

Chapter 8

Protection-Based Relief: Forging a Path to Permanent Status

Sarah Brenes

Lindsey Greising

Alison Griffith

The Advocates for Human Rights
Minneapolis

The authors thank Kara Rieke and Volunteer Lawyers Network for consulting about best practices in custody proceedings in state courts.

Authors

Sarah Brenes

Sarah Brenes is the Program Director of the Refugee and Immigrant Program at The Advocates for Human Rights. She oversees the organization's legal services program which provides legal assistance to low-income asylum seekers, human trafficking survivors and detained immigrants. Sarah and her team recruit, train and support pro bono attorneys to represent clients, as well as provide direct legal services representing clients seeking immigration remedies.

Sarah received her J.D. from the University of St. Thomas School of Law where was awarded the John R. Roach Fellowship for pursuit of a career in public interest. Sarah has a master's degree in Human Rights and Peace Education from the National University in Costa Rica. She earned her bachelor's degree in international affairs from the George Washington University.

Lindsey Greising

Lindsey Greising is a Staff Attorney for The Advocates for Human Rights. In that capacity, Lindsey works on advocacy efforts, particularly involving immigration and trafficking policies. Lindsey also supports rural outreach efforts, special projects, and training for volunteer attorneys and others on the trafficking and immigration matters.

Before joining The Advocates, Lindsey spent many years working internationally on human rights programs, including: work with the International Organization for Migration (IOM) on human trafficking research; the International Labour Organization (ILO) on labor rights and gender equity; and the US Department of State on conflict prevention programming and research. In addition, she worked on Internally Displaced Persons (IDP) reintegration as well as access to justice projects with local NGOs in East Timor (Timor-Leste). Lindsey also brings experience in private immigration practice where she provided representation on a range of immigration cases including humanitarian, family-based, and employment-based matters as well as naturalization and citizenship. Lindsey has co-authored two research guides on legal research in Timor-Leste in addition to co-authoring a piece on second generation security sector reform in international development.

Lindsey graduated magna cum laude from the University of Minnesota Law School with a concentration in human rights law and received her Bachelor of Arts in international studies from the University of Denver with magna cum laude honors. While in law school, Lindsey served in the Immigration & Human Rights Clinic, where she worked on asylum cases and helped to start a working group on pro bono representation for detained migrants. She also worked as a teaching assistant for an undergraduate International Human Rights Law course, interned for the judges at the International Criminal Tribunal for Rwanda (ICTR), and assisted Amnesty International USA on human rights research and advocacy. Lindsey currently serves as an adjunct professor of immigration law at the University of St. Thomas School of Law in Minneapolis and is a member of the American Immigration Lawyers Association (AILA).

Alison Griffith

Alison is a former Staff Attorney for The Advocates for Human Rights' Refugee & Immigrant Program. In that capacity, she mentored and supported pro bono attorneys handling asylum cases before the asylum office and the Immigration Court, as well as other humanitarian immigration matters. Alison also handled a caseload of asylum cases and other matters for The Advocates. Before joining The Advocates, she represented unaccompanied minors at Kids In Need of Defense (KIND), where she represented unaccompanied children seeking asylum, Special Immigrant Juvenile Status, U Visas, and other forms of humanitarian relief from deportation. Prior to her work with KIND, she represented asylum seekers with complex claims during law school at the University of St. Thomas Legal Clinic.

TABLE OF CONTENTS

§ 8.1	GENERAL INFORMATION	8-1
§ 8.2	ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE	8-2
	A. Asylum Eligibility Requirements	8-3
	1. Persecution.....	8-3
	2. Government and Non-Government Persecutors	8-4
	3. Well-Founded Fear.....	8-7
	4. Past Persecution and Rebuttable Presumption of Future Fear	8-9
	5. Protected Grounds: Race, Religion, Nationality, Membership in a Particular Social Group, and Political Opinion.....	8-11
	6. Nexus.....	8-16
	7. Government Protection	8-16
	8. Bars to Asylum Relief	8-17
	B. Withholding of Removal.....	8-18
	1. Eligibility Standard for Withholding of Removal	8-19
	2. Bars to Eligibility For Withholding of Removal	8-20
	C. Convention Against Torture/Deferral of Removal	8-22
	1. Withholding Under CAT	8-22
	2. Deferral of Removal Under CAT	8-22
	3. Benefits Under CAT Relief	8-23
	4. Eligibility Based on Future Fear of Torture	8-23
	D. Process	8-24
	1. One Year Filing Deadline.....	8-27
	2. The Application Packet for Affirmative Filing.....	8-29
	3. Receipt and Biometrics	8-31
	4. Supplementing the Record.....	8-31
	5. Asylum Interview or Hearing	8-32
	6. Decision	8-33
	E. Dependents.....	8-34
§ 8.3	T VISA.....	8-35
	A. Eligibility for T Visa	8-35
	1. Definition of Human Trafficking	8-35
	2. Physically Present in the United States on Account of Human Trafficking, 8 C.F.R. § 214.11	8-36
	3. Comply With Reasonable Requests to Assist Law Enforcement	8-37
	4. Suffer Extreme Hardship If Removed	8-38
	5. Be Admissible to the United States	8-38
	B. Application Process	8-39
	1. Documents to Prove Applicant Was a Victim.....	8-40
	C. Applicants in Removal Proceedings.....	8-41
	D. Applicants with Outstanding Removal Orders.....	8-42
	E. Benefits	8-42

