

T Visa Quick Reference for Judges

By Sylvie Sheng and Leslye E. Orloff

October 14, 2020

<p>Purpose of the T visa</p>	<ul style="list-style-type: none"> • Congress created the T visa program out of recognition that human trafficking victims without legal status may otherwise be reluctant to help in the investigation or prosecution of their human traffickers.¹ Congress sought not only to prosecute perpetrators of crimes committed against immigrants, but also to strengthen relations between law enforcement and immigrant communities.²
<p>Benefits of the T visa</p>	<ul style="list-style-type: none"> • The T visa strengthens the ability of the courts, law enforcement, prosecutors, and state and federal government agencies to detect, investigate, prosecute, convict and sentence perpetrators of human trafficking while offering immigrant crime victims legal immigration status, work authorization, and protection from deportation.³ • Immigrant victims are ensured access to justice by alleviating fears, such as deportation, that keep victims from participating in the civil, family, and criminal justice systems.⁴ The T visa promotes access to justice by enhancing accessibility and ensuring fairness. • If certain conditions are met, an individual with T visa may apply for lawful permanent residency (i.e., apply for a green card in the United States) after three years in the United States or upon completion of the investigation or prosecution, whichever occurs earlier.⁵
<p>T visa Qualifying Criminal Activities⁶</p>	<ul style="list-style-type: none"> • A victim of a severe form of trafficking in persons is an individual who is a victim of either: <ul style="list-style-type: none"> • Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion; • Sex trafficking in which the person induced to perform such an act is under the age of 18; • The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude (including psychological coercion), peonage, debt bondage, or slavery.⁷ • DHS clarifies that an individual need not actually perform labor, services, or a commercial sex act to meet the definition; even if the illicit end is never realized, the definition is met as long as a particular means (force, fraud, or coercion) and a particular end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery) are present in the case.⁸ This would include, for example, a situation where the victim was recruited and came to the United States through force, fraud or coercion for the purpose of a commercial sex act, but the victim was rescued or escaped before performing a commercial sex act.⁹

¹ See TVPA 2000 § 102(b)(20), Pub. L. No. 106-386, 114 Stat. 1464.

² *DHS U and T Visa Resource Guide* at 9; 67 Fed. Reg. 4782, 4785 (2002).

³ 72 Fed. Reg. 92266, 92269 (2016).

⁴ 67 Fed. Reg. 4782, 4784 (2002); 73 Fed. Reg. 75540, 75554 (2008).

⁵ See generally 73 Fed. Reg. 75540 (2008).

⁶ *DHS U and T Visa Resource Guide* at 12.

⁷ 72 Fed. Reg. 92266, 92305 (codified at 8 C.F.R. § 214.11(a)) (2016).

⁸ 72 Fed. Reg. 92266, 92307 (codified at 8 C.F.R. § 214.11(f)(1)) (2016); 72 Fed. Reg. 92266, 92270 (2016); Freedom Network, General Tips for T Visas for Victims of Severe Form of Trafficking in Persons (Apr. 2018), <https://freedomnetworkusa.org/app/uploads/2018/04/CAST-Advisory-General-T-Visa-Tips-April-2018.pdf>.

⁹ 72 Fed. Reg. 92266, 92270 (2016).

