

September 14, 2021

U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Policy and Strategy
Samantha Deshommes, Chief
Regulatory Coordination Division

Submitted via www.regulations.gov

Re: Comments in Response to Interim Final Rule: Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, CIS No. 2507-11; DHS Docket No. USCUS-2011-0010; RIN 1615-AA59

Dear Chief Deshommes:

The undersigned organizations submit the following comments to the U.S. Department of Homeland Security in response to the above-referenced Interim Final Rule, first published December 19, 2016, and reopened for comment on July 16, 2021 (Interim Final Rule or IFR).¹

I. Introduction

The Tahirih Justice Center, ASISTA Immigration Assistance, Central American Resource Center of Northern California (CARECEN), Freedom Network USA, Human Trafficking Legal Center (HT Legal), Immigration Center for Women and Children (ICWC), Immigrant Law Center of Minnesota, and National Immigrant Women's Advocacy Project (NIWAP Inc.) are direct services and policy advocacy organizations specializing in assisting immigrant survivors of gender-based violence including trafficking.

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence and their families since its inception 24 years ago. Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence.²

ASISTA is a national organization dedicated to safeguarding and advancing the rights of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of violence. Our agency has assisted advocates and attorneys across the United States in their work for immigrant survivors, so that survivors may have greater access to protections they need to achieve safety and independence.

¹ See 81 Fed. Reg. 92,266 (Dec. 19, 2016); 86 Fed. Reg. 37,670 (July 16, 2021); 86 FR 44,593 (August 13, 2021). All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

² See, e.g., Tahirih Justice Center, [Tahirih in the News](#); Tahirih Justice Center, [Congressional Testimony](#); Tahirih Justice Center, [Comments](#).

CARECEN SF empowers and responds to the needs, rights and aspirations of Latino, immigrant, and under-resourced families in the San Francisco Bay Area — building leadership to pursue self-determination and justice. By helping to adjust immigration status for all who are eligible, our work positively impacts the community we serve, increasing economic self-sufficiency and leveling the field for a successful and healthy integration into this country. Our goal is to empower the immigrant community to counter xenophobic attacks and discrimination through education about local, state, and federal laws designed to protect individuals and families regardless of their immigration status.

Human Trafficking Legal Center is a non-profit organization working to improve federal policy to benefit trafficking survivors and creating a bridge between trafficking survivors and highly skilled pro bono legal representation. Human Trafficking Legal Center works to hold traffickers accountable for their crimes through civil litigation and criminal restitution.

The Immigration Center for Women and Children (ICWC) is a non-profit legal organization providing free and affordable immigration services to underrepresented immigrants in California and Nevada. ICWC strives to provide security and stability for children who are abused, abandoned or neglected and for immigrants who are victims of domestic violence, sexual assault and other violent crimes.

The Immigrant Law Center of Minnesota (ILCM) enhances opportunities for immigrants and refugees through legal representation and through education and advocacy with diverse communities.

The National Women’s Advocacy Project, Inc. (NIWAP) is a training, technical assistance, and public policy advocacy organization with almost four decades of experience developing, reforming and promoting the implementation and use of laws and policies to improve legal rights, services, and assistance to immigrant women and children who are victims of domestic violence, sexual assault, stalking, human trafficking, and other crimes. NIWAP’s Director was involved in drafting the Trafficking Victims Protection Acts of 2000 and 2008. NIWAP provides direct technical assistance and training materials for attorneys, advocates, state court judges, immigration judges, the Board of Immigration Appeals, police, sheriffs, prosecutors, Department of Homeland Security, and other professionals.

We thank DHS for reopening and extending the comment period for the Interim Final Rule, so that we may provide feedback, insight, and recommendations before the rule is finalized. We especially appreciate that USCIS is seeking feedback on the IFR, seeking to assess its impact since its initial issuance in 2016. Given the myriad of policy and procedural changes since the IFR’s initial promulgation, we agree that this comment opportunity will help ensure that DHS is “fully considering all current factors, concerns and input of the parties who may be affected by this rulemaking.”³

³ 86 Fed. Reg. at 37,671 (July 16, 2021).

