Chapter 8

Protection-Based Relief:

Forging a Path to Permanent Status

Sarah Brenes
Lindsey Greising
Alison Griffith
The Advocates for Human Rights
Minneapolis

CAVEAT

If the applicant is filing a defensive asylum application and qualifying dependents are in the United States, but not in removal proceedings, the immigration judge does not have jurisdiction to grant them asylum. The principal applicant will need to file a Form I-730 petition for those dependents after the immigration judge grants asylum.

§ 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. 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 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.

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 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 she or he is present in American Samoa or the Commonwealth of the Northern Mariana Islands.

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. Federal Register, Vol. 81, No. 243, December 19, 2016 at 92273.

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. 92274.

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. 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 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 updates regulations define "reasonable requests" as:

- Totality of the circumstances test 8 CFR 214.11(h)(2).
- "comparably situated crime victims" standard; not a "subjective trafficked person"
- Whether the LEA request was reasonable, now weather the victim's refusal was unreasonable. 8 CFR 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 Office Refugee Resettlement 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.

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 his or her cooperation with the investigation and prosecution of the crime. See section 8.3.F.1, *infra*, for more discussion of continued presence.

CAVEAT

Law enforcement assistance 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 the she or he 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. *Id.* at 11. *See 8 C.F.R. § 214.11(i)(1)(i-viii)*. 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 of the 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 noy subject to the public charge ground.

All 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
- Tax avoidance

Applicants who are subject to these unwaivable grounds of inadmissibility cannot be granted T visa. 8 C.F.R. § 214.11(j).

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).

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 ($930 at time of writing). Applicants can request a waiver of such fee by filing the Form I-912 with supporting evidence of financial hardship. We are seeing increasing denials of these fee waiver requests, so it is crucial that the lawyer provide sufficient evidence of financial hardship or encourage the client to pay the fee.

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 at <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. three passport-sized photographs;
3. a personal statement detailing the client's experience as a victim of trafficking; and
4. evidence the client meets the eligibility requirements.

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 an 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 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 he or she 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 his or her suffering.

PRACTICE TIP CONTINUED

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 your application. Particularly if your case is novel or complex, you should brief the issues in your 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):

- **Requirement for LEA endorsement as a primary evidence:** description of victimization and signature of a supervising official responsible for investigation/prosecution.
- **Requirement for 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. Visa – 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 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 a request for evidence before sending additional materials.
- Do not tab the files on the side or staple them.
- Include applicant's name and DOB on back of any photographs submitted.
- Use 2 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 Judge - no jurisdiction to evaluate 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 delated 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 TVPRA and the regulations.

If the petitioner is in proceedings before an immigration judge (IJ) or the Board of Immigration Appeals (BIA), he or she 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." Under *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the immigration judge has inherent authority to control his or her docket. Thus, the respondent can argue that, despite the language in 8 C.F.R. § 1214.2(a), the immigration judge can order that the case be continued or administratively closed in order for USCIS to adjudicate the T visa over a DHS objection to such motion. 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 checked on USCIS's website under "Case Status Online" at <https://egov.uscis.gov/casestatus/landing.do>. 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).

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(l)/8 U.S.C. § 1255(l) 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 he or she is 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, he or she must not be detained in facilities inappropriate to his or her status as a crime victim; must receive necessary medical care and assistance; and must be provided protection if his or her 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. 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, she or he is 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, he or she 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 he or she 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, his or her 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 his or her filing of the application to USCIS, then his or her 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). However, for the parents and for the siblings to be eligible, the Secretary of Homeland Security must determine that these family members face or will face severe forms of retaliation as a result of either the derivative applicant's escape from the human trafficking or from the cooperation with the law enforcement. 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).

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, he or she may file a motion to reconsider or a motion to reopen. *See* 8 C.F.R. § 103.5. All motions must include a Form I-290B, Notice of Appeal or Motion (instruction) with a $585 fee and must be filed within 30 days of the initial denial. 8 C.F.R. § 103.5(a)(l)(i); *see also In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009). 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-aao/administrative-appeals-office-aao> (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 his or her 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.