<p>Who is eligible for a T visa?¹⁰</p>	<ul style="list-style-type: none"> • U.S. Citizenship and Immigration Services (USCIS) of DHS may find an individual eligible for a T visa if the victim: <ul style="list-style-type: none"> ○ Is or was a victim of a severe form of trafficking in persons (which may include sex or labor trafficking), as defined by federal law; ○ Is in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or at a U.S. port of entry due to human trafficking; ○ Has complied with any reasonable request from a law enforcement or prosecution agency for assistance in the detection, investigation or prosecution of human trafficking;¹¹ and ○ Would suffer extreme hardship involving unusual and severe harm if removed from the U.S.¹² • In addition, the victim must be admissible (based on a review of criminal history, immigration violations, and other factors) to the United States. If inadmissible, the individual may apply for any waiver of inadmissibility for which they may be eligible.¹³ • Individuals currently in removal proceedings or with final orders of removal are eligible for a T visa.¹⁴ • Certain family members of a T visa recipient may also be eligible to live and work in the United States. These are: <ul style="list-style-type: none"> ○ Children; ○ Spouse; ○ Parents of child trafficking victims who are under age 21 at the time of application, or any victim’s parents who face a present danger of retaliation as a result of the victim’s escape from trafficking or cooperation with law enforcement; ○ Unmarried siblings under 18 years old of child victims who are under age 21 at the time of filing, or any victim’s unmarried siblings under 18 years old who face a present danger of retaliation as a result of the victim’s escape from trafficking or cooperation with law enforcement; and ○ Adult or minor children of any T visa recipient (including eligible family members of the victim), if the children face a present danger of retaliation as a result of the victim’s escape from trafficking or cooperation with law enforcement.¹⁵ • While in the United States, the victim has an ongoing duty to comply with law enforcement’s reasonable requests for assistance in the investigation or prosecution of human trafficking.¹⁶
<p>Status of Criminal Case Against Crime Perpetrator</p>	<ul style="list-style-type: none"> • The perpetrator may have any immigration or citizenship status including but not limited to U.S. citizen, legal permanent resident, diplomat, work-visa holder, or undocumented immigrant. • A declaration may be signed whether or not a criminal investigation or prosecution is brought against the trafficker and regardless of the outcome of the criminal case brought against the trafficker. There is no requirement that an arrest, prosecution, or conviction occur.¹⁷

¹⁰ *DHS U and T Visa Resource Guide* at 9–10.

¹¹ Special exceptions are made for trafficking victims who are under 18, or those who are unable to cooperate due to physical or psychological trauma.

¹² 72 Fed. Reg. 92266, 92305 (codified at 8 C.F.R. § 214.11(b)) (2016).

¹³ 72 Fed. Reg. 92266, 92283 (2016).

¹⁴ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(1)(i)) (2016).

¹⁵ Age-out protection applies. 72 Fed. Reg. 92266, 92310 (codified at 8 C.F.R. § 214.11(k)(1)(i)) (2016).

¹⁶ 72 Fed. Reg. 92266, 92274 (2016); *DHS U and T Visa Resource Guide* at 13.

¹⁷ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(3)(i)) (2016); *DHS U and T Visa Resource Guide* at 21.

What Is a T visa Declaration?¹⁸

- The T visa declaration is supplementary evidence that law enforcement agencies and judges can complete for a T visa applicant to help demonstrate victimization and compliance with reasonable requests¹⁹ for assistance in the detection, investigation or prosecution of human trafficking.²⁰
- The T visa declaration is not a required document or conclusive evidence for a T visa application, but when provided, it is useful evidence.²¹ DHS applies the Violence Against Women Act's "any credible evidence" standard to T visa cases to encourage government officials including judges, law enforcement and prosecutors to sign T visa declarations.²²
- Signing a declaration is at the judge's discretion, and it does not mean the judge is sponsoring or endorsing the victim for a T visa.²³ USCIS considers the T visa declaration as one part of the evidence in the T visa application. USCIS also conducts a full background check and, in considering each T visa application and the applicant's credibility, examines the totality of the evidence and the circumstances of each case.²⁴
- The T-visa declaration must be provided on Form I-914 Supplement B, and must be completed by a qualifying certifier, such as a judge. On the I-914B form the certifying official verifies that that the victim applying for a T visa meets the following criteria:
 - The victim is or was a victim of a severe form of trafficking in persons; and
 - The victim has met the "assistance requirement" by either having complied with any reasonable requests from law enforcement or prosecutors in an investigation or prosecution of human trafficking or by being exempt from the requirement because the victim is under 18 years of age, or because the victim is unable to assist due to physical or psychological trauma.²⁵
- The criminal activity may have occurred at **any time** in the past.²⁶ There is no statute of limitations and certification can be made even when the state statute of limitations for the criminal activity has passed. There is no expiration date for the Form I-914B T visa declaration. The applicant can submit the form any time after the certifying judge signs the form.

¹⁸ *DHS U and T Visa Resource Guide* at 10–11.

¹⁹ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(3)(i)) (2016). Although 8 C.F.R. § 214.11(d)(3)(i) only requires judges to demonstrate victimization *and/or* compliance with reasonable requests, we recommend attesting to both prongs if you have sufficient information. See DEP'T OF HOMELAND SECURITY, INSTRUCTIONS FOR SUPPLEMENT B, FORM I-914B 2 (expires 04/30/2021), https://www.uscis.gov/system/files_force/files/form/i-914supbinstr.pdf.

