



September 1, 2021

Elizabeth Dallam, Office of Policy and Strategy  
U.S. Citizenship and Immigration Services, DHS  
20 Massachusetts Avenue NW.  
Washington, DC 20529-2099

Submitted via regulations.gov

RE: Comment Regarding DHS Docket No. USCIS-2011-0010

Dear Ms. Dallam,

The Advocates for Human Rights (The Advocates, or AHR) appreciates the opportunity to comment on the Interim Final Rule (IFR) for T nonimmigrant status. In this unique situation, we have had several years to witness the impacts of the rule. It is an ideal moment to reflect on the pros and cons of each section with an eye toward finalizing a rule that serves the greatest good for preventing trafficking and supporting survivors. Overall, The Advocates welcomes many of the provisions of the IFR, which expanded much-needed T nonimmigrant protections and, thereby, supported trafficking investigations. Key areas for change, however, relate to: the “on account of trafficking” standard; protections for trafficking victims in immigration court proceedings or detention; clarifying protections for minors; clarifying the extreme hardship upon removal standard; ensuring inadmissibility waivers reflect the nuances of trauma and trafficking; clarifying benefits for derivative family members; preventing re-victimization by providing EADs to applicants through expedited bona fide determinations; and eliminating barriers caused by fees.

We further note that the Advocates joined other service organizations in requesting an extension of the 30-day comment period in light of the COVID-19 pandemic. We are grateful for the Department’s willingness to grant an extended comment period, which will allow more affected communities to provide input on this important regulation.

### **About the organization**

The Advocates for Human Rights is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights' mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, AHR regularly engages UN human rights mechanisms.

We have worked on anti-trafficking efforts for more than a decade, providing free legal services to trafficking victims, conducting baseline community needs assessments, and serving in advisory capacity to state and local governments on human trafficking protocols and legislation. Through this work, we have provided pro bono representation to hundreds of trafficking victims in immigration proceedings and worked with local, state, and federal law enforcement agencies on investigations of trafficking. The Advocates has also provided free legal representation to asylum seekers for nearly four decades, and more recently with unaccompanied children and people detained by ICE, working with more than 10,000 cases to assess, advise, and represent people in the Upper Midwest.

The Advocates has led legal reform, training, and technical support efforts on human trafficking in Minnesota for more than a decade. Our publications include: [Sex Trafficking Needs Assessment for the State of Minnesota](#) (2008), [Safe Harbor: Fulfilling Minnesota's Promise to Protect Sexually Exploited Youth](#) (2013), [Asking the Right Questions: A Human Rights Approach to Ending Trafficking and Exploitation in the Workplace](#) (2016), [Safe Harbor for All Strategic Planning Process Report](#) (2018), and [Labor Trafficking Protocol Guidelines: Identifying and Responding to Victims of Labor Trafficking 24 Years Old and Under](#) (2019).

In addition to legal representation, AHR works with women's and LGBTQI+ human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. AHR is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women's human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. We have worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, we help draft laws that promote the safety of women. We have provided commentary on new and proposed domestic violence laws in nearly 30 countries. We have worked with host country partners to document violations of women's human rights, including domestic violence. We train police, prosecutors, lawyers, and judges to implement both new and existing laws on domestic violence. In addition, our Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working with the UN, we developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

### **The Advocates for Human Rights Encourages DHS to Create a Final Rule that Protects Victims and Prevents Trafficking**

The Advocates welcomes many of the proposed changes in the IFR. Based on our experience working on T nonimmigrant cases and supporting state and local anti-trafficking efforts over the years since the IFR was in place, we have seen several areas where the IFR must be revised to

fill gaps and eliminate barriers that exclude trafficking victims from protection. Below, we provide changes we believe necessary for the IFR and then highlight changes in the IFR that should be retained.

**1. Proposed changes to 8 CFR 214.11(g)’s “physical presence” requirements make needed changes but still exclude trafficking victims from protection.**

We welcome the IFR’s expansion of the definition of physical presence, but caution that the standard as contained in the IFR excludes a significant number of trafficking victims from T nonimmigrant status protections. The expansions in 8 CFR 214.11(b)(2), (g)(1), (g)(2) and (g)(3) are important and helpful, but as drafted will continue to exclude trafficked persons from protection. The final rule should entirely remove the departure bar and clarify that an applicant may meet the “on account of” standard so long as the trafficking was or is a central reason for their presence *or previous presence* in the U.S. Indeed, while part 214.11(g) requires that USCIS analyze whether the applicant was in the U.S. on account of trafficking *at the time of application*, part 8 CFR 214.11(g)(3) appears to narrow this and has been interpreted as not applying where the person has been removed, even if they were removed while their T application is pending, unless they can show they fall within the few narrow exceptions.