TABLE OF CONTENTS

F.	Adjustment of Status for T Visa Holders.....	8-42
1.	Continuous Presence and Travel.....	8-43
2.	Ongoing Compliance with Requests for Assistance	8-45
3.	Extreme Hardship.....	8-46
4.	Discretion.....	8-46
G.	Dependents.....	8-46
H.	Appeals	8-47
I.	Revocation	8-47
§ 8.4	U VISA.....	8-48
A.	Eligibility	8-48
1.	Victim of Serious Crime	8-48
2.	Crime Occurred Within the United States or Activity Violated a Federal Extraterritorial Jurisdiction Statute.....	8-49
3.	Suffered Substantial Abuse	8-49
4.	Have Information About Qualifying Crime.....	8-50
5.	Cooperate In the Investigation or Prosecution Of Crime	8-50
6.	Be Admissible To the United States	8-50
B.	Process	8-51
C.	Benefits	8-52
D.	Adjustment of Status for U Visa Holders	8-52
E.	Discretion	8-55
F.	Dependents.....	8-55
G.	Appeals	8-56
§ 8.5	SPECIAL IMMIGRANT JUVENILE STATUS	8-56
A.	Eligibility Requirements and State Court Process.....	8-57
1.	Child Must be Under 21 Years of Age at the Time the Application is Filed.....	8-57
2.	The Child Must be Unmarried	8-58
3.	The Child Must be Under the Jurisdiction of a State Juvenile Court	8-59
4.	Special Findings in State Court.....	8-59
B.	Federal Immigration Process.....	8-63
C.	Visa Availability and Backlog Issues.....	8-67
D.	Grounds of Inadmissibility.....	8-67
E.	Dependents.....	8-69
F.	Denials and Appeals	8-69
	APPENDIX A – APPLICATION COMPARISON CHART.....	8-70

§ 8.1 GENERAL INFORMATION

Several sections of the United States immigration laws provide a means for clients to remain in the United States indefinitely, or temporarily with the possibility of eventual permanency in the case of U/T visas and special immigration juvenile status, for purposes of protecting the client from harm. The types of harm and the criteria to determine whether protection will be afforded vary. The initial benefits, if relief is granted, vary as well, but all of the forms of relief presented in this chapter ultimately lead to an opportunity to seek an indefinite, if not permanent status in the United States.

This chapter provides an overview of the basic forms of protection-based relief: asylum, withholding of removal, relief under the Convention Against Torture, U Nonimmigrant Status, and T Nonimmigrant Status, and special immigrant juvenile status.

As part of an initial consultation with a potential client, the lawyer should always screen for protection-based relief. Clients may not be intuitively aware that past harms or future fears would allow them an opportunity to remain in the United States. Moreover, rapidly shifting policies on protection-based relief require careful consideration before pursuing a claim. The past few years have seen sweeping changes to policies and regulations, often followed by intense litigation efforts to minimize their impact. Below are a few of the major changes impacting asylum-seekers.

- **Asylum Regulation Overhaul:** On Oct. 20, 2020, the Trump Administration issued final regulations designed to eviscerate the United States' asylum system. The rules, set to go in effect on Nov. 20, 2020, are the latest attempt to undermine the right to seek and enjoy asylum from persecution guaranteed in federal statute and international treaty.
- **Changes to Work Permit Eligibility and Processing:** New regulations impacting asylum seekers' access to an Employment Authorization Documents (EAD) went into effect on August 21, 2020 and August 25, 2020, though several provisions have been partially enjoined through litigation in *Casa de Maryland Inc. v. Wolf*, Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Key changes include dropping the 30-day processing time for initial EAD filings and limiting access to work permits for those who do not meet the one-year deadline, enter the U.S. illegally, and expand limitations for those with criminal histories.
- **COVID Bars to Asylum:** Proposed regulations were released in July 2020 to expand the ability of Department of Homeland Security (DHS) to prevent access to the asylum process during pandemics. The rule proposes to allow Customs and Border Patrol (CBP) to consider emergency public health concerns based on communicable disease as a bar to asylum. Specifically, it would allow CBP to bar asylum seekers whose entry they determine pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States, pose a significant danger to the security of the United States.
- **Safe Third Country Bar:** In July 2019, the United States implemented a new regulation requiring any refugee seeking asylum at the southern U.S. border who has passed through another country to have first asked for and been denied asylum in that country before seeking asylum in the United States. This policy, in effect, removes asylum as an option for individuals from Honduras, El Salvador, Guatemala, and others who are fleeing violence and persecution in their home countries and seeking safety in the U.S. The United States Supreme Court ruled in September 2019 that the proposed DHS rule may stand while being litigated in U.S. courts. On June 30, Judge Timothy Kelly of the U.S. District Court for the

District of Columbia struck down President Trump's second asylum ban, ending a restrictive policy that had virtually halted asylum at the southern border for the last year. The Ninth Circuit affirmed a preliminary injunction in the *East Bay* case in July 2020.

The Immigration Court and Asylum Office have initiated new policies to maximize efficiency in processing claims. Asylum claims filed after January 2018 can expect priority scheduling for interviews. See U.S. Citizenship and Immigration Services, *USCIS to Take Action to Address Asylum Backlog* (Jan. 21, 2018), available at <www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>. The Director of the Executive Office for Immigration Review has instituted performance measures for immigration judges based on case completion times. See James R. McHenry, *Memo: Case Priorities and Immigration Court Performance Measure*, (Jan. 17, 2018), available at <www.justice.gov/eoir/page/file/1026721/download>. This will speed up the processing times for asylum claims filed following a credible fear interview. It will also impact the ability of respondents to continue a removal case while awaiting a decision on a benefit over which USCIS has jurisdiction, including U visas, T visas, and Special Immigrant Juvenile Status.