²⁰ *DHS U and T Visa Resource Guide* at 18–19.

²¹ 72 Fed. Reg. 92266, 92276 (2016).

²² 72 Fed. Reg. 92266, 92272 & 92276 (2016).

²³ *DHS U and T Visa Resource Guide* at 11.

²⁴ 72 Fed. Reg. 92266, 92276 (2016).

²⁵ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(3)(i)) (2016).

²⁶ See 72 Fed. Reg. 92266, 92278 (2016). "USCIS will accept applications regardless of when the applicant was victimized."

Judges as T visa Certifiers

- Judges are specifically listed in the T visa regulations²⁷ as authorized certifiers to complete the T visa Declaration Form I-914, Supplement B.
- The declaration is not required to establish eligibility for the T visa, and does not by itself grant a visa to the victim. To obtain a T visa, a victim must meet eligibility requirements. USCIS has sole authority to grant or deny a T visa and completes a full background check on all applicants.²⁸
- **The unique role of judges in the T visa certification process:**
 - **Judges make a range of determinations and findings under probable cause.** By regulation, the terms “investigation or prosecution” include the *detection* of criminal activities, giving effect to Congress’ intent to include judges as certifiers.²⁹ Detection of criminal activities is a part of the initial proceedings that take place in a court, both civil and criminal. It, like probable cause findings, is the first step in a criminal or civil case. Judges are authorized to sign declarations at detection (e.g. when the judge has made findings that a criminal activity occurred, when the judge has probable cause to believe the immigrant has been a victim of human trafficking) as well as when the judge has been involved in conviction and/or sentencing. A declaration can be signed by a judge at any stage in the process, from “detection” by the court through or after sentencing in a criminal case or the issuance of the court’s final order in a civil or family court case.³⁰
 - **Judges make findings and issue orders based on qualifying criminal activities.** In civil protection order, custody, divorce, and child abuse cases, family court judges “detect” criminal activity when issuing protection orders, making determinations in child/elder abuse or juvenile court proceedings, or when making findings in custody, divorce, adoption, and employment cases.³¹
 - **Judges were included as certifiers to increase victims’ ability to access relief.** Immigrant crime victims – especially those with limited English proficiency (LEP) – do not always know or understand the range of available relief.³² A judge may be the first certifying official the victim encounters who is knowledgeable about the T visa that the victim has encountered. In some jurisdictions, certifiers such as police and prosecutors have not been adequately trained on how the T visa supports crime detection, investigation and prosecution. In other jurisdictions, the courts will be the first agency that LEP victims can communicate effectively with because the court provides the victim a qualified interpreter. There are cases in which the only potential certifier will be a judge.³³ Since law enforcement and prosecutors are not required to open criminal investigations against human traffickers or may not be able to successfully prosecute the trafficker, there may be no case in the criminal justice system. Victims who turn to the courts for help in civil or sexual assault protection order, domestic violence or child abuse related custody or divorce cases, or in sexual assault based employment and/or other civil matters will seek judicial declaration.
 - **Which judges can certify.** Federal or state criminal, civil, and family court judges, administrative law judges, commissioners, magistrates, aldermen, judicial referees, surrogates, masters, chancellors and any other person with delegated authority from the court to issue decisions can issue T visa declarations.³⁴ A judicial officer who heard the case involving the victim could certify based on the court proceedings. Additionally, any other judicial officer may certify based on the court records and/or court orders, findings or rulings made by another court. Some courts have designated one judge to sign certifications and have issued U visa certification protocols or policies.³⁵
 - **Judges have legal training and experience with crime victims and witnesses.** Judges are certifiers because they are familiar with administering justice as a neutral party and often have considerable training on issues affecting crime victims.

²⁷ 72 Fed. Reg. 92266, 92305 (codified at 8 C.F.R. § 214.11(a)) (2016).

²⁸ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(5)) (2016); *DHS U and T Visa Resource Guide* at 10; DEP’T OF HOMELAND SECURITY, INSTRUCTIONS FOR SUPPLEMENT B, DECLARATION OF LAW ENFORCEMENT OFFICER FOR VICTIM OF TRAFFICKING IN PERSONS at 1 (expires 04/30/2021), https://www.uscis.gov/system/files_force/files/form/i-914supbinstr.pdf.

