-petitioners, VAWA cancellation of removal and VAWA suspension of deportation applicants, as well as U and T visa applicants.).

<sup>76</sup> Violence Against Women Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3058 (2006).

<sup>77</sup> See INA § 212(a)(9)(C)(iii); 8 U.S.C. § 1182(a)(9)(C)(iii) (explaining that the Secretary of Homeland Security may waive the application for VAWA self-petitioners if there is a connection between the non-citizen’s battering or subjection to extreme cruelty and the noncitizen’s removal, departure from the United States, reentry or attempted reentry into the United States); see also Memorandum from Michael Aytes, Acting Deputy Dir., U.S. DEP’T OF HOMELAND SEC. (May 19, 2009), <https://www.aila.org/infonet/uscis-adjudicating-forms-i-212-inaa9c>.

<sup>78</sup> See Violence Against Women Act of 2005, §§ 813–14, Pub. L. No. 109-162, 119 Stat. 2960, 3058 (2006) (describing when officials should consider exercising authority); see also INA § 241(a)(5); 8 U.S.C. § 1231(a)(5) (outlining reinstatement of removal); Memorandum from Michael Aytes, Acting Deputy Dir., U.S. DEP’T OF HOMELAND SEC. (May 19, 2009), <https://www.aila.org/infonet/uscis-adjudicating-forms-i-212-inaa9c>.

<sup>79</sup> Leslye E. Orloff et al., Executive Summary, *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/exec-summarytransforming-lives>.

<sup>80</sup> Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* 1, 4 (June 8, 2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf>.



unavailable to prosecutors who need them to be available for both current and future prosecutions. For example, immigrant victims removed through reinstatement of removal become totally unavailable to help law enforcement and prosecutors who receive a rape kit match that could lead to the successful prosecution of a human trafficker.

Social science research has found that once immigrant victims receive certification and file U visa applications, their participation in the justice system substantially increases.”<sup>81</sup> A study by NIWAP found that 44% “of victims sometimes, often or almost always assisted law enforcement in criminal investigations and/or assisted prosecutors in criminal prosecutions of the perpetrators of the crimes committed against them.”<sup>82</sup> The report demonstrated how gaining protection from deportation and legal work authorization allows victims to “successfully leave abusive homes and workplaces in greater numbers ... [making them] more willing and less reticent to turn to police for help when they suffer abuse or victimization in the future.”<sup>83</sup> This report found that after receiving protection from deportation and work authorization, both VAWA and U visa victims became more willing to turn to the civil and criminal justice systems for help and their trust of police rose 114%.<sup>84</sup>

*d. DHS Needs to Create A Process in Which The Presumption is That Reinstatement of Removal Does Not Occur in Cases of VAWA, T, and U Visa Eligible Victims*

Immigrant victims of crime and abuse who file for VAWA, T visa, or U visa immigration relief play a vital role in assisting law enforcement and prosecutors in deterring crime and improving community safety.<sup>85</sup> When DHS reinstates the removal of T visa, U visa, and VAWA self-petitioners, DHS denies them the opportunity to have their VAWA, T visa, or U visa case adjudicated, including seeking access to the waivers of inadmissibility created for these victims by Congress.<sup>86</sup> This conflicts with the public policy goals of VAWA.<sup>87</sup> Further, by deporting VAWA, T visa, and U visa victims who play an active role in helping fight crime, DHS is effectively telling federal, state, and local prosecutors that although VAWA and TVPA gave DHS an important national crime fighting role as the agency responsible for implementing crime

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<sup>81</sup> Corrin Chow et al., *Stories from the Field; The Crime Fighting Effectiveness of the U Visa* 1, 1 (Aug. 27, 2020), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/LEA-Prosecutors-U-visa-stories-Final-8.28.20.pdf> (compiling stories from law enforcement officials and prosecutors who describe ways in which they have found that the U visa program significantly improved the ability for state and local law enforcement).

<sup>82</sup> Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* 1, 8 (June 8, 2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf> (reporting research findings on data collected in 2016 and 2019 from 169 organizations in forty-two states and D.C. serving 11,171 VAWA and U visa eligible victims).

<sup>83</sup> *Id.* at 61.

<sup>84</sup> *Id.* at 132.

<sup>85</sup> See Sara Daresshori, *Immigrant Crime Fighters: How the U visa Program Makes US Communities Safer*, HUM. RTS. WATCH (July 3, 2018), <https://www.hrw.org/report/2018/07/03/immigrant-crime-fighters/how-u-visa-program-makes-us-communities-safer#> (noting that immigration protections in the United States have been “crucial to police and prosecutors’ ability to effectively fight crime”).

<sup>86</sup> INA § 212(d)(13)–(14); 8 U.S.C. § 1182(13)–(14).

<sup>87</sup> See Eligibility Requirements for U Nonimmigrant Status, 72 Fed. Reg. 53014, 53015 (Sept. 17, 2007) (explaining that the intent of VAWA 2000 was “to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute, convict and sentence in cases of domestic violence, sexual assault, human trafficking, and other crimes” and to “offer protection to victims of such criminal activities”).

victim protection, DHS has chosen not to take on those Congressionally mandated responsibilities and to instead choose only to enforce immigration laws in a manner that directly undermines the need of state and local law enforcement and prosecution officials.<sup>88</sup> This approach is particularly troubling because reinstatement of removal against crime victims currently often occurs without ICE officials even attempting to determine whether the immigrant against whom removal is being reinstated is a crime victim.