§ 8.2 ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

Asylum, withholding of removal, and relief under the Convention Against Torture (CAT) are related forms of relief designed to protect individuals who fear returning to their country of origin due to persecution or torture. Each form of relief has separate elements to satisfy the legal standard, but the lawyer can prepare a request for all three forms of relief simultaneously using the application Form I-589 available on the USCIS website, <www.uscis.gov>.

The lawyer should keep in mind that asylum can be granted by USCIS asylum officers (Department of Homeland Security) or the immigration judge (Department of Justice), while withholding of removal and CAT relief can only be granted by the immigration judge.

Asylum offers the most protection of these three forms of relief. It is the only one that creates a path to permanent residence, reunification with some family members, and the opportunity to travel outside of the United States without forfeiting the protection offered under the immigration laws. Not all clients will be eligible for asylum, however, so it is important that the lawyer evaluate and pursue withholding of removal and CAT as alternative forms of relief if colorable claims exist.



PRACTICE TIP

Although the legal standards governing eligibility for asylum and refugee status are the same, refugee status can only be sought by individuals who are outside of the U.S. at the time they file their application for protection. See U.S. Citizenship and Immigration Services, *Flow Chart: United States Refugee Admissions Program*, available at <www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27I%20Ops/USRAP_FlowChart.pdf> (explaining how refugees apply for status and the process they undergo prior to being admitted to the United States). In contrast, the asylum process exists to permit individuals already present in the U.S. or who present at a U.S. port of entry seeking protection, to apply for that protection from inside the United States. See INA § 208(a).

§ 8.3 T VISA

The T non-immigrant status (informally referred to as the “T visa”) is a form of protective relief designed for victims of human trafficking. The T visa was created by Congress in 2000 in order to strengthen law enforcement capacity to investigate and prosecute human trafficking, and also offer protection to victims.

The T visa is a nonimmigrant visa, but creates a pathway to permanent residence since visa holders are eligible to apply for permanent residence three years after the T visa is granted, or after the conclusion of prosecution for the trafficking—whichever is first. The requirements for a T visa and the process for application/adjudication are outlined below, followed by a summary of evidence to include in the filing. *See* INA § 101(a)(15)(T); 8 C.F.R. § 214.11.

The T visa applications are adjudicated by the USCIS Vermont Service Center, a centralized processing center for T, U, and VAWA claims. Though the immigration judge does not have jurisdiction to evaluate or grant a T visa claim, if a client is in removal proceedings, the lawyer should inform the immigration judge that the client is seeking a T visa and request a continuance to be placed on the status docket, or administrative closure pending its adjudication by USCIS. Early communication with the Department of Homeland Security Office of Principal Legal Advisor can also open negotiations for release from custody if the client is held in immigration detention. And, as discussed below, clients may be eligible for deferred action or continued presence, which would halt removal.

A. Eligibility for T Visa

In order to be eligible for a T visa, the applicant must meet the following criteria:

- be a victim of of severe forms of trafficking, as defined by federal law;
- be in the United States on account of the trafficking;
- comply with reasonable requests to assist law enforcement;
- show that they would suffer extreme hardship involving unusual and severe harm if removed from the U.S.; and
- be admissible to the United States.

See INA § 101(a)(15)(T); 8 C.F.R. § 214.11.

1. Definition of Human Trafficking

Federal law defines “severe forms of trafficking” under two categories:

- (1) “Sex trafficking” is defined as the “recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age.”
- (2) “Labor trafficking” is defined as 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 involuntary servitude, peonage, debt bondage, or slavery.”

**PRACTICE TIP**

2017 revisions to T visa regulations provided clarification that a “victim of severe forms of trafficking” can include instances where an individual has not actually performed labor or sex acts. For example, a victim who was recruited for trafficking and came to the United States under force, fraud, or coercion but escaped or was rescued from the situation before performing any labor or sex acts is still a “victim of severe forms of trafficking.” 8 C.F.R. § 214.11(f)(1).

2. Physically Present in the United States on Account of Human Trafficking, 8 C.F.R. § 214.11

To be eligible for a T visa, an applicant must be physically present in the United States or at a port of entry due to trafficking. An applicant is also eligible if the applicant is physically present in the U.S., American Samoa, Commonwealth of the Northern Mariana Islands, or any port of entry thereto.

**PRACTICE TIP**

Prior to the January 2017 regulatory changes, applicants who had escaped a trafficking situation prior to LEA involvement needed to establish that there was no “opportunity to depart” the United States. That is no longer necessary to establish physical presence. 81 Fed. Reg. 243, 92273 (Dec.19, 2016).

Physical presence for the purpose of this element is assessed at the time the application is filed. Regulatory changes that went into effect in January 2017 provided clarification to this vague requirement to address situations where trafficking victims may have left the United States but returned to participate in enforcement efforts, and to address victims of continuous trafficking schemes, among other victims. The new regulations provide five categories of physical presence related to human trafficking:

- individuals currently subjected to human trafficking;
- individuals liberated from human trafficking by a law enforcement agency (LEA);
- individuals who escaped the trafficking situation before LEA became involved;
- individuals subjected to human trafficking in the past and whose ongoing presence in the United States is on account of human trafficking; and
- individuals present in the United States on account of having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of human trafficking.