§ 8.4 U VISA

The U visa is a nonimmigrant visa that is a form of protection-based immigration relief for victims of serious crimes. Beneficiaries of a U visa are able to apply for permanent resident status after three years. Unique to the U visa is a requirement to have a certification signed by a law enforcement agency confirming the applicant's cooperation in the prosecution and/or investigation of the crime. The applicant must also include a personal statement establishing she or he suffered serious physical or emotional harm as a result of the crime. Each of the requirements is outlined below, followed by a summary of evidence to include in the filing. *See* INA § 101(a)(15)(U); INA § 214(p); 8 C.F.R. § 214.14.

A. Eligibility

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

- be a victim of a qualifying criminal activity;

- the crime occurred in the United States or violated United States laws;
- have suffered substantial physical or mental abuse as a result of the crime;
- have information about the criminal activity;
- be helpful to law enforcement in the investigation or prosecution of the crime; and
- be admissible to the United States.

See INA § 101(a)(15)(U); INA § 214(p); 8 C.F.R. § 214.14.

1. Victim of Serious Crime

USCIS provides a long list of crimes that qualify for a U visa including domestic violence, extortion, prostitution, and sexual assault. It also includes a catch-all "other related crimes" that encompasses "any similar activity where the elements of the crime are substantially similar." Further, the provisions also include attempt, conspiracy, or solicitation to commit any of the above and other related crimes. *See* 8 C.F.R. § 214.14(a)(9).

PRACTICE TIP

In some instances, applicants may qualify for a U visa as "indirect" victims of qualifying crimes if the direct victim is unable to provide information concerning the criminal activity due to incompetence or incapacitation or if the victim is deceased due to murder or manslaughter. *See* 8 C.F.R. § 214.14(a)(14).

2. Crime Occurred Within the United States or Activity Violated a Federal Extraterritorial Jurisdiction Statute

In order for a qualifying crime to exist, the United States government needs to have the capacity to investigate and prosecute the crime. The criminal activity needs to have occurred in the United States or violate a United States federal law that provides for extraterritorial jurisdiction to prosecute the offense in a United States federal court. *See* 8 C.F.R. § 214.14(b)(4).

3. Suffered Substantial Abuse

Regulations require a case-by-case analysis to determine whether the applicant suffered substantial abuse as a result of having been a victim of qualifying criminal activity. Several factors are specifically listed for consideration, including:

- the nature of the harm inflicted or suffered;
- the severity of the perpetrator's conduct;
- the severity of the harm suffered;

- the duration of the infliction of harm; and
- the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.

See 8 C.F.R. § 214.14(b)(1).

PRACTICE TIP

For cases involving long-term harm such as domestic abuse, the lawyer should include information regarding past incidents of abuse, regardless of whether they were reported to the police. A series of incidents taken together may constitute serious harm, even where no single incident by itself would be considered substantial.

PRACTICE TIP

When submitting medical documentation, the lawyer should include narrative reports from treating physicians, psychologists, or other medical professionals whenever possible. The lawyer should avoid submitting duplicative or exceptionally technical medical records without explanation. In general, reports from mental health professionals who provide ongoing treatment are viewed more favorably than those providing limited forensic mental health evaluations.

4. Have Information About Qualifying Crime

The applicant must have credible and reliable information about the qualifying crime. This information will form the basis for the certifying official to determine the applicant has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity. *See* 8 C.F.R. § 214.14(b)(2).

CAVEAT

If the applicant is under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may have the necessary information about the crime for purposes of satisfying this element. *Id*.

5. Cooperate In the Investigation or Prosecution Of Crime

The applicant must have been helpful, is helpful, or is likely to be helpful in the investigation or prosecution of the crime. This element is satisfied by obtaining the law enforcement certification on Form I-918, Supplement B, U Nonimmigrant Status Certification. Note that the regulations require ongoing cooperation, noting that "since the initiation of the cooperation, [the applicant] has not refused or failed to provide information and assistance reasonably requested." *See* 8 C.F.R. § 214.14(b)(3). The same caveat applies that family, friends, and guardians can serve in the applicant's place if the applicant is under the age of 16 or otherwise incapacitated.