II. The Age of the Applicant for Purposes of the Minor Exemption to the Reporting Requirement Should Be Determined as of the Date of Their Trafficking, Not the Date of the Filing of the T Application

The INA requires T applicants to “compl[y] with any reasonable request for assistance in the Federal, state or local investigation” of trafficking or related crimes but includes an exception to this requirement for anyone who has “not attained 18 years of age.” 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) & (cc). The current regulations are ambiguous as to the requirement that “the applicant” must be under 18 years old. 8 C.F.R. § 214.11(h)(4)(ii). The most natural reading of the statute—which never mentions the filing date of the application—is that the survivor must be under 18 *at the time of victimization*. Any other interpretation would be an *ultra vires* reading of the statute and inconsistent with USCIS’s current practice. More significantly, it would cause serious harm to survivors. Young survivors in detention face added barriers of not having sufficient access to legal and social services and may not have an opportunity to report the trafficking before they are released. As a result, the regulation should be clarified to extend to all applicants who were under 18 years of age at the time of the trafficking.

Survivors of trafficking suffer extensive, long-term trauma, persistent fear of punishment from traffickers, and distrust of law enforcement.⁴ The developing adolescent brain is particularly vulnerable to adverse effects of repeated trauma and stress.⁵ Trafficking results in serious impacts on children’s psychological and emotional development.⁶ When victims have to discuss the events of the trafficking, this often causes retraumatization, especially for children.⁷ Child victims of trafficking deserve special protections against retraumatization.

Lucinda⁸ was seventeen at the time of her attempted trafficking and nineteen at the time she filed her application for T nonimmigrant status. When she attempted to report the trafficking to her local law enforcement agency, the officers who received her report questioned her for several hours, attacked her credibility, and pressured her to leave her cell phone in their custody. Lucinda was so traumatized she said she will never report another crime to local law enforcement because she cannot trust them.

Jennifer was fifteen when she was trafficked by gang members. She escaped the trafficking, reported the crime to local law enforcement, entered foster care, and received social services and supportive counseling. She was 19 when she applied for T nonimmigrant status.

⁴ Kathryn Marburger and Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, *The Professional Counselor* 10:1, at 13-24 (Mar. 2020).

⁵ Kathryn Marburger and Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, *The Professional Counselor* 10:1, at 13-24 (Mar. 2020) (noting the impact of trafficking of children on their “psychological, spiritual, and emotional development”).

⁶ *Id.*

⁷ Elzbieta Gzdzia, Ph.D. and Micah N. Bump, M.A., *Victims No Longer: Research on Child Survivors of Trafficking for Sexual and Labor Exploitation in the United States*, at 87-88 (Georgetown University Institute for the Study of International Migration, Mar. 2008).

⁸ All survivor stories included in this comment describe actual clients of the organizations who contributed to this comment. Survivor names have been changed to protect client confidentiality.

Although Jennifer had reported the crime to the local police, she was reticent to continue to cooperate because of the ongoing emotional cost of doing so.

Amending the regulation to make clear that the compliance requirement only applies to those who were at least 18 at the time of the trafficking comports with prior USCIS guidance and minimizes trauma to young trafficking survivors.⁹

III. An Applicant’s Physical Presence on Account of Trafficking Should Be Presumed Where the Applicant Has Not Departed the United States Since the Trafficking Victimization

USCIS’s narrow interpretation of “physical presence on account of trafficking” creates barriers to individuals applying for T nonimmigrant status. The statute requires that a successful T applicant must be “physically present in the United States ... on account of ... trafficking.” 8 U.S.C. § 1101(a)(15)(T)(i)(II). We appreciate that the 2016 changes to the T visa regulations addressed this issue. However, although the statutory language is unambiguously broad, current regulations continue to narrow that language significantly.¹⁰

USCIS has—in recent cases—read the statute and regulations as effectively containing a timing requirement. For example, over the last several years, USCIS has taken the position in many cases that an applicant has failed to demonstrate their physical presence under § 214.11(g) because of the length of time that has transpired between escaping the trafficking situation and filing the I-914, finding instead that the applicant’s continuing presence in the U.S. is no longer directly related to the trafficking. This *de facto* temporal limitation is not found in the statute or the legislative history and results in the exclusion of many bona fide victims of trafficking from the protections intended by Congress.

