**OPPORTUNITY TO COMMENT ON**

[**REGULATIONS RELATED TO TRAFFICKING VICTIMS**](https://www.federalregister.gov/documents/2021/07/16/2021-14992/classification-for-victims-of-severe-forms-of-trafficking-in-persons-eligibility-for-t-nonimmigrant)

The Department of Homeland Security (DHS) implements the Trafficking Victim Protections Act and the T nonimmigrant status process through regulations. In 2016, it proposed an “Interim Final Rule” with regulatory changes based on public comments received during a 2002 rulemaking and DHS’s experience of operating under the 2002 rules for 14 years. The 2016 Interim Final Rule (“IFR”) has been in effect since that time, although DHS has never acted on the 71 comments received in response to its notice. Now, DHS has re-opened the 2016 rule for updated comments with an eye toward finalizing the interim regulations regarding T nonimmigrant status. This is a crucial opportunity to identify parts of the regulations that work as well as those that need to be improved based on your experience over the four years that the IFR has been in effect. DHS will issue a final rule to govern T visa processes and protections for trafficking victims after reviewing all the prior and updated comments. Comments are due August 16, 2021 and must be submitted through the federal regulations portal online. A model comment is provided below. Consult the original 2016 IFR (81 Fed. Reg. 92266 (Dec. 19, 2016)) to locate the specific sections or wording contained in the regulations.

The model comment is offered as a guide for you to use in drafting personal and individualized comments about your experience with the IFR. Your experience about what works and what does not work presents the most powerful messages about what DHS should consider in formulating the final rules. The Advocates for Human Rights’ (“The Advocates”) model comments below provide outlines of the key points we think should be addressed in comments and suggested areas to provide personalized input in yellow. Of course, you do not have to address all the areas in your comments, but only those with which you have interest or experience.

**Agency/Docket Numbers:**

CIS No. 2507-11

DHS Docket No USCIS-2011-0010

**RIN:**

[1615-AA59](https://www.federalregister.gov/regulations/1615-AA59/classification-for-victims-of-severe-forms-of-trafficking-in-persons-eligibility-for-t-nonimmigrant-)

**Document Number:**

2021-14992

**Comments due : 09/14/2021**

**Submitted via:** the *Federal eRulemaking Portal*[*http://www.regulations.gov*](http://www.regulations.gov/)*.*

August 16, 2021

Dear Sec. Mayorkas,

Thank you for the opportunity to comment on the Interim Final Rule regarding T nonimmigrant victims of trafficking.

[describe yourself and why you are interested in the issue/expertise driving your comment]

I support regulatory measures that increase protections for noncitizen victims of trafficking, thereby allowing for increased trust and cooperation with law enforcement for investigations and prosecution of acts of trafficking in persons or crimes where trafficking is one central element. Several changes in the 2016 IFR (81 FR 92266, Dec. 19, 2016) were welcome improvements in advancing these goals. Yet, even with those improvements, there remain gaps in protections that can and should be remedied in any final rule. I detail those below and request that the Department modify the current IFR to better serve the purpose of the Trafficking Victims Protection Reauthorization Act (“TVPRA”), that is, to protect noncitizen trafficking victims and support law enforcement’s ability to prevent and punish trafficking consistent with our international treaty obligations under the Palermo Protocol. I further encourage the Department to review and include the issues and recommendations raised in a comment provided by The Advocates for Human Rights. These concerns are further echoed in the comment by the Texas Regional Legal Aid (TRLA) and others who work directly with T visa applicants and trafficking victims.

[pick any of these to discuss; you can cover all of them or just some of them; or write your own comment more generally about what protections work or what ones do not. Keep in mind that personalized comments can have the most impact. To that end, if you have worked on a T case or with a trafficking victim, you should include case examples of issues under the current regulations or areas where the system has (or has not) been successful.]

1. I support maintaining the changes made in the IFR that expand the opportunities for family members to apply for derivative status, *see* 81 FR at 92280 (outlining general categories of family members eligible based on age of the principal or on a showing of present danger of retaliation). The current IFR allows principal applicants under 21 years of age to apply for derivative nonimmigrant status for unmarried siblings under 18 years, spouses, unmarried children under 21 years of age, and parents. Principal applicants over 21 years of age at the time of application can apply for derivative status for spouses and unmarried children under 21 years old. Principal applicants of any age can apply for derivative status for children (of any age or marital status) of the principal’s derivative family member if the derivative’s child faces a present danger of retaliation due to the principal’s escape from a severe form of trafficking or cooperation with law enforcement. *Id.* This expansion allows trafficking victims greater support in overcoming the trauma associated with trafficking as well as support for cooperating with law enforcement that comes from having family members available to the victims and in knowing that their families can be protected from retaliation in their home country.