PRACTICE TIP

The Immigrant Legal Resource Center (ILRC) has created a guide to obtaining a U visa certification. *See* Sally Kinoshita & Alison Kamhi, *A Guide to Obtaining U Visa Certifications*, Immigrant Legal Resource Center (Practice Advisory July 2017), *available at* <https://www.ilrc.org/sites/default/files/resources/u_visa_certification_advisory_ab.ak_.pdf>.

6. Be Admissible To the United States

The U visa includes several generous waiver provisions. 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.

B. Process

Applications for U visas are submitted to the USCIS Vermont Service Center. The lawyer should review the application instruction sheet for the most current address at <www.uscis.gov/i-918>.

PRACTICE TIP

Though the qualifying crime needs to have occurred in the United States, an applicant can be residing outside the United States while applying for the U visa. If granted, the applicant would consular process at the United States consulate in the country where she or he is residing.

The application packet should include the following:

- Form I-918, Petition for U Nonimmigrant Status;

- Form I-918, Supplement B, U Nonimmigrant Status Certification, signed by an authorized official of the certifying law enforcement agency;
- Form I-192, Application for Advance Permission to Enter as Nonimmigrant, if any grounds of inadmissibility apply;
- personal statement describing the criminal activity; and
- evidence to establish each eligibility requirement.

U visa applications are adjudicated exclusively on the paper application. The client will not be called for an interview. The processing goal is four months, but at the end of FY2017, USCIS reported that over 100,000 applications were pending. As of April 2018, USCIS reported processing times of approximately 42–54.5 months for U visa applications. If additional evidence is required, the 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 approved. The applicant will have an opportunity to respond before a final decision is issued.

PRACTICE TIP

Attorneys can contact USCIS directly for updates on case status and to update USCIS regarding address changes:

- Email: HotlineFollowupI918I914.vsc@uscis.dhs.gov; or
- Call USCIS at 802-527-4888.

The Nebraska Service Center joined the Vermont Service Center in reviewing U visa applications starting in June 2016. Cases that have been transferred or are being adjudicated by the Nebraska Service Center can send inquiries to: nsc.i-918inquiries@uscis.dhs.gov.

C. Benefits

A pending U visa can lead to administrative closure or termination of removal proceedings. The lawyer should also note that clients with removal orders are not barred from filing U visa applications and can file for the U visa from outside the United States. In instances where the client is in immigration detention, the lawyer may be able to request that the proceedings be continued in order to file the U visa application, but a pending U visa application may not be sufficient to terminate proceedings. Thus, in some situations, the client may wish to accept a grant of voluntary departure and return to the United States if the U visa is granted.

D. Adjustment of Status for U Visa Holders

U visa holders are eligible for permanent residence three years after being granted. The lawyer should note, however, that the applicant must apply for permanent residence before the fourth year or the U visa benefits will be lost.

In order to qualify to apply for adjustment of status, the U visa holder must meet the following criteria:

- have been lawfully admitted in U-1 nonimmigrant status;
- be in U-1 nonimmigrant status at the time the Form I-485 is filed;
- have been physically present in the United States for a continuous period of at least three years since:
  - admitted as a U-1 nonimmigrant; or
  - at the time the Form I-485 is filed;
- must continue to be physically present through the date that USCIS makes a decision on the adjustment application;
- must not have unreasonably refused to provide assistance in the investigation or prosecution of the qualifying criminal activity, starting from when the client was first admitted as a U-1 nonimmigrant through the date that USCIS makes a decision on the adjustment application;
- not be inadmissible under INA § 212(a)(3)(E) (Nazi persecution, torture, genocide, extrajudicial killing);
- establish that their presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest; and
- merits a favorable exercise of discretion.

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 U visa holders includes:

1. Evidence of U Visa Status
   - Copy of Form I-797, Approval Notice, for Form I-918, Petition for U Nonimmigrant Status
2. Continuous Presence and Travel
   - Copies of every page of all passports or equivalent travel documents that were valid while in U-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 U 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.

3. 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-918B stating that:
   - the absence was necessary in order to assist in the investigation or prosecution of the qualifying criminal activity; or
   - the absence was otherwise justified.
4. Evidence establishing continuous physical presence, including but 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.
5. The client's affidavit attesting to the continuous physical presence. If the client does not have documentation to establish continuous physical presence, he or she 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.