**PRACTICE TIP**

The January 2017 regulatory changes made clear that “judicial processes” does not require LEA sponsorship for entry nor is it limited to investigation or prosecution in a criminal proceeding. It also contemplates a victim being paroled into the United States in order to pursue civil remedies related to human trafficking. This can be significant, as most civil remedies have a longer statute of limitations than in the criminal context. 81 Fed. Reg. 92274 (Dec. 19, 2016).

3. Comply With Reasonable Requests to Assist Law Enforcement

In order to qualify for a T visa the applicant must comply with any reasonable request from a law enforcement agency to assist in the investigation or prosecution of human trafficking. Unlike the U visa, no formal certification is required to submit with the T visa application; however, the client must still provide evidence that the crime was reported to law enforcement, unless the applicant is under 18 years old. Reporting to the National Human Trafficking Hotline is not, by itself, sufficient. Pursuant to 2017 regulatory changes, DHS no longer applies special weight to an LEA endorsement (certification), but rather applies equal weight to primary and secondary evidence using an “any credible evidence” standard. Nonetheless, if the client has been or is cooperating with law enforcement, it is still advisable to request a certification to include with the application. Additionally, the regulations expanded the class of those agencies eligible to certify for T visas. This includes local and state law enforcement agencies as well as federal law enforcement agencies and the Department of Labor.

The updated regulations define “reasonable requests” as:

- totality of the circumstances test, 8 C.F.R. § 214.11(h)(2);
- “comparably situated crime victims” standard, not a “subjective trafficked person”;
- whether the LEA request was reasonable, now whether the victim’s refusal was unreasonable. 8 C.F.R. § 214.11(m)(2)(ii).

Note that this obligation continues through adjustment of status of the conclusion of prosecution, whichever comes first.

**PRACTICE TIP**

The regulations do not provide a clear definition of the “any credible evidence” standard applied by USCIS. For purposes of showing victimization as part of a T visa application, such evidence may include, but is not limited to: “a grant of continued presence or OTIP (Office of Trafficking in Persons) certification”; “a description of what the person has done to report the crime to an LEA or to the National Human Trafficking Hotline”; “a statement indicating whether similar records for the time and place of the crime are available”; and any evidence that the applicant made “good faith attempts” to obtain the LEA endorsement and a description of those efforts. Note that an OTIP letter is not, in itself, sufficient.

Moreover, if a criminal investigation has not yet begun or is incomplete, requesting continued presence will allow the client to access a variety of benefits, including work authorization, medical assistance, and financial assistance in exchange for their cooperation with the investigation and prosecution of the crime. See section 8.3.F.1, *infra*, for more discussion of continued presence.



CAVEAT

Assistance to law enforcement is not necessary if the applicant is under the age of 18 or is unable to cooperate due to physical or psychological trauma.

4. Suffer Extreme Hardship If Removed

The client must also demonstrate that they would suffer “extreme hardship involving unusual and severe harm” if removed from the United States. 8 C.F.R. § 214.11(b)(4). Several types of immigration benefits require variations of “extreme hardship.” The T visa standard of extreme hardship “involving unusual and severe harm” is a relatively high standard. Factors, including the age and personal circumstances of the applicant, the physical and mental trauma suffered by the applicant that “necessitates medical or psychological attention not reasonably available in the foreign country,” and the extent of the consequences of the human trafficking, are taken into consideration. See 8 C.F.R. § 214.11(i)(1)(i)–(viii). This is a non-exhaustive list of factors that may be considered. They may also consider country conditions, access to judicial remedies and other services, etc. For an in-depth review of the standard through an analysis of appeals decisions, see Virgil Wiebe & Sarah Brenes, *Mental Health Professionals and Affirmative Applications for Immigration Benefits: A Critical Review of Administrative Appeals Office Cases Involving Extreme Hardship and Mental Harm*, Immigration Briefings, No. 11-27 (2011), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923924>.

5. Be Admissible to the United States

Certain other inadmissibility grounds apply which may make an applicant ineligible for a T visa, including health-related, criminal-related, security-related, and other miscellaneous grounds. See INA § 212(a)(3)(E), (d)(14); 8 U.S.C. § 1182(a)(3)(E), (d)(14). The T visa applicants can receive a waiver of inadmissibility, granted by the Secretary of Homeland Security, to be admissible. T visa applicants are not subject to the public charge ground.

Many grounds of inadmissibility can be waived for T visa applicants by filing a Form I-192, except:

- if the applicants have participated or committed an act of severe trafficking in persons themselves, then they are barred from being eligible. INA § 214(o)(1); 8 U.S.C. § 1184(o)(1);
- security/terrorism grounds;
- child abduction; and/or
- tax avoidance.

Applicants who are subject to these unwaivable grounds of inadmissibility may not be granted T visa, although applicants may be eligible for a waiver in the exercise of DHS discretion or in the national interest, even if an unwaivable ground applies. 8 C.F.R. § 214.11(j).

If a ground of inadmissibility applies, the applicant can submit a waiver on Form I-192, Application for Advance Permission to Enter as a Nonimmigrant. Note that the I-192 does have a fee (practitioners should confirm the fee amount before submitting the application, as the fee amount is subject to change). Applicants can request a waiver of such fee by filing the Form I-912 with supporting evidence of financial hardship. The authors are seeing increasing denials of these fee waiver requests, so it is crucial that the lawyer provide sufficient evidence of financial hardship or work with the client to pay the fee, especially if facing tight deadlines. Note that, while a new regulation set to go into effect on Oct. 2, 2020 would increase fees and disallow fee waivers for many categories of migrants, T visa applicants are still eligible to request fee waivers for all forms related to their T status, through naturalization.