[provide any information about derivatives or trafficking victims who have benefitted from the increased group of derivative applicants available under the IFR]

1. I support the changes made to expand the definition and discussion of Law Enforcement Agencies (LEA) to include “any Federal, State or local law enforcement agency, prosecutor, judge, labor agency, or other authority that has responsibility for the detection, investigation, and/or prosecution of severe forms of trafficking in persons,” 81 FR at 92276/2, and to incorporate within the expanded definition any “agency that has the responsibility to detect severe forms of trafficking in person [as a potential LEA] even if the agency does not investigate or prosecute acts of trafficking.” *Id.* These changes, in conjunction with adoption of the “any credible evidence” standard, have increased the incentive for trafficking victims to comply with reasonable requests for assistance by LEAs in investigating and prosecuting trafficking. The expanded definition makes it easier for victims to obtain an LEA endorsement of compliance from LEAs that may institute, or otherwise play a role in uncovering potential trafficking crimes, despite a lack of authority to charge or to prosecute these crimes under federal law. As DHS considers these LEA endorsements “a useful and convenient form of evidence” for meeting the statutory compliance requirement, 81 FR at 92276/1, the expanded LEA definition should encourage greater reporting and cooperation by victims consistent with Congress’ intent to stop trafficking at all levels.

[provide information about the important role of state/local law enforcement in investigations that stop trafficking—and any victims that benefitted as a result] For example, New York City’s Commission on Human Rights (NYCCHR) and Minnesota’s Commerce Fraud Bureau can issue T Visa Certificates.

1. Related changes to requirements for victims to show they have complied with LEA requests for assistance with the investigation/prosecution have been helpful in protecting children and people who have been traumatized and cannot actively participate in the investigative process. Survivors of trafficking may suffer from physical and psychological trauma, including depression, feelings of hopeless, fear, anger and rage, drug or alcohol addiction, and suicidal thoughts or attempts. Donna Sabella, The Role of the Nurse in Combating Human Trafficking: Learn How to Recognize the Signs that Someone is Being Trafficked and How to Safely Intervene, 111 Am. J. of Nursing 28, 32 (2011). *See generally* Janice G. Raymond & Donna M. Hughes, Coal. Against Trafficking in Women, Sex Trafficking of Women in the United States (2001), available at http://www.uri.edu/artsci/wms/hughes/sex\_traff\_us.pdf; *see also* Atsuro Tsutsumi et al., Mental Health of Female Survivors of Human Trafficking in Nepal, 66 Soc. Sci. & Med. 1841, 1842-43 (2008) Trafficking survivors may not be able to assist with the prosecution of their traffickers due to other reasons, such as lack of trust, understanding, and fear of retribution. Determining the Reasonableness of Non-Compliance: Examining the “Trauma Exception” 15 ScholarsJ 385, 409-10. The Department should give greater recognition to likelihood that be for a majority of victims these kinds of physical and psychological trauma can legitimate grounds for what may appear to be a lack of cooperation or assistance in the investigation. Indeed, DHS has previously recognized that trafficking survivors “‘rarely come forward to seek help because of . . . fear of the traffickers, and/or fear of law enforcement’” and that “‘trauma caused by the traffickers can be so great that many may not identify themselves as victims or ask for help, even in highly public settings.’” The Blue Campaign, What is Human Trafficking?, DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking>.
2. One important change in this direction has been the clarification “that a formal investigation or prosecution is not required in order for an LEA to complete an endorsement,” supported by materials and training for LEAs to that effect. 81 FR at 92776/3. In this regard, I would support new consideration of the current requirement that “the LEA endorsement by signed by a supervising official responsible for the detection, investigation or prosecution of severe forms of trafficking in persons.” *Id.* That requirement adds what may be an unnecessary step to the more flexible approach that has been adopted to satisfy this evidentiary requirement.
3. DHS has long recognized that for minors, the trafficking experience can be particularly traumatizing, and may prevent minors for complying with reasonable LEA requests. The reasonableness of the LEA request must be balanced against the circumstances of the victim, including traumatization. *See* 8 CFR § 214.11(a)(2009). The regulations include “fear” as one of the specific circumstances of the victim because it can be experienced as part of the trauma experienced by victims. *See* Clawson et. al., U.S. Dep’t of Health and Human Services, Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking 2 (2008). Raising the age that a person is considered a minor from 15 to 18 years of age, “acknowledge[es] the significance of an applicant’s maturity in understanding the importance of participating with an LEA.” 81 FR at 92295 Table 2. While I support that change, DHS should clarify that an applicant under 18 years of age who reports the trafficking to the National Human Trafficking Hotline or Office of Trafficking in Persons would meet the requirement that the person report to LEAs and comply with reasonable requests, including even if they make an anonymous report. Additionally, DHS should clarify that the victim’s age at the time of *application* for T status should be determinative throughout the entire process. In other words, if the victim turns 18 after applying, this does not trigger a new requirement to comply with reasonable law enforcement requests. This not only helps continue to support juvenile victims who will continue to carry trauma and fear despite turning 18, but also creates clarity and consistency for USCIS adjudicators.