The Advocates is particularly concerned about this departure bar contained in the current IFR. While the text of the TVPRA does indicate that a person must be in the U.S. “on account of” trafficking to qualify for T nonimmigrant status, this should be read more broadly than as the IFR indicates in order to comport with Congressional intent to protect victims and prevent trafficking. The IFR determines that someone is unable to prove that they are in the US on account of trafficking if they have left or been deported since the trafficking. The IFR provides no timeline for this. Thus, if a person was in the US on account of trafficking, applied for a T nonimmigrant status and then was deported during the pendency of the T, the IFR could be interpreted to bar T eligibility. At the very least, DHS should update the final rule to correct that this is limited to the time of filing—if a person was in the US on account of the trafficking when they filed the application, subsequent departure or removal should not bar relief. This is particularly true since T status could be issued as a visa by the State Department. The physicality limitations set forth by Congress in the TVPRA related only to restrict T eligibility to those who were victims in the US or connected their trafficking to the US rather than victims solely trafficked outside of the US who had no connection between the trafficking and their presence in the U.S. at any time. While DHS made an important step toward aligning the IFR with Congressional intent by removing the opportunity to depart, the IFR at present remains too narrow.

Proposed language in the final rule, therefore, should read:

*To be eligible for T-1 nonimmigrant status an applicant must be physically present in the United States, American Samoa, the Northern Marianas Islands, the Virgin Islands, or at a port-of-entry thereto on account of such trafficking.*

*(1) Applicability. The physical presence requirement requires USCIS to consider the alien's presence in the United States at the time of application. The requirement reaches an alien who:*

*(i) Is present because he or she is currently being subjected to a severe form of trafficking in persons;*

*(ii) Was liberated from a severe form of trafficking in persons by an LEA **at any time prior to or during the application process**;*

*(iii) Escaped a severe form of trafficking in persons before an LEA was involved; ~~subject to paragraph (g)(2) of this section~~;*

*(iv) Was subject to a severe form of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons, **including due to ongoing trauma, financial harms/need, and more**; or*

*(v) Is present on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.*

*(2) Departure from the United States. An alien who has voluntarily departed from ~~(or has been removed from)~~ the United States at any time after the act of a severe form of trafficking in persons **and before submitting an application** is deemed not to be present in the United States as a result of such trafficking in persons unless:*

*(i) The alien's reentry into the United States was the result of the continued victimization of the alien;*

*(ii) The alien is a victim of a new incident of a severe form of trafficking in persons; ~~or~~*

*(iii) The alien has been allowed reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking, described in paragraph (g)(4) of this section; **or***

***(iv) The person's departure was a direct result of immigration proceedings initiated against them by DHS.***

*(3) Presence for participation in investigative or judicial processes. An alien who was allowed initial entry or reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking will be deemed to be physically present in the United States on account*

*of trafficking in persons, regardless of where such trafficking occurred. To satisfy this section, an alien must submit documentation to show valid entry into the United States and evidence that this valid entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.*

*(4) Evidence. The applicant must submit evidence that demonstrates that his or her physical presence in the United States or at a port-of-entry thereto, is on account of trafficking in persons, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking. USCIS will consider all evidence presented to determine the physical presence requirement, including the alien's responses to questions on the application for T nonimmigrant status about when he or she escaped from the trafficker, what activities he or she has undertaken since that time including the steps he or she may have taken to deal with the consequences of having been trafficked, and the applicant's ability to leave the United States. The applicant may satisfy this requirement by submitting:*

*(i) An LEA endorsement, described in paragraph (d)(3) of this section;*

*(ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35;*

*(iii) Any other documentation of entry into the United States or permission to remain in the United States, such as parole under section 212(d)(5) of the Act, or a notation that such evidence is contained in the applicant's immigration file; or*

*(iv) Any other credible evidence, including a personal statement from the applicant, stating the date and place (if known) and the manner and purpose (if known) for which the applicant entered the United States and demonstrating that the applicant is now present on account of the trafficking.*

## **2. The Regulations Must Not Punish Victims for Law Enforcement Capacity or Training Issues**

Law enforcement capacity to identify and investigate complex human trafficking crimes is nascent and limited, and victims must not be penalized for this lack of capacity. The Advocates has trained and worked with law enforcement and other government agencies, including the Minnesota Departments of Health, Human Rights, Labor and Industry, and Public Safety and the U.S. Department of Labor, in addition to service providers, community groups, faith organizations, and more on identification and support of trafficking victims. The Advocates currently is working on a multi-year project with the state Bureau of Criminal Apprehension's Human Trafficking Investigative Task Force

(which includes DHS/HSI, FBI, and the U.S. Attorney’s Office in addition to state and local agencies) to develop and test investigative protocols to effectively identify, investigate, and prosecute labor trafficking crimes.

In our work, The Advocates has seen how, in practice, law enforcement has limited capacity to investigate and respond to trafficking crimes. In fact, we saw trifold increase in investigations from 7 to 21 from 2013 to 2017 after our outreach and training began. In our ongoing work with law enforcement, we have seen a growing and sustained interest by local and state agencies in identifying, investigating, and prosecuting trafficking. Yet, in other cases where we have referred a victim to law enforcement for investigation, some agencies have been unable or unwilling to investigate. Thus, it is crucial that USCIS not prevent bona fide victims of trafficking from obtaining protections Congress intended them to have simply because law enforcement is either unable or unwilling to assist. Given Congress’ exemption from the certification requirement for T cases (*c.f.* U visas), it is clear that Congress intended broad benefits to trafficking victims without reliance on law enforcement. While there is no certification requirement, the Department must not create any type of *de facto* or *de jure* requirements that place bona fide victims of trafficking at the mercy of law enforcement to access benefits to which Congress intended they be entitled.