Additionally, any applicant who does not make any contact (different from cooperation) with a law enforcement agency regarding the underlying severe form of human trafficking will be ineligible for a T visa. 58 C.F.R. § 214.11(h)(2).

B. Application Process

Applications for T visas are submitted to the USCIS Vermont Service Center. The lawyer should review the application instruction sheet for the most current address, available at the USCIS website, <www.uscis.gov/sites/default/files/files/form/i-914supbinstr.pdf>.

The application packet should include the following:

- (1) Form I-914, Application for T Nonimmigrant Status;
- (2) a personal statement detailing the client's experience as a victim of trafficking; and
- (3) evidence the client meets the eligibility requirements.



PRACTICE TIP

The authors recommend the packet include the I-192 and (if needed) I-912 at the time of filing in order to avoid a request for evidence (RFE), or that such be supplemented in the record later.



PRACTICE TIP

Though applicants are encouraged to submit Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, the form is not required for a T visa application as it is in the case of a U visa. If it is not included, the applicant should provide other evidence to show she or he has complied with reasonable requests to assist law enforcement. At a minimum, this must include proof that the applicant reported the trafficking to a law enforcement agency, which can be shown by emails, phone logs, police reports, etc.

The application must include a personal statement explaining the applicant's experience as a victim of human trafficking. The personal statement must state that the



PRACTICE TIP, CONTINUED

applicant is a victim of a severe form of trafficking in persons; that the applicant is physically present in the United States on account of the trafficking; and that the applicant would suffer extreme hardship involving unusual and severe harm if the applicant were removed from the United States. It is essential that the applicant avoid any inconsistencies in recounting facts and provide detailed descriptions of the nature and the context of their suffering.

In addition, it is helpful to include a cover letter in the application. The cover letter indexes the documents included with the application, providing a roadmap for the adjudicator. The letter may also include a brief argument in support of the application. Particularly if the case is novel or complex, the attorney should brief the issues in their cover letter or be prepared to submit a supplementary brief in support.

1. Documents to Prove Applicant Was a Victim

Primary evidence (endorsement from law enforcement agency on Form I-914 Supplement B, instructions) demonstrating continued presence or secondary evidence (describing the nature and scope of force/fraud/coercion used against victim):

- **LEA endorsement as a primary evidence:** description of victimization and signature of a supervising official responsible for investigation/prosecution.
- **LEA endorsement as a secondary evidence:** original statement, credible evidence, statement indicating similar records for the time and place, must show good-faith attempts.

Each of the requirements is outlined below, followed by a summary of evidence to include in the filing. *See* INA § 101(a)(15)(T); 8 C.F.R. § 214.11.

a. Nonimmigrant Status – Adjudicated by the USCIS Vermont Service Center

- A completed application packet to the USCIS Vermont Service Center, 75 Lower Welden St., St. Albans, VT 05479.
- Include any fees or request of a fee waiver (payable to “The U.S. Department of Homeland Security”).
- Need applicant’s original signature (better to sign in blue ink—to distinguish the signature as original, instead of photocopies).
- Wait until USCIS sends an RFE before sending additional materials; though, one may choose to supplement the filing before an RFE, particularly if a certification or additional proof are obtained.
- Do not tab the files on the side or staple them—binder clips are preferred.

- Include applicant’s name and DOB or Alien Number on back of any photographs submitted.
- Use two-hole punch on top of every piece of paper submitted.
- Contact Vermont Service Center if there are questions:
 - Center’s VAWA Hotline at 1-802-527-4888 and leave a detailed message OR
 - Email HotlinefollowupI918I914.vsc@uscis.dhs.gov. Email turnaround time is typically 72 hours. It is requested that attorneys use only one of the methods.



COMMENT

T visa applications are adjudicated exclusively on the paper application. The client will not be called for an interview. If additional evidence is required, the Vermont Service Center (VSC) will issue a request for evidence and allow the applicant an opportunity to answer questions or offer additional evidence in response to the request. If the VSC does not plan to grant the application, a “Notice of Intent to Deny” will be issued, describing the reasons the application may not be granted. The applicant will have an opportunity to respond before a final decision is issued.

C. Applicants in Removal Proceedings

Immigration judges have no jurisdiction to evaluate or grant the T visa claim, but practitioners should still inform the judge that the client is seeking a T visa and request a continuance or administrative closure pending its adjudication by USCIS. Note that at time of writing, EOIR was tightening the instances in which removal proceedings would be delayed while applications are pending before USCIS; however, there are still arguments to be made that T visa cases should be granted continuances or status docket, particularly based on the Trafficking Victims Protection Reauthorization Act (TVPRA) and the regulations.

If the applicant is in proceedings before an immigration judge (IJ) or the Board of Immigration Appeals (BIA), the applicant can request that the proceedings be administratively closed or that a motion to reopen be indefinitely continued for USCIS to decide the T visa application. *See* 8 C.F.R. § 214.11(d)(8). Pursuant to 8 C.F.R. § 1214.2(a), an immigration judge may, with the concurrence of government counsel, administratively close pending proceedings in order to allow victims of severe forms of trafficking in persons to seek T nonimmigrant status. Similarly, under 8 C.F.R. § 1214.2(b), “[a] determination by the Service that an application for T-1 nonimmigrant status is bona fide automatically stays the execution of any final order of exclusion, deportation, or removal. This stay shall remain in effect until there is a final decision on the T application.” Any family member of the principal petitioner who is seeking a derivative T visa in proceedings before an IJ or the BIA will undergo the same process. *See* 8 C.F.R. § 214.11(d)(8)–(9), (o)(8); *see also* USCIS Adjudicator’s Field Manual § 39.2(c)(1)(C). If USCIS were to deny the T visa application, then the proceedings would be reopened. *See* 8 C.F.R. § 214.11(d)(8), (o)(8).