[provide any information about victims between 15-18 years old or people traumatized by trafficking who could not participate in the investigation/prosecution. You may consider also including any data or reports or articles about the type of trauma you mention and how this impacts victims.]

1. I further support all changes made that help make applications more accessible. This includes: amending the regulations consistently with new statutory language to clarify that T nonimmigrant applicants are exempted from the public charge ground of inadmissibility, *see* 81 FR at 92290/3 & n. 31; revised or expanded waiver authority for grounds of inadmissibility both for the T nonimmigrant status phase and at the adjustment of status phase, *see id.* at 92284-85; replacing weighing evidence as either primary or secondary in favor of the “any credible evidence” standard, *see, e.g., id.* at 92301 Table 4 (summarizing change);; removal of burdensome application requirements and definitions so as to encompass a wider group of eligible victims harmed by trafficking who will be able to seek T-visa status, *see id.* at 92270-71 (noting, among other things, that “an individual need not actually perform labor, services, or a commercial sex act to meet the definition of a ‘victim of a severe form of trafficking in persons’”).

[include additional experiences or insights on these changes]

While I welcome the important changes made, this is a crucial opportunity to improve other areas fix areas to ensure the greatest protections for trafficking victims.

1. **DHS should increase protections for people in removal proceedings.** At present, trafficking victims in removal and/or detention must file an application for T nonimmigrant status directly with USCIS and obtain continued presence or deferred action, or rely on DHS to join in a motion to close or to terminate their removal case pending the T nonimmigrant status proceedings. Stays are not guaranteed and are without prejudice to later reinstatement if T status is denied. *See generally* 81 FR at 92306/1 (outlining procedure). The current regulations state only that DHS “may agree” to a respondent’s “request to file a joint motion to administratively close or terminate proceedings without prejudice” while USCIS adjudicates an application for T-1 or T- derivative nonimmigrant status. 8.C.F.R. § 214(d)(1)(ii); (k)(2)(i) (emphasis added). DHS should require OCC to agree to a motion to administratively close, terminate or continue proceedings for respondents with pending I-914 applications. The current permissive "may" language is insufficient, especially given that applicants will no longer be eligible for T- nonimmigrant status if they are removed. Substituting "shall" will provide greater protection. The regulations also bar T eligibility for people who have been removed or departed the US, meaning that many trafficking victims are foreclosed from protections while in removal proceedings. In cases where applicants can make a credible showing that they were placed in removal proceedings through retaliatory actions of their trafficker, DHS should clarify that such a showing would automatically warrant joining in a motion to close or to terminate the removal proceeding for the pendency of the T nonimmigrant application, including through any appeals, and overcoming any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23. DHS must also increase protections and serve the goals of the TVPRA by removing the “departure bar” currently in 8 CFR 214.11(g), which bars bona fide T nonimmigrants from benefits simply by virtue of their removal even if they have a pending T application.

[provide any case examples or experiences where a client or someone you support has tried to apply for T nonimmigrant status while in detention or removal.]

1. **DHS should improve access to employment authorization during the pendency of the T application.**

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

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

[provide any information about supporting trafficking victims who are unable to obtain employment authorization, including any studies or reports showing this change would be important.]

1. **DHS should make further, crucial changes to the “on account of” standard**

While the 2017 IFR made crucial updates by slightly expanding the regulatory definition of physical presence, removing the “opportunity to depart” requirement, and addressing some instances of trafficking abroad, as the regulations are currently written, they exclude and harm vast categories of people Congress intended to protect. In particular, the TVPRA states only that the person show they are “physically present in the United States . . . on account of such trafficking.” In 8 CFR 214.11(g), the IFR states that the analysis of whether the person meets this standard will be determined at the time of the application. The IFR expands the list of instances that may be considered “on account of.” Yet, in 8 CFR 214.11(g)(3), the IFR then limits this for anyone who has been removed or voluntarily departed from the U.S.—even if during the pendency of their application—with a few narrow exceptions. I support maintaining the exceptions related to parole for investigation/prosecution/civil litigation as well as the important recognition that ongoing effects of trafficking may result in someone returning or remaining in the US on account of trafficking. However, I urge the Department to remove the departure bar in 214.11(g)(3) particularly as relates to people removed during the pendency of an application. Since immigration courts do not have the authority to grant T visas, persons in removal proceedings may face removal even if they are otherwise eligible for a T visa. This was particularly the case where the Department may oppose closing proceedings or allowing a continuance for the pendency of the T application. Since the unprecedented expansion in delays—it now takes nearly two years to receive a decision on a T visa—people in removal proceedings may lose T eligibility. The Department should clarify, at a minimum, that this bar applies only to people removed or who voluntarily depart before filing a T visa application.

[provide information about cases where the person was removed after the trafficking or had to leave]

Thank You,

[name]