For the reasons noted above, therefore, The Advocates supports the IFR’s removal of the “opportunity to depart” for those who escaped traffickers before law enforcement became involved. This provision had severely disadvantaged victims who had escaped trafficking or had been assisted by someone other than law enforcement in leaving the situation. As noted, we know from our work that LEAs may not have capacity or training to identify and help every victim, but this does not remove the need for immigration protections for those who have escaped before they could be identified. Indeed, maintaining the current standard in the IFR should further Congress’ intent of the TVPRA by *increasing* LEA ability to investigate and prosecute trafficking because victims will be identified and secured through other means, such as service providers, who can then refer the cases to LEAs while the person is safely away from their trafficking situation but remaining in the US and available as a witness.

### **3. The Regulations Must Protect Victims of Trafficking Who Are in Removal Proceedings**

As the immigration court has no power to adjudicate T nonimmigrant status, victims of trafficking in removal proceedings face serious gaps in protections. This is particularly true where OPLA takes a hard stance against continuances, stays or closure/termination in favor of removal notwithstanding available relief. Stays are not guaranteed and are without prejudice to later reinstatement if T status is denied. *See generally* 81 FR at 92306/1 (outlining procedure). The Final Rule should revise this to require DHS issue a

stay of removal until a *bona fide* determination is made where an applicant, including derivative T applicants, has a pending T nonimmigrant application. Moreover, in cases where applicants can make a credible showing that they were placed in removal proceedings through retaliatory actions of their trafficker or due to the trafficking experience, DHS should clarify that such a showing would automatically warrant joining in a motion to close or to terminate the removal proceeding for the pendency of the T nonimmigrant application, including through any appeals, and overcoming any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23. This credible showing may be made following the “any relevant evidence” standard and can be made solely based on the statement of the applicant under penalty of perjury. Such provisions are necessary given the way in which traffickers strategically function to evade creating evidence.

Additionally, while The Advocates appreciates the efforts to screen for trafficking amongst minors as required by law, we note that there are serious gaps in screening of adult victims at all levels of DHS. The final rule should further protections from trauma by requiring DHS to conduct screening for trafficking victims by *all levels of DHS*. The Department must make clear that fulfilling the Congressional purpose of the TVPRA and stopping trafficking is a priority for all of DHS, and that it requires every office to play a role. The Final Rule should explicitly require screening for trafficking at each stage of an immigration process to ensure multiple checks that increase identification.

As such, the Final Regulation should add a section to require ICE/ERO agents to screen amongst all detained individuals and provide release on bond or parole for anyone identified as a trafficking victim—or potential victim of trafficking who may be unable to convey their experience due to trauma—even if CP or deferred action are not sought by law enforcement. Detention is rife with factors that can exacerbate trauma, so the Department should take steps to avoid such re-traumatization.

In addition, data and experience show that traffickers often report victims to immigration authorities in retaliation or to prevent being identified. As a result, many people end up in detention through retaliatory actions of their traffickers. The Department should require all agents under its purview to screen for trafficking victims whenever conducting an immigration enforcement action, such as at workplace raids, in reviewing workplace compliance, and more.

Finally, the Rule should require that OPLA attorneys screen for trafficking both before issuing Notices to Appear as well as for each case it is prosecuting in EOIR. If an OPLA attorney determines that there are indicators of trafficking, the Rule should require that they refrain from issuing an NTA until further analysis can be done to rule out possible trafficking. If an NTA has already been issued, the Rule should require that the attorney

immediately notify the court and opposing counsel (or, in absence of counsel, the Respondent), request a continuance or administrative closure, and refer the victim for trafficking support services and investigation.

These changes serve the goals of the TVPRA and improve efficiency by ensuring victims of trafficking are not further traumatized by immigration detention and removal proceedings, guaranteeing such victims are not foreclosed from protections, and ensuring witnesses remain available to law enforcement.

In at least one case, The Advocates had a client who was apprehended, detained, and put into expedited processing due to a prior removal order. Despite his being eligible for T nonimmigrant status and having crucial information for law enforcement, OPLA processed him quickly through removal proceedings before The Advocates was able to get law enforcement to request deferred action. Because he was subsequently removed, USCIS has issued an RFE related to the “on account of” standard given his removal.

In another case, The Advocates identified a victim of trafficking in detention who had serious workplace injuries. This identification led The Advocates to refer the case to local law enforcement for investigation and resulted in a conviction for labor trafficking. Had DHS conducted its own screenings for each person placed in detention, the Department may have identified and investigated the trafficking itself. And, in yet another case, AHR identified a client in detention as a victim of trafficking. We referred the case to the local law enforcement, which opened an investigation. However, due to the detention situation, they were required to conduct initial interviews over the phone in detention until they could convince DHS to release the victim on deferred action. Such inefficiencies are contrary to the Congressional intent of preventing and suppressing trafficking. Investigations will be made more efficient by ensuring proper screening and procedures that allow law enforcement to more easily access victims and ensure that victim/witnesses are not lost through removal.