6. Ongoing compliance with requests for assistance:

    - a newly executed Form I-918, Supplement B, U Nonimmigrant Status Certification;
    - a photocopy of the original Form I-918, 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 any efforts the client made to obtain a newly executed Form I-918, Supplement B, or other evidence describing whether the client received any requests to provide assistance in the criminal investigation or prosecution of the qualifying criminal activity, and the response to these requests. If submitting an affidavit, it must include:
        - a description of all instances when the client was requested to provide assistance in the criminal investigation or prosecution of persons in connection with the qualifying criminal activity after the client was granted U nonimmigrant status and how the client responded to such requests;
        - any identifying information the client has about the law enforcement personnel involved in the case;
        - any information the client has about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons why; and
        - if the client has refused a request for assistance in the investigation or prosecution, he or she must provide a detailed explanation of why he or she refused to comply with requests for assistance and why he or she believed that the requests for assistance were unreasonable.

COMMENT

In cases where the U-1 petitioner was a child (or incompetent or incapacitated) and was not directly required to provide the assistance in an investigation or prosecution of the qualifying criminal activity, someone other than the child, such as a parent, guardian, or next friend may need to provide evidence of continued assistance (or that there was no unreasonable refusal to comply) with an investigation or prosecution of the qualifying criminal activity.

E. Discretion

A U 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.

The limit on the number of U visas that may be granted each year is 10,000. If the cap is reached before all pending U visa applications have been adjudicated in a given year, USCIS will grant deferred action to applicants on the waiting list. Applicants with deferred action are eligible to apply for work authorization.

PRACTICE TIP

Although there *is* a cap on the number of U visas that can be issued to principal applicants, there is *no* cap on the number of derivative visas that can be granted.

F. Dependents

The U visa has a generous definition of qualifying family members who can receive derivative U visas, particularly for those under 21 years of age. U visa holders who are under 21 years of age may file for derivative benefits for his or her spouse, children, parents, and unmarried siblings under the age of 18. U visa holders who are over 21 may file for derivative benefits for his or her spouse and children. Applications for qualifying family members are made on Form I-914, Supplement A, Application for Immediate Family Member of U-1 Recipient.

PRACTICE TIP

In September 2016, USCIS accepted the USCIS Ombudsman's recommendation to implement a parole policy for U visa petitioners and qualifying relatives who live abroad. The policy is intended to allow individuals to enter or re-enter the United States while they are on the waitlist. USCIS has yet to issue detailed guidance on the procedures to request parole in this context.

G. Appeals

If a U visa application is denied, it can be appealed to the Administrative Appeals Office (AAO) for paper review.

§ 8.5 SPECIAL IMMIGRANT JUVENILE STATUS

Special immigrant juvenile status (SIJS) is a form of protective relief that may only be granted by the U.S. Citizenship and Immigration Service (USCIS). It is one of several "special immigrant visas" that USCIS has designated for specific groups of individuals. SIJS is designed to protect children who have been abused, neglected, or abandoned by one or both of their parents. The abuse, abandonment, and/or neglect could happen either in their home country or in the United States, provided that the child meets the other eligibility requirements to receive SIJS. Unlike many forms of immigration relief, it requires special findings from a state court before the child can apply for SIJS status through a self-petition with USCIS. Once the child's self-petition is approved, the child may immediately apply for permanent residency if the proper visa is available, without having to leave the country to adjust status through the U.S. consulate in their country of origin. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11; INA § 245(h).

Attorneys should ensure that they review the USCIS Policy Manual Sections on special immigrant juvenile status and special immigrant based adjustment of status before submitting any documentation to an adjudicator. Both sections of the USCIS Policy Manual are available at the USCIS website, <www.uscis.gov>. These Policy Manual sections lay out.

A. Eligibility Requirements and State Court Process

1. Child Must be Under 21 Years of Age at the Time the Application is Filed

The child must be under 21 years of age at the time the application for special immigrant juvenile status is filed. *See* 8 C.F.R. § 204.11(c)(1); USCIS Policy Manual, section on Special Immigrant Juvenile Status.