D. Applicants with Outstanding Removal Orders

The applicant may request a stay of removal from DHS; if granted, DHS will not remove the applicant from the country until USCIS decides on the application. 8 C.F.R. § 214.11(d)(9). Once USCIS determines that the application is bona fide, USCIS undertakes a de novo review of the application and the removal is automatically stayed until the final adjudication. 8 C.F.R. § 214.11(d)(9). The status of individual cases can be obtained through contacting VSC as described above. The USCIS online Case Status System does not include information for VSC cases. If such application is denied, the stay of the removal order is then lifted effective on the date of the denial, regardless of whether the applicant files an appeal. If the application is approved, then the removal order is deemed cancelled on the approval date. 8 C.F.R. § 214.11(d)(9). Any family member of the principal petitioner who is seeking a derivative T visa who is subject to final removal orders will undergo the same process. *See* 8 C.F.R. § 214.11(d)(8)–(9), (o)(8); *see also* USCIS Adjudicator’s Field Manual § 39.2(c)(1)(C). If an applicant has been granted continued presence or deferred action, their removal will be stayed for the duration—and any extension thereof—of that status.

E. Benefits

Once the T visa application has been approved, T status is granted for four years, allowing the client to stay in the United States during this time. 8 C.F.R. § 214.11(p)(1). This time period could be extended if: “a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking or certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity;” or the Secretary of Homeland Security determines that an extension is warranted due to exceptional circumstances; or the child eligible for relief under INA § 245(I)/8 U.S.C. § 1255(I) and “is unable to obtain such relief because [implementing] regulations have not been issued.” INA § 214(o)(7)(A)–(B); 8 U.S.C. § 1184(o)(7)(A)–(B).

The Form I-539 should be filed before the T nonimmigrant status expires but no more than 90 days before expiration. However, if the client can explain in writing why they are filing the Form I-539 after the T nonimmigrant status has expired, USCIS has discretion to grant, on a case-by-case basis, an extension based on an untimely filed Form I-539.

Even before a T visa is granted, the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS) can offer a letter of eligibility entitling the petitioner to multiple protections. *See* 22 U.S.C. § 7105(a)–(b). If the survivor is under the custody of the federal government, they must not be detained in facilities inappropriate to their status as a crime victim; must receive necessary medical care and assistance; and must be provided protection if their safety is at risk. 22 U.S.C. § 7105(c)(1). Furthermore, the survivor must have access to information about their rights and translation services and to the extent practicable, information about federally funded or administered anti-trafficking programs. 22 U.S.C. § 7105(c)(2).

F. Adjustment of Status for T Visa Holders

T visa holders are eligible for permanent residence three years after being granted, or after the completion of the prosecution or investigation of the crime, whichever is first. They are immediately issued work permits upon receiving the T visa grant. In addition, T visa applicants may be eligible to receive certain federally-funded benefits even before a T visa application is filed, once they receive certification from the United States Department of Health and Human Services (HHS) and the Office of Refugee Resettlement (ORR). These benefits are distinct from the T visa nonimmigrant status. If the victim is under 18 years of age, they are eligible for some benefits without the need for certification.

T-1 nonimmigrant holders may file Form I-485 only after they have been in the United States for the following time period, whichever is less:

- a continuous period of at least three years since the client was first admitted as a T-1 nonimmigrant; or
- a continuous period during the investigation or prosecution of acts of trafficking, and the Attorney General has determined the investigation or prosecution is complete.

Derivative applicants (T-2 through T-6 nonimmigrant) may file Form I-485 only once the principal applicant has met the above physical presence requirement.

Practitioners should follow the USCIS instructions for filing the adjustment of status application found on the USCIS website. The required documentation that is unique to T-Visa holders includes:

- evidence the client was lawfully admitted in T nonimmigrant status and continues to hold such status at the time the Form I-485 is filed; and
- evidence that adjustment of status is warranted as a matter of discretion.

Principal applicants must also submit:

- evidence of continuous physical presence;
- evidence of good moral character; and
- evidence that the client complied with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking, or evidence that the client would suffer extreme hardship involving unusual and severe harm upon removal from the United States, or evidence that the client was under 18 years of age at the time of the victimization that qualified the client for T nonimmigrant status.

1. Continuous Presence and Travel

The following must be submitted:

- copies of every page of all passports or equivalent travel documents that were valid while in T-1 nonimmigrant status (or a valid explanation of why this evidence is not available);
- documentation of any departure from, and return to, the United States while in T-1 nonimmigrant status, including:
 - date of departure;
 - place of departure;
 - length of departure;
 - manner of departure (plane, boat, etc.);
 - date of return; and

- place of return.

If absent from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days, certification from the investigating or prosecuting agency that signed Form I-914B stating that:

- the absence was necessary in order to assist in the investigation or prosecution of acts of trafficking; or
- an official involved in the investigation or prosecution of acts of trafficking certifies that the absence was otherwise justified.