Finally, as detailed further above, DHS must also increase protections and serve the goals of the TVPRA by removing the “departure bar” currently in 8 CFR 214.11(g), which bars bona fide T nonimmigrants from benefits simply by virtue of their removal even if they have a pending T application.

#### **4. The Regulations Should Protect Minor Victims of Trafficking by Maintaining, Clarifying and Expanding Provisions that Recognize Vulnerability of Young People**

DHS has long recognized that for minors, the trafficking experience can be particularly traumatizing, and may prevent minors from complying with reasonable LEA requests. The reasonableness of the LEA request must be balanced against the circumstances of the

victim, including traumatization. *See* 8 CFR § 214.11(a)(2009). The regulations include “fear” as one of the specific circumstances of the victim because it can be experienced as part of the trauma experienced by victims. *See* Clawson et. al., U.S. Dep’t of Health and Human Services, *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking 2* (2008). Raising the age that a person is considered a minor from 15 to 18 years of age, “acknowledge[es] the significance of an applicant’s maturity in understanding the importance of participating with an LEA.” 81 FR at 92295 Table 2.

Many of our clients have benefitted from these changes. For example, The Advocates has worked with a minor who was trafficked by his sponsor. This minor was incredibly traumatized by the experience, fearing retaliation both to himself and to his family. When we discussed reporting to law enforcement, this exacerbated the trauma. The changes contained in the IFR allowed us to avoid furthering that trauma because the minor was not required to comply with any requests to assist with the investigation. Given the identified vulnerabilities of minors, these changes must remain in the Final Rule.

While we support these changes, The Advocates encourages DHS to clarify that an applicant under 18 years of age who reports the trafficking to the National Human Trafficking Hotline or Office of Trafficking in Persons would meet the requirement that the person report to LEAs and comply with reasonable requests, including even if they make an anonymous report.

Additionally, DHS should clarify that the victim’s age *at the time of trafficking* should be determinative throughout the entire process. In other words, if the victim is trafficked while under 18 years of age but turns 18 during the pendency of the T nonimmigrant application or before they can report to law enforcement, this does not trigger a new requirement to comply with reasonable law enforcement requests. This not only helps continue to support juvenile victims who will continue to carry trauma and fear despite turning 18, but also creates clarity and consistency for USCIS adjudicators.

Going further, the Department should consider regulations or other efforts that would expand protections to other vulnerable young people in recognition of the fact that the serious harms of trafficking do not simply end at age 18. Minnesota passed legislation protecting youth under the age of 24 who are victims of trafficking<sup>1</sup>. The Department should consider similarly increasing the age to reflect trauma and vulnerability concerns.

**5. The trauma-informed approach in the IFR’s changes in 8 CFR 214.11(h)(4)(i) must be included throughout so as not to exclude bona fide victims**

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<sup>1</sup> 2017 Minn. Laws Chap. 6, Art. 10 §145, 1st Special Session (see Appendix A)

The Advocates welcomes the changes in the IFR which recognize the severe impact trafficking has on all victims—both minors and adults—in creating trauma. As outlined throughout this comment, The Advocates encourages DHS to consider trauma in *all* aspects of adjudications of T nonimmigrant status to best serve the Congressional intent of protecting victims of trafficking.

We support maintaining the changes in the IFR that recognize the impact trauma has on allowing victims to participate in the investigation and prosecution of the trafficking, as well as in how requiring such participation may be unreasonable because it can exacerbate the harms and trauma. The Department should maintain the standard, which provides a balancing test of factors that can be considered in determining the reasonableness of a request as well as an exemption from complying with reasonable requests from LEAs for those who are unable to do so due to trauma.

The Advocates knows from our work the impact trafficking has on individuals, which may make it impossible—or even harmful—for them to comply with requests. For example, one of our clients participated in the *federal* case against his trafficker, who had forced the client to work in a restaurant and participate in sexual acts, keeping him essentially caged in the basement. During the course of the federal court case, the client's trauma was exacerbated by the questioning of the defense attorney and the process of going through testimony. As a result, when the state brought a separate case against the trafficker, our client's psychologists severely discouraged his participation on fears of suicide or other harms. The government attorneys agreed that going forward with his testimony would be harmful, and they were able to proceed with the case notwithstanding. Because of the important changes contained in the IFR, our client was able to avoid re-traumatization without sacrificing T eligibility. He has since been able to reunite with family and reports to us that has been able to start recovering from the trauma. For cases like this, The Advocates encourages maintaining the changes in the IFR that protect trauma-impacted individuals.

In addition, we call on DHS to not only make changes to eligibility that reflect trauma-informed processing, but to also ensure and fund proper training on trauma impacts for all USCIS adjudicators and DHS staff. Trauma from and leading-up to trafficking can cause victims to commit acts or act in ways that do not fit within the “perfect victim” framework. This does not mean that victims should be excluded from protections simply by not being “perfect.” Instead, they must be further protected by ensuring they are met with investigators, prosecutors, and adjudicators who recognize trauma and do not exacerbate it.