Some advocates have reported that if a survivor’s victimization is more than three or four years old, then USCIS will typically send a Request for Evidence (RFE) seeking more information supporting the assertion that the survivor is present in the United States on account of trafficking.

USCIS’s imposition of a timing requirement has led adjudicators to erroneously conclude that the mere passage of time results in the survivor’s physical presence in the U.S. being unrelated to their trafficking. Instead, USCIS should—consistent with the broad statutory language—adopt a presumption that a trafficking survivor who has not departed the United States is present on account of the trafficking. In the absence of such a presumption, USCIS

⁹ See USCIS. “Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status” (Captured April 27, 2017), available at: <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-of-human-trafficking-t-nonimmigrant-status> (“If under the age of 18 *at the time of the victimization*, or if you are unable to cooperate with a law enforcement request due to physical or psychological trauma, you may qualify for the T nonimmigrant visa without having to assist in investigation or prosecution.”) (emphasis added).

¹⁰ See 8 C.F.R. § 214.11(g).

should deem a survivor present on account of the trafficking if she fears ongoing or revictimization by traffickers or if she is seeking or receiving treatment or services related to trafficking victimization that cannot be provided in her home country.

The agency's current, narrow interpretation of "on account of" has the additional unintended consequence of causing additional trauma to trafficking survivors. Survivors are often exposed to trauma before, during, and after the trafficking victimization.¹¹ Requiring applicants to provide *additional* evidence of presence on account of trafficking under a standard far more restrictive than included in the statute can result in retraumatization.¹² This is especially true because a response may often need to be supported by a medical or psychological evaluation or supporting affidavits from the survivor's community in order to prove that the survivor continues to be impacted by their victimization of trafficking.

Further, many trafficking survivors are unable to quickly apply for relief for various reasons related to their victimization. To apply for immigration relief, trafficking survivors must discuss the details of their trauma as part of their request for relief. Providing these details is often impossible in the aftermath of trauma. Instead, they must take the time to find, and come to trust, an advocate and should not be penalized for taking this time.¹³ Moreover, the trauma from trafficking often so deeply affects survivors' lives that they encounter challenges establishing self-sufficiency. Survivors may be lower income, have lower English proficiency, lack familiarity with systems and resources, and enter and exit a series of exploitative work situations as a result of the initial trafficking. Many survivors do not have access to social services, mental

¹¹ Chic Dabby, *Considerations and Recommendations on Trauma-Informed Advocacy for Trafficking Survivors*, Asian Pacific Institute on Gender-Based Violence, (2017), at 3-4; National Organizational Advocacy Roundtable, *Intersections of Human Trafficking, Domestic Violence, and Sexual Assault* (2016), at 5 (explaining that traffickers target vulnerable individuals, including those "fleeing violent social or familial environments"); Kathryn Marburger & Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, The Professional Counselor 10:1, at 13-24 (Mar. 2020) (explaining that some trafficking victims "come from abusive households" and, after trafficking, "lack social support" and "basic needs such as shelter and financial support"); Heather J. Clawson, Ph.D., Amy Salomon, Ph.D., & Lisa Goldblatt Grace, LICSW, *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recover for Victims of Human Trafficking*, U.S. Dep't of Health and Human Services Office of the Assistance Secretary for Planning and Evaluation (Mar. 14, 2008), available at: <https://aspe.hhs.gov/reports/treating-hidden-wounds-trauma-treatment-mental-health-recovery-victims-human-trafficking-0>.