²⁹ 72 Fed. Reg. 92266, 92305 (codified at 8 C.F.R. § 214.11(a)) (2016).

³⁰ *DHS U and T Visa Resource Guide* at 19.

**When Judges
are Able to
Grant
T visa
Declaration**

- If the judge finds or has probable cause to believe that criminal activity occurred and that the victim was cooperative, a declaration can be signed at any stage of the court case and may also sign the declaration after the conclusion of the case.³⁶ Any of the possible stages:
 - Arraignment
 - Preliminary hearings or grand jury proceedings
 - Judge to whom the grand jury presents the true bill of indictment can sign a certification based on those findings.
 - Pre-trial motions
 - During all stages of the criminal trial/civil or family court proceeding
 - After the criminal/civil/family proceeding has closed
- Judges may certify regardless of whether the certifying judge continues to preside over the case. Judges signing T visa declarations in open cases may need to consider whether judicial ethics rules will allow the judge to continue to hear the case in the future.
- Judicial authority to certify exists whether or not law enforcement opens an investigation or the prosecutor ultimately pursues prosecution of the perpetrator for the T visa criminal activity.³⁷ The authority also exists when the criminal investigation or prosecution of the human trafficking case is closed.

³¹ See DHS BLUE CAMPAIGN, WHAT CAN YOU DO? RECOGNIZING AND SUPPORTING VICTIMS IN THE COURTROOM (2019), <https://www.dhs.gov/sites/default/files/publications/blue-campaign/materials/pamphlet-judicial/bc-pamphlet-judicial-english.pdf>; JUDICIAL COUNCIL OF CAL., HUMAN TRAFFICKING IN CALIFORNIA: TOOLKIT FOR JUDICIAL OFFICERS 45 (2017).

³² See *DHS U and T Visa Resource Guide* at 4.

³³ “Judges should be aware of potential trafficking victims in the courtroom because other justice stakeholders may have failed to identify red flags, so the judge may be the last hope for a victim.” JUDICIAL COUNCIL OF CAL., HUMAN TRAFFICKING IN CALIFORNIA: TOOLKIT FOR JUDICIAL OFFICERS 45 (2017).

³⁴ *DHS U and T Visa Resource Guide* at 16.

⁹⁸ See e.g., San Francisco Superior Court Civil Division U Visa Certification Protocol, <http://niwaplibrary.wcl.american.edu/pubs/san-francisco-court-civil-division-u-visa-certification-protocol>.

³⁶ *DHS U and T Visa Resource Guide* at 18.

³⁷ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(3)(i)) (2016); *DHS U and T Visa Resource Guide* at 21.

Assessing the Assistance Requirement

- The T visa requires that the victim comply with any reasonable requests from law enforcement in detection, investigation, or prosecution of human trafficking and/or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime.³⁸
- In determining “reasonableness” of the request, USCIS will consider the totality of the circumstances using a broad range of factors, including but not limited to: general law enforcement and prosecutorial practices; the nature of the victimization; and the specific circumstances of the victim, including fear, severe traumatization, and the age and maturity of young victims.³⁹ DHS emphasizes that the proper standard is the reasonableness of the request, not whether a victim unreasonably refused to assist.⁴⁰ It is generally reasonable for law enforcement to ask a trafficking victim similar things they would ask other comparably situated crime victims, such as domestic violence victims.⁴¹
- There are certain times when a victim is not required to cooperate with requests for assistance: (1) if the victim is under the age of 18, or (2) if the victim has experienced physical or psychological trauma that prevents him or her from complying with a reasonable request.⁴²
- If a T visa victim has complied with any reasonable request in the detection, investigation, or prosecution the certifying official may prepare the certification even when investigation or prosecution efforts have been abandoned or did not result in conviction.⁴³ A judge may also certify when the only case the victim participated in was a family or civil court matter.
- If a judge is unsure whether the victim meets the assistance requirement, they may sign the declaration and include all information that has been found relevant about the victim’s assistance (Form I-914B includes several options to select). USCIS will ultimately determine whether the victim meets these requirements.⁴⁴
- The victim must fulfill an ongoing responsibility to provide assistance from the time of their initial application through the time they apply for lawful permanent residency.⁴⁵ At their discretion, a certifying judge may revoke or disavow a declaration if a victim stops assisting; after revocation or disavowal, the declaration will no longer be considered as evidence.⁴⁶

³⁸ I.N.A. § 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa).