**6. The IFR in 8 CFR 212.16(b)(3), as written, does not reflect a trauma-informed approach and will exclude bona fide victims unnecessarily**

The Advocates is concerned about the Regulation’s approach to inadmissibility waivers. The Department proposes to limit waivers of inadmissibility for criminal issues when the crime is not related to the trafficking. The IFR allows DHS to exercise such discretion “in cases where the applicant has a conviction for a violent or otherwise dangerous crime, ... in its discretion, in ‘extraordinary circumstances’ only.” *See* new 8 CFR 212.16(b)(3). While there certainly will be cases where the crime clearly occurred while the person was trafficked, we know that many applicants commit crimes due to ongoing trauma from the trafficking experience, re-victimization, or due to vulnerabilities that lead to trafficking.<sup>2</sup> Such circumstances should not further punish or victimize trafficking victims by denying them crucial immigration protections, and should not bar the purposes of the T nonimmigrant status’ goals of encouraging victim compliance with law enforcement requests. Nothing in the legislative history indicates that Congress intended victims of trafficking to be punished for criminal histories, and the regulations should not make such a distinction either.

The Advocates encourages DHS to amend the Final Rule to require consideration of the trafficking circumstances and criminal situation when determining whether to exercise discretion to grant a waiver. DHS should determine whether the crime occurred before the trafficking situation or is related to the trafficking, including trauma or vulnerabilities in the wake of trafficking. DHS should change the regulation not to focus on the seriousness or numerosity of the criminal history; instead, focusing on a more victim-centered approach that weighs the individual circumstances and a balancing test of factors.

Such changes would more accurately reflect the circumstances of trafficking matters. For example, in one of our cases, The Advocates represented a youth who experienced serious harms in his home country, causing him to flee. En route, he was trafficked and forced to work for a cartel. As part of this work, he was required to take drugs and then smuggle the drugs into the United States. Luckily, he was identified and assisted in the United States. Nonetheless, the trauma of what he experienced led him to be vulnerable and he was a victim of assault in foster care. He then became involved with drugs as a mechanism for dealing with multiple traumas and eventually was arrested for assault and

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<sup>2</sup> *See, e.g. The Advocates for Human Rights, Sex Trafficking Needs Assessment for the State of Minnesota* (2008), p. 133-137, “Interviewees reported women and girls being involved in crimes including selling false identification, check fraud, and welfare fraud. Recent cases of young women in prostitution involved more serious crimes, including attempted murder and murder.” Available at: [file:///C:/Users/empol/The%20Advocates%20for%20Human%20Rights/Immigration%20-%20Documents/Advocacy/Federal%20Policy/Regulations-%20Notice%20and%20Comment/2021/report\\_final\\_10\\_13\\_08.pdf](file:///C:/Users/empol/The%20Advocates%20for%20Human%20Rights/Immigration%20-%20Documents/Advocacy/Federal%20Policy/Regulations-%20Notice%20and%20Comment/2021/report_final_10_13_08.pdf)

theft. While his initial drug crimes were part of the trafficking experience, by the time of these later crimes, the client had escaped the trafficking situation. However, they were directly related to the *impacts of* the trafficking and ongoing vulnerabilities. While this applicant may fit within DHS' proposed "exceptional circumstances," we encourage DHS to eliminate such strict rules around criminal issues in the Final Rule to more accurately reflect the realities of trauma and further the Congressional intent.

There is broad and growing recognition both related to the involvement of trauma-affected individuals in crime as well as to the over-policing and disproportionate impact of criminal justice systems on communities of color, including noncitizens. Therefore, DHS should use the final rule to ensure victims are not foreclosed from benefits in the future simply because of a different analysis around what constitutes "exceptional circumstances." Instead, a final rule should require analysis of balancing factors including trauma impacts from trafficking and vulnerabilities in each case in order to determine whether a waiver is merited.

**7. The Final Rule should maintain and clarify protections for derivative beneficiaries**

The Advocates welcomes the changes to the IFR that allowed greater protections for derivatives, as we know trafficking victims are benefitted from having support systems and family. *see* 81 FR at 92280 (outlining general categories of family members eligible based on age of the principal or on a showing of present danger of retaliation and removing the requirement that eligible family members prove extreme hardship if not admitted or removed. *81 FR 92282*). The Department should maintain the changes in the IFR.

The current IFR allows principal applicants under 21 years of age to apply for derivative T status for unmarried siblings under 18 years, spouses, unmarried children under 21 years of age, and parents. Principle applicants over 21 years of age at the time of application can apply for derivative status for spouses and unmarried children under 21 years old. Principal applicants of any age can apply for derivative status for children (of any age or marital status) of the principal's derivative family member if the derivative's child faces a present danger of retaliation due to the principal's escape from a severe form of trafficking or cooperation with law enforcement. *Id.* This expansion allows trafficking victims greater support in overcoming the trauma associated with trafficking as well as support for cooperating with law enforcement that comes from having family members available to the victims and in knowing that their families can be protected from retaliation in their home country.

Indeed, The Advocates has seen the importance of these relationships with our clients. For example, we are currently working with a T nonimmigrant client who has been

separated from her daughter since being trafficked from her homecountry many years ago. The trafficker is still in her homecountry, and the country is falling into conflict. While our client works to send money to support her child, she continually expresses concerns about her child's safety. We have requested expedited processing of the derivative application as a result; however, it is clear that this hardship weighs heavily on her—making recovery from trafficking and any further development quite difficult.