¹² Heather J. Clawson, Ph.D., Amy Salomon, Ph.D., & Lisa Goldblatt Grace, LICSW, *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recover for Victims of Human Trafficking*, U.S. Dep't of Health and Human Services Office of the Assistance Secretary for Planning and Evaluation (Mar. 14, 2008).

¹³ Heather J. Clawson, Ph.D., Amy Salomon, Ph.D., & Lisa Goldblatt Grace, LICSW, *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recover for Victims of Human Trafficking*, U.S. Dep't of Health and Human Services Office of the Assistance Secretary for Planning and Evaluation (Mar. 14, 2008) (describing the difficulty service providers and law enforcement face in establishing trusting relationships with survivors).

health resources, and legal advocacy¹⁴—the type of support required to enable them to quickly process their trafficking and prepare an application for T nonimmigrant status. Requiring this vulnerable population to apply quickly fails to recognize these challenges.

Our organizations have seen the harms caused by USCIS’s impermissibly narrow interpretation of the statute play out in individual cases. For example, Maya, a survivor of labor trafficking and domestic servitude escaped her traffickers after months of abusive work conditions. She spent years seeking support to help her identify that her exploitation was human trafficking and processing the horrific experience. Only twelve years after escaping did Maya feel supported and ready to file her application for T nonimmigrant status. Maya is a low-income single parent and lacks a good paper trail of the trafficking situation as well as the services she sought and received in the intervening years. Because of the time elapsed between her victimization and her filing, Maya received an RFE, and her application was then denied. Her application is currently on administrative appeal, nearly three years after filing.

Elena’s traffickers brought her from her home country to Saudi Arabia, where she was labor trafficking for eight years. She was then brought to the United States on a diplomatic visa and worked for a diplomat, again under egregious conditions. After she escaped in 2008, she found herself illiterate, impoverished, and unfamiliar with the country and even her neighborhood. As a practical matter, she was unable to leave the United States. She was victimized again in an abusive marriage for several years. After escaping that abusive marriage, she found mental health and legal support and filed her application for T nonimmigrant status in 2016. Because of the gap in time between her victimization and her filing date, Elena received an RFE, and her application was then denied; it is currently pending appeal.

Finally, we note that the agency is also harmed by its narrow interpretation of the “on account of” requirement. Its practice of routinely issuing RFEs to those present in the United States for some time diverts a significant amount of the agency’s limited resources to a question that has no basis in the language of the INA and that simply prolongs the adjudication of many meritorious petitions. That practice, of course, also causes additional delays for an agency plagued by them.

IV. USCIS Should Provide Bona Fide Determinations of T Eligibility Within 90 Days of Filing the Application for T Nonimmigrant Status

USCIS should simplify the regulations and processes regarding bona fide determinations for T visa applications. We call on USCIS to establish a process similar to the one recently implemented for a bona fide determination of U nonimmigrant status.¹⁵

¹⁴ Kathryn Marburger and Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, The Professional Counselor 10:1, at 13-24 (Mar. 2020) (“survivors are often met with substantial challenges while seeking basic services”).

¹⁵ <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf>.

The current T visa regulations contemplate a process for making bona fide determinations of eligibility for T nonimmigrant status; however, it has never been implemented.¹⁶ The bona fide process outlined in the regulations, sets forth a heightened standard of review and is essentially akin to a full adjudication of the application. Thus, this process does not provide trafficking victims any measurable benefit while their applications are pending.

When processing times ranged from 4-9 months, these bona fide determinations may have seemed less urgent.¹⁷ As of August 2021, processing times for T nonimmigrant status ranged from 20 to 43.5 months.¹⁸ These processing delays compromises the safety and well-being of T visa applicants and their families. Such long waits for the adjudication of their cases, coupled with other barriers (such as a lack of access to work authorization or other financial support) can be devastating to victims.

Similarly, survivors who are facing these incredible backlogs risk potential deportation before their applications are adjudicated, a result that contravenes the purpose of these bipartisan protections established by