PRACTICE TIP

T-1 nonimmigrants can file for adjustment of status prior to accruing three years of continuous physical presence since they were first admitted as a T-1 nonimmigrant if they can provide evidence that the investigation or prosecution is complete. This evidence may include a document signed by the Attorney General of the United States (or designee) stating that the investigation or prosecution is complete. The attorney can also request a letter from the Department of Justice Civil Rights Division by emailing the department at T-Adjustment.Cert@usdoj.gov and including the client's name, alien number, the date the T visa was granted, location and approximate dates of trafficking, law enforcement contact where case was reported, and information about any prosecution, including any correspondence with law enforcement or prosecution.

Evidence establishing continuous physical presence may include, but is not limited to:

- documentation issued by any governmental or nongovernmental authority as long as the documentation contains the client's name, was dated at the time it was issued, and contains the normal signature, seal, or other authenticating instrument of the authorized representative of the issuing authority;
- educational documents;
- employment records;
- certification of having filed federal or state income tax returns showing school attendance or work in the United States throughout the entire continuous physical presence period;
- documents showing installment payments, such as a series of monthly rent receipts or utility bills; or
- a list of the type and date of documents already contained in the DHS file that establishes physical presence, such as, but not limited to, a written copy of a sworn statement given to a DHS officer, a document from the law enforcement agency attesting to the fact that the applicant has continued to comply with requests for assistance, the transcript of a formal hearing; and Form I-213, Record of Deportable-Inadmissible Alien; and

- the client’s affidavit attesting to the continuous physical presence. If the client does not have documentation to establish continuous physical presence, the client must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the client’s continuous physical presence with specific facts.

2. Ongoing Compliance with Requests for Assistance

The attorney must submit evidence that shows that the client:

- (1) was under 18 years of age at the time of the victimization that qualified for T nonimmigrant status;
- (2) would suffer extreme hardship involving unusual and severe harm if removed from the United States; or
- (3) complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, including but not limited to:
 - a newly executed Form I-914, Supplement B, T Nonimmigrant Status Certification;
 - a photocopy of the original Form I-914, Supplement B, with a new date and signature from the certifying agency;
 - documentation on official letterhead from the certifying agency stating that the client has not unreasonably refused to cooperate in the investigation or prosecution of the qualifying criminal activity;
 - court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of other witnesses or officials;
 - an affidavit describing how the client continues to comply with any reasonable requests; and
 - if the client assisted law enforcement when they received the T visa but is no longer assisting law enforcement, the client should include an affidavit describing why the cooperation is no longer necessary. Some reasons may include:
 - the investigation or prosecution is complete;
 - the T-1 nonimmigrant status is based on willingness to assist but the client was not needed, and that the client continues to be willing to assist but the assistance is still not needed;
 - the client was not asked to assist after being granted T-1 nonimmigrant status;
 - a request to assist was not reasonable pursuant to 8 C.F.R. § 214.11(a); or
 - the client was not subject to the compliance requirement due to age or severe trauma at the time of trafficking.

3. Extreme Hardship

Clients may also submit evidence that they will suffer extreme hardship involving unusual and severe harm if they are removed from the United States. If the attorney plans to provide this evidence, here are a few considerations:

- USCIS may consider both traditional extreme hardship factors and the factors associated with having been a victim of a severe form of trafficking in persons.
- Economic harm or the lack of or disruption to social or economic opportunities is generally insufficient to meet the standard.
- Relevant country condition reports or any other public or private documents may also support a hardship claim.
- USCIS will only consider factors that show hardship to the principal applicant, not to other people or family members. See 8 C.F.R. § 214.11(i) for a list of factors.



CAVEAT

Though USCIS is not bound by its previous extreme hardship determination, if the basis of the current extreme hardship claim is a continuation of the extreme hardship claimed in the application for T-1 nonimmigrant status, the attorney does not need to re-document the entire claim. Instead, submit evidence to establish that the previously established extreme hardship is ongoing.

4. Discretion

A T visa may be granted where there is evidence that adjustment of status is warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest (for more details, go to the “Additional Instructions for Human Trafficking Victims and Crime Victims” section in the Instructions for Form I-485).

G. Dependents

Besides the direct victim of the human trafficking, their family members may obtain “derivative” T visas if accompanying the principal T visa petitioner. INA § 101(a)(15)(T)(ii)(I)–(III); 8 U.S.C. § 1101(a)(15)(T)(ii)(I)–(III). If the principal applicant (T-1 petitioner) or the trafficking survivor is under 21 years of age at the time of their filing of the application to USCIS, then their spouse (T-2 visas), children (T-3 visas), parents (T-4 visas), and siblings who are unmarried and under the age of 18 (T-5 visas) may be eligible for derivative T nonimmigrant status. INA § 214(o)(5); 8 U.S.C. § 1184(o)(5); INA § 101(a)(15)(T)(ii)(I)–(III); 8 U.S.C. § 1101(a)(15)(T)(ii)(I)–(III). Additionally, parents, siblings under 18 years old, and children of any age or marital status of other qualifying relatives that face “present danger of retaliation” as a result of either the derivative applicant’s escape from the human trafficking or from the cooperation with the law enforcement, may also be eligible for derivative T nonimmigrant status (T-6 visas). 8 C.F.R. § 214.11(k)(6). The family member seeking a derivative T

visa must demonstrate that either the principal applicant or the family member seeking derivative status would suffer extreme hardship if that family member would be denied admission or removed from the United States. Furthermore, the necessary relationship between the family member seeking derivative status and the principal applicant must exist when the original petition was filed and must continue to exist until the family member is admitted. 8 C.F.R. § 214.11(o)(4). Additionally, unlike T-1 visas, there is no cap or limitation on the number of T-2, T-3, T-4, or T-5 visas available annually. INA § 214(o)(2)–(3); 8 U.S.C. § 1184(o)(2)–(3).