We further encourage DHS to codify, through the final rule, the policy around after-acquired spouses. *See Medina Tovar*. This year, DHS clarified that it would allow derivative eligibility for after-acquired spouses of *U visas* in accordance with the ruling in *Medina Tovar*. USCIS stated in policy that it would also apply that interpretation to T nonimmigrants. While this is a crucial update, DHS should codify this change in the present rule to eliminate any future uncertainty as to after-acquired T derivatives.

#### **8. The IFR currently fails to protect victims from continuing exploitation by failing to provide employment authorization**

As the Department notes in the IFR, an initial review is conducted, including completion of biometric and background checks along with a prima facie showing of eligibility, to determine if the T nonimmigrant status application is a bona fide application. 81 FR at 92279. One corollary benefit of this procedure is that USCIS may grant the applicant deferred action upon a pre-adjudication bona fide determination, which allows the applicant to request employment authorization. The Congressional intent in creating a bona fide determination was to ensure that victims can access a process to secure access to benefits and employment. See 22 USC §7105(b)(1)(E)(II)(aa) (indicating that certification for federal benefits can be granted if an applicant has made a bona fide application for a visa under INA §101(a)(15)(T)). In the 2016 comment period, one party asked that the bona fide application process be completed within 90 days, but a specific deadline for completion was denied. *Id.* At that time, processing times of the entire application procedure lasted approximately six months. Now, however, the process has extended to more than 24 months. Absent issuance of a prompt bona fide determination in these conditions, trafficking victims have had to wait for years to work lawfully and access many benefits unless they are able to obtain continued presence or deferred action authorizations—two measures that, as detailed below, are insufficient. This places trafficking victims at increased risk for exploitation and re-trafficking as they must rely on others for basic support over an extended period.

The Advocates has seen through our direct work with clients and our development of protocols with state and local agencies that employment authorization is a crucial protection in the process. Law enforcement investigations can be negatively impacted by lack of employment authorization as victims may be unable to pay for transportation,

may have unstable living circumstances and phone contacts that make them difficult to keep in touch with, and may fall victim to exploitation or re-trafficking that leads them to be unable or unwilling to assist an investigation. This is particularly the case as local law enforcement cannot request continued presence directly.

In addition, many of our clients report lack of access to employment authorization as a traumatizing experience, and something that makes them additionally vulnerable to re-victimization. In one case, for example, a client had been trafficked into the US by a dangerous cartel when he was quite young. When he turned 18 and wanted to start working after leaving foster care, he reported to our office that he was forced to work for someone who failed to pay wages timely and that he felt trapped at home because he could not get a driver's license because he was unable to get an EAD. Other clients have similarly reported employers taking advantage of their lack of employment authorization. And, in one instance, one of our clients reported being a victim of exploitation and abuse by their family on whom they were forced to depend throughout the pendency of the T application because they were unable to work to support themselves.

In light of these circumstances, The Advocates urges DHS to change the current regulatory process, and, instead, set a 90-day deadline, for making a bona fide determination. Recognizing that “occasionally the [bona fide] checks [and determinations] will take longer than 90 days,” *id.*, does not diminish the importance to applicants of completing the large majority of these determinations within the 90-day deadline, so that they can obtain some protection for immigration status purposes, employment authorization, and the availability of other public benefits. *Id.* In fact, a USCIS memo in May 2009, Michael Aytes, Acting Deputy Director wrote, “USCIS does not currently have a backlog of I-914 cases; therefore, focusing on issuing interim EADs is not necessary. USCIS believes it is more efficient to adjudicate the entire I-914 and grant the T status, which produces work authorization for the applicant, rather than to touch the application twice in order to make a bona fide determination. However, in the event that processing times should exceed 90 days, USCIS will conduct bona fide determination for the purpose of issuing employment authorization.” Memorandum, “Response to Recommendation 39: ‘Improving the Process for Victims of Trafficking and Certain Criminal Activity: The T and U Visas.’” USCIS (May 22, 2009). This is all the more crucial now as there *is* a backlog of more than two years for case processing. Given this change, it is clear that USCIS cannot rely on the lack of backlog in order to protect victims from re-exploitation and should instead simply provide bona fide processing or a path to EADs through the pendency.

In addition, The Advocates encourages the Department to take all measures available to ensure Continued Presence benefits are not arbitrarily adjudicated or delayed. While CP

is not included in the IFR, The Advocates takes this opportunity to recommend DHS create regulations on CP which direct the Agency to grant CP within 60 days of receiving a credible report of human trafficking. The Regulations should detail a uniform, fair and timely process for granting or denying CP, with a focus on providing the greatest amount of protections as envisioned by Congress. The Regulations should, to the extent possible under legislation, allow the Agency to receive CP requests from *any* law enforcement agency.