³⁹ 72 Fed. Reg. 92266, 92308 (codified at 8 C.F.R. § 214.11(h)(2)) (2016).

⁴⁰ 72 Fed. Reg. 92266, 92275 (2016).

⁴¹ *Id.*

⁴² 72 Fed. Reg. 92266, 92305 (codified at 8 C.F.R. § 214.11(b)(3)) (2016).

⁴³ DEP’T OF HOMELAND SECURITY, INSTRUCTIONS FOR SUPPLEMENT B, DECLARATION OF LAW ENFORCEMENT OFFICER FOR VICTIM OF TRAFFICKING IN PERSONS I (expires 04/30/2021), https://www.uscis.gov/system/files_force/files/form/i-914supbinstr.pdf; *DHS U and T Visa Resource Guide* at 17, 19.

⁴⁴ *Id.* at 18.

⁴⁵ 72 Fed. Reg. 92266, 92274 (2016).

⁴⁶ 72 Fed. Reg. 92266, 92306 (codified at 8 C.F.R. § 214.11(d)(3)(ii)) (2016).

<p>T visa, Time Line & Attaining Lawful Permanent Residency</p>	<ul style="list-style-type: none"> • Typically within six (6) months after filing the T visa application, if USCIS finds that there is sufficient evidence in the case, the applicant’s case will receive bona fide determination and the victim will receive formal protection from deportation, work authorization,⁴⁷ and access to state and federal public benefits.⁴⁸ DHS will run a background check based on the applicant’s fingerprints before granting bona fide determination.⁴⁹ • Approximately two (2) years after the bona fide determination, that is, about 2.5 years after filing, DHS will adjudicate the case. If the case is approved the applicant receives a T visa that lasts for four (4) years. At this point, if the trafficking case is concluded, the applicant will be able to immediately apply for lawful permanent residency. If not, the applicant will be able to apply for to apply for legal permanent residency three (3) years after receipt of T visa.⁵⁰ • To obtain lawful permanent residency as a T visa holder, the victim must prove: <ul style="list-style-type: none"> ○ That they lawfully hold T visa and can prove that they have good moral character; ○ That they meet one of the following: <ul style="list-style-type: none"> ▪ They have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking; ▪ They would suffer extreme hardship involving unusual and severe harm if they were removed from the United States; or ▪ They were under 18 years of age at the time of the trafficking. ○ That they have continuous presence in the U.S. since receiving the T visa. Due to the “continuous presence” requirement, the T visa holder cannot depart the U.S. for any single period of time longer than 90 days, or for shorter periods in the aggregate exceeding 180 days; and ○ That they are admissible to the United States or have been granted a waiver by USCIS of any waivable grounds of inadmissibility.⁵¹ • Congress capped the number of available T visas for principal applicants at 5,000 per fiscal year.⁵² However, to date, the annual cap has never been reached and visas remain available to all applicants who qualify.⁵³
<p>More Information</p>	<ul style="list-style-type: none"> • Please visit NIWAP’s web library for more information http://niwaplibrary.wcl.american.edu/ and for training or technical assistance contact NIWAP at (202) 274-4457 or niwap@wcl.american.edu.

⁴⁷ 72 Fed. Reg. 92266, 92279 & 92307 (codified at 8 C.F.R. § 214.11(e)) (2016); 8 C.F.R. 274a.12(c)(14); Katelyn Deibler and Leslye E. Orloff, *T-Visa Timeline with Background Checks* (2019), <http://niwaplibrary.wcl.american.edu/pubs/t-visa-timeline>.

⁴⁸ To look up what federal and state public benefits human trafficking victims are eligible for in each state see NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, *All State Public Benefit Charts* (2019), <http://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

⁴⁹ 72 Fed. Reg. 92266, 92307 (codified at 8 C.F.R. § 214.11(e)(1)(iv)) (2016)

⁵⁰ 73 Fed. Reg. 75540, 75558 (codified at 8 C.F.R. § 245.23(a)(3)) (2008).

⁵¹ 73 Fed. Reg. 75540, 75558 (codified at 8 C.F.R. § 245.23(a)) (2008).

⁵² I.N.A. § 214(o)(2)–(3), 8 U.S.C. § 1184(o)(2)–(3).

⁵³ *DHS U and T Visa Resource Guide* at 10.