For the case of every VAWA, T visa, and U visa applicant, DHS must create and implement policies designed to identify victims subject to reinstatement who are VAWA, T visa and U visa eligible and red flag these cases using the VAWA confidentiality system. DHS must then immediately exercise discretion not to reinstate removal of eligible victims.<sup>89</sup> This policy could include an exception in instances where there is evidence that the individual participated in Nazi persecutions, genocide, terrorist activity, or commission of acts of torture or extrajudicial killings as these applicants would be barred from VAWA, T or U visa relief.<sup>90</sup> There could also be an exception to this policy for cases where there is evidence of national security and public safety concerns, which include but are not limited to:

murder, rape, or sexual abuse; offenses involving firearms, explosive materials, or destructive devices; offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons; aggravated assault; an offense relating to child pornography; and manufacturing, distributing, or selling of drugs or narcotics.<sup>91</sup>

In all other cases of VAWA, T visa, and U visa applicants, and cases where victims are eligible for protection under VAWA confidentiality, DHS must immediately exercise its discretion not to reinstate the removal of immigrant victims of human trafficking, crime and abuse.<sup>92</sup>

This approach recognizes and is founded upon the social science research data that demonstrates positive results when immigrant victims and law enforcement work together to fight crime. Waiving reinstatement of removal for all VAWA, T visa, and U visa applicants,

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<sup>88</sup> John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN, no. 5, at 460 (May 2007) (highlighting Congressional intent to protect victims from deportation); see also Corrin Chow et al., *Stories from the Field: The Crime Fighting Effectiveness of the U Visa* 1, 1 (Aug. 27, 2020), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/LEA-Prosecutors-U-visa-stories-Final-8.28.20.pdf> (highlighting how law enforcement relies on the help of U visa victims in investigating crime).

<sup>89</sup> 34 U.S.C. § 12291(b)(2).

<sup>90</sup> INA § 237(a)(4)(D); 8 U.S.C. § 1227(a)(4)(D) (incorporating the language of the inadmissibility provisions in INA sections 212(a)(3)(E)(i), (ii), and (iii) into the deportability statutes).

<sup>91</sup> See Chapter 5: *Bona Fide Determination Process*, USCIS POLICY MANUAL (June 14, 2021), <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (explaining that if there is evidence of any of these public safety or national security concerns, USCIS may choose not to exercise its discretion to grant a Bona Fide Determination Employment Authorization Document).

<sup>92</sup> See 8 U.S.C. § 1367 (outlining the confidentiality protections); Violence Against Women Act of 2005, Pub. L. No. 106-162, 119 Stat. 2960, 3058 (2006).

subject to the exceptions above, will benefit victims, law enforcement, and prosecutors, and will play an important role in holding perpetrators accountable.<sup>93</sup>

## CONCLUSION

The Department of Homeland Security must fully implement all VAWA and TVPA provisions that Congress crafted to ensure that human trafficking victims, battered immigrants and other immigrant crime victims receive the full protection of the laws created to help them. This includes providing in the T visa regulations a more robust definition of “physical or psychological trauma” together with examples of the evidence victims can present and USCIS adjudicators must routinely accept as proof that a T visa applicant human trafficking victims is eligible for the physical or psychological trauma exception to the T visa cooperation requirement. Additionally, DHS must take this opportunity presented by the process of finalizing the T visa regulations to confirm a new presumption that reinstatement of removal does not apply to T visa, U visa and VAWA self-petitioners. This presumption would help human trafficking victims who apply through the T visa program as well as trafficking victims who apply as VAWA self-petitioners or through the U visa program and will equally offer needed help to crime victims eligible for VAWA or U visa protections.

By implementing these and all of the other T visa regulations changes proposed by Freedom Network USA, TRLA, Asista and Tahirih, the result will be more victims of sex and labor trafficking who come forward and obtain T visa protections. This will result in law enforcement and prosecutors being better able now and in the future to bring human traffickers to justice because more victims would have the protections they need to seek help in the justice system and would become actively involved in helping law enforcement without fear of deportation.

Making NIWAP’s requested improvements to the T visa regulations would have a meaningful impact on the lives of immigrant victims of human trafficking, domestic violence, child abuse, sexual assault, and other violent crimes who will be better able to access the special forms of immigration relief Congress created for their protection.

Thank you in advance for considering these comments. If you have any questions about these comments and you want further information, please do not hesitate to contact us at (202) 274-4457 or [info@niwap.org](mailto:info@niwap.org).

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<sup>93</sup> Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* (June 8, 2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf> (reporting data that shows how crime is decreased and how trust in the police increases when battered immigrants help law enforcement); *see also* Corrin Chow et al., *Stories from the Field; The Crime Fighting Effectiveness of the U Visa* 1, 1 (Aug. 27, 2020), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/LEA-Prosecutors-U-visa-stories-Final-8.28.20.pdf> (providing accounts from law enforcement on their experience working with battered immigrants).