**9. The Regulations should remove fees for T-related applications or detail procedures that ensure fee waivers are available and fairly adjudicated**

Congress made clear that fee waivers must be available for applications connected to the T nonimmigrant status in recognition of the victimization of T applicants as well as the opportunity for future exploitation if forced to pay fees for protections. While Congress required that T nonimmigrant applicants be eligible for fee waivers, it did not require that any fee be charged. DHS maintains discretion for fees. The Advocates encourages DHS to eliminate fees for applications related to the T status, including waivers of inadmissibility for the applicant and their derivatives as well as eliminating the fee for adjustment of status under INA 245(l). As Congress recognized, and DHS is aware, the majority of trafficking victims may be unable to pay fees without facing exploitation or harms. A significant part of trafficking involves dependency relationships and the overall control of a victim, including finances. Many trafficking victims have lost all wages to debt bondage or involuntary servitude. In the case of sex trafficking, many victims will also have been forced to provide any wages to the trafficker or pay “fees” for services. In many cases of noncitizen trafficking victims, they may have had to pay fees for visas, transportation, smuggling, and more to traffickers. Thus, very few trafficking victims will have any financial resources. What few resources they have will be required for maintaining freedom from trafficking. This, compounded with the fact that T nonimmigrants have no access to employment authorization during the current two-year processing timeline unless granted continued presence or deferred action—two rare benefits in many cases—makes paying fees connected with immigration benefits impossible. Thus, fee waivers are a crucial lifeline. However, DHS could eliminate this burden and reduce its own costs by simply eliminating the fees entirely in recognition of the fact that most T applicants will need a fee waiver. Rather than processing the fee waivers, DHS can save time and resources—and also reduce the burden on the T nonimmigrant.

If DHS determines it would rather undertake the waiver review, it must ensure that the final rule provide clear guidelines and policies on fair adjudication. Over the life of the IFR, we have witnessed significant resistance to fee waiver grants—often, through route denials without explanation despite victims having evidence of hardship. In one case

from The Advocates, we submitted a fee waiver request with an I-192 that was required in response to an RFE. The fee waiver was denied, causing the I-192 to be untimely for the RFE response. When appealed, we also filed a fee waiver request for the I-290B fees, *which was granted*. That case has remained on appeal for more than 18 months. This case illustrates the inconsistency with which fee waivers are adjudicated as well as the hardship that will befall trafficking victims without clear guidelines.

The Advocates for Human Rights, therefore, encourages DHS to use this final rule to eliminate any and all fees for T nonimmigrants and their derivatives. In the alternative, DHS should include in the final rule specific factors to consider when adjudicating a fee waiver request for a T nonimmigrant, such as the financial impact of the trafficking experience and likelihood of future victimization due to financial vulnerabilities, and require that all fee waiver requests be processed within 30 days of receipt.

**10. The IFR excludes bona fide trafficking victims by failing to provide sufficient detail regarding the hardship standard**

The Advocates is aware of several cases that have been denied or given a NOID based on the hardship prong despite the “any credible evidence” standard. We support the broad list of factors contained in the IFR that should be considered by DHS. We recommend that the Final Regulation be amended, however, to include financial and support issues considered within the context of trauma and vulnerability to future trafficking. The Advocates notes that the US is a party to the Palermo Protocol and has passed the TVPRA with the purpose of supporting trafficking victims and preventing trafficking. We know that economic vulnerabilities and lack of social support are significant vulnerabilities for trafficking. Thus, USCIS must consider the hardship involved in returning someone from the US who will become vulnerable to re-trafficking as a result of financial vulnerabilities. We encourage the Department to provide a greater list of possible, but not exhaustive, factors that must be considered by USCIS when determining whether the person would suffer a severe hardship upon removal.

**11. The Department should maintain other changes from the IFR that serve the Congressional purpose of protecting trafficking victims and improving law enforcement ability to stop trafficking**

The original IFR made important improvements, and we want to ensure that DHS maintain those positive changes. With the corrections, clarifications and changes outlined above, we further recommend that DHS maintain the following changes originally contained in the IFR:

- Expanding the definition and discussion of Law Enforcement Agencies (LEA) to include State and local law enforcement agencies. 8 CFR 214.11(a).

- The Advocates has seen the positive impact of this. Since beginning to implement a grant targeting labor trafficking in 2017, The Advocates has worked closely with state and local law enforcement agencies who are deeply committed to ending trafficking. In many instances, such agencies are able to obtain important support from federal agencies; however, in many other cases, the type and size of case may not meet requirements for federal investigation and interest. Yet, such cases are important to safety and protection in the state. Thus, allowing a broader range of law enforcement agencies furthers the purposes of the TVPRA by tackling trafficking at all levels. The Department should maintain this change.
- Discontinuing the practice of weighing evidence as primary and secondary in favor of an “any credible evidence” standard. 8 CFR 214.11(d)(2)(ii) and (3).
  - The Advocates supports maintaining this provision, which has furthered protections for victims of trafficking and eased USCIS processing burdens. The “any credible evidence” standard more accurately aligns with the nuances of trafficking cases in which primary evidence may be unavailable due to tactics of the traffickers. In many of The Advocates’ cases, for example, the trafficker used the tactics of paying only in cash for labor, doing business only by phone calls to avoid paper trails, and utilizing multiple different agents to interact with victims to reduce opportunity for identification. Because traffickers often keep victims’ documents and use tactics of control that limit victim autonomy, victims meant to be protected are severely disadvantaged by requiring primary evidence that may not exist. While law enforcement and court records may be used, we have seen many cases where law enforcement either lacks capacity or interest in investigating and pursuing cases, or where charges cannot be brought due to lack of evidence for the reasons mentioned above. As a result, the any credible evidence standard better aligns with the realities and needs of these cases and is the best way to further the goals of the TVPRA.
- Providing guidance on the definition of “severe form of trafficking in persons” where an individual has not performed labor or services, or a commercial sex act. 8 CFR 214.11(f)(1).
  - The Advocates welcomes this guidance which recognizes that victims at multiple stages of trafficking may be able to assist law enforcement in preventing and punishing trafficking, and will merit protections, even if they did not perform labor, services or commercial sex acts for a variety of reasons. This change is a crucial reflection of the complexity and nuance of trafficking