PRACTICE TIP

Carefully review age-out issues for derivatives to ensure filing of the principle applicant's T visa, which will lock-in derivative ages. Additionally, counsel should review derivative processing before filing for adjustment of status for the principle applicant (T-1).

H. Appeals

If the client's T visa application has been denied, any appeal must be taken to the Administrative Appeals Office (AAO) of DHS. If the petitioner believes that the law was applied inappropriately or has additional information, they may file a motion to reconsider or a motion to reopen with the AAO. *See* 8 C.F.R. § 103.5. All motions must include a Form I-290B, Notice of Appeal or Motion (instruction) with a filing fee and must be filed within 30 days of the initial denial. 8 C.F.R. § 103.5(a)(1)(i); *see also In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009). A brief and additional evidence may be submitted within the 30 days following the I-290B. Initially, USCIS will review the appeal and determine whether to grant the benefits requested, but if the appeal is not granted at USCIS, it will forward the appeal to the AAO for appellate review. *See* USCIS, The Administration Appeals Office (AAO), *available at* <<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao>> (outlining the AAO appeal process). The appellate review will likely be completed within six months of when the AAO receives the appeal. *Id.*

I. Revocation

Attorneys should advise clients that approved T visa status could be revoked. If the T nonimmigrant violates any requirements of the T visa eligibility or if the approval of the application violates 8 C.F.R. § 214.11 or involves error during the process that affected the outcome of the application, the T visa may be revoked. 8 C.F.R. § 214.11(s)(1)(i)–(ii). Additionally, if the petitioner is 18 years or older and if the law enforcement agency involved in investigating or prosecuting the traffickers reports to USCIS with a detailed explanation that the petitioner has unreasonably refused to cooperate, or if the law enforcement agency withdraws or disavows its endorsement with a detailed explanation to USCIS, this could be a ground for revocation of approved T nonimmigrant status. 8 C.F.R. § 214.11(s)(1)(iv)–(v). The petitioner must notify USCIS of any changes in the terms and conditions of their conditions that may affect eligibility of the T nonimmigrant status. 8 C.F.R. § 214.11(s). If the principal T-1 immigrant's status is revoked, all family members who have derivative T nonimmigrant status from the T-1 will have their status revoked automatically, even if the applications are still being adjudicated. 8 C.F.R. § 214.11(s)(5). The revocation of the T visa status will not have any effect on the annual 5000 cap as described above.

Appendix A – Application Comparison Chart

	Asylum	SIJS	T-Visa
Adjudication Process	1 month to 5 year waiting period for interview. If UAC stripped, must pursue in adversarial proceeding before the immigration judge.	Family court adjudication separately from immigration. Immigration process requires filing forms/evidence. Processing times with USCIS are 1-2 years.	Personal affidavit required with application filing, evidence of LEA reporting and eligibility as victim of trafficking. Approximately 2 year waiting process; no in-person interview.
Adjudication Substance	USCIS interview focuses on asylum eligibility – often extensive questioning regarding past trauma.	USCIS interview which focuses on biographic information and admissibility, and not on abuse/neglect/abandonment (deference to state court).	Paper application with no interview.
Green card eligibility	Can apply for green card 1 year after grant.	Backlog means long wait for green card from certain countries. Can concurrently file with green card application, if from certain countries that do not have a backlog.	Eligible to file three years after T-Visa grant or if the investigation and prosecution of acts of trafficking are completed, as determined by the Attorney General. (Written statement included with adjustment application).
International Travel	Must apply for refugee travel document while in asylee and LPR status. Advisable not to return to home country even after green card granted.*	No restrictions on travel to home country, once green card granted.	May use valid T-Visa in your expired passport along with a new valid passport for travel and admission to the United States—must get T visa in passport; cannot use approval notice alone. Can apply for advance parole. Generally should not travel during pendency of T and investigation. Travel to home country not advised as it may undermine hardship arguments, resulting in revocation of T.
Public Benefits	Access to broad array of public benefits	Access to some public benefits	Extensive benefits

	Asylum	SIJS	T-Visa
Derivatives (Family Reunification) –Eligibility	Spouse and children <21 at time of filing.		Principal < 21: Parents, spouse, unmarried siblings under 18, unmarried children under 21; and children (any age) of other beneficiaries who face immediate danger due to trafficking. Principal > 21: Spouse, children (unmarried under 21); and children (any age) of other beneficiaries who face immediate danger due to trafficking.
Derivatives – Restrictions	Can apply for other family members after obtaining green card. After asylee obtains green card, and then U.S. citizenship, can sponsor parents and siblings for immigrant visa.	Cannot ever petition parents for an immigration benefit. (triggers at adjustment based on SIJS?).	Must be in T status to petition—cannot adjust before. Once adjusted, can petition for family members the same as any other green card holder (spouse, children) or citizen (parents, siblings, spouse and children).
Derivatives (Family Reunification) – Process	Can include spouse and children on application or apply for them within 2 years of grant.	Cannot include derivative beneficiaries in application, but as LPR, can sponsor spouse and children.	Can file at the same time as principal application or any time after grant, so long as unadjusted T. NOTE: IOM will help coordinate/pay for travel docs and travel for derivatives.