matters, and should be maintained. For example, The Advocates represented a client who was trafficked into the U.S. for the purposes of sex trafficking, but who was rescued before she was required to perform commercial sex acts. While we are grateful this client was never forced to experience such harms, she nonetheless suffered from the trauma of the experience. Moreover, she had information available to law enforcement that would help the agents investigate and stop the traffickers from causing the same harms to others. This clarification helps similar cases and ensures the regulations are in-line with the Congressional intent to capture a broad range of trafficking matters.

- Eliminating the requirement that an applicant provide three passport-style photographs. *See* 81 FR 92298.
  - The Advocates supports this change and any others that eliminate procedural barriers and increase administrative efficiency.
- Removing the filing deadline for applicants victimized prior to October 28, 2000. Update the regulation to reflect the creation of DHS, and to implement current standards of regulatory organization, plain language, and USCIS efforts to transform its customer service practices. *See* 81 FR 92277.
  - The Advocates supports this change and any others that eliminate procedural barriers and increase administrative efficiency.
- Exempting T nonimmigrant applicants from the public charge ground of inadmissibility. 8 CFR 212.16(b).
  - The Advocates welcomes this change. We know from our work with trafficking victims that many have lost financial supports because of dependence on their trafficker or due to the costs of trafficking. The trauma and impacts of trafficking have also resulted in needs for other social services. And, this can be exacerbated by lack of access to employment authorization due to delays in bona fide determinations and restrictions on continued presence. As a result, many T nonimmigrants may appear to be public charges. Removing this ground serves the overall Congressional purpose of making benefits available to trafficking victims despite their circumstances that may otherwise bar immigration benefits. It does so at very little cost to the government given then small number of visas available—a cap which has never been met. This change should be maintained.
- Exempting applicants who are unable, due to physical or psychological trauma, to comply with any reasonable request by an LEA. 8 CFR 214.11(b)(3)(ii) and (h)(4)(i).

- The Advocates supports this important change. As we have seen in our work, the impacts of trauma from trafficking are far-reaching and long-lasting. As a result of this trauma, including both physical harms and psychological harms, many people with whom we work are unable to comply with reasonable law enforcement requests. This is often because of fear that exacerbates these traumas. It may also be that the impacts of physical and psychological harms make it difficult for them to remember experiences and details. For example, one of The Advocates clients' psychologists requested that the client not be required to participate in a state case against his trafficker after the federal court case due to concerns about suicidal thoughts. The Advocates welcomes the important exception, therefore, which reflects the kind of victim-centered and trauma-informed practices upon which the TVPRA are founded and which The Advocates encourages DHS to use in all aspects of T nonimmigrant status processes.
- Limiting the duration of T nonimmigrant status to 4 years but providing extensions for LEA need, for exceptional circumstances, and for the pendency of an application for adjustment of status. 8 CFR 214.11(c)(1) and (l).
  - The Advocates welcomes changes which allow greater protections and flexibility for trafficking victims. The granting of status for four years with recognition that T status may need to be extended is a crucial part of that. While we welcome this change, we encourage DHS to consider expanding these benefits to allow extension of status without evidence of LEA need, such as where an applicant is awaiting family reunification, is experiencing trauma or other hardships related to the trafficking experience that make filing for adjustment of status impossible within the four years, and other victim-centered reasons.
- Clarifying that presence in the Commonwealth of the Northern Mariana Islands after being granted T nonimmigrant status qualifies toward the requisite physical presence requirement for adjustment of status. 8 CFR 245.23(a)(3)(ii).
  - In addition to the changes we have discussed above regarding the “on account of” standard, we support this change to reflect the text of the TVPRA and broader protections for victims who are in the US and its territories or ports of entry.
- Conforming the regulatory definition of sex trafficking to the revised statutory definition in section 103(10) of the Trafficking Victims Protection Act. 22 U.S.C. 7102(10), as amended by section 108(b) of the JVTVA, 129 Stat. 239. 8 CFR 214.11(a).

- The Advocates supports changes that keep the regulations in-line with the TVPA and its overarching purposes.

Thank you for your consideration of comments that help fulfill Congress' intentions by providing protections for trafficking victims, which ensures safer communities and better investigations by law enforcement. Should you require further information, please contact our office.

Sincerely,

A rectangular box with a blue border, used to redact the signature of Michele Garnett McKenzie. The box is positioned below the word "Sincerely," and above the name and title.

Michele Garnett McKenzie  
Deputy Director, The Advocates for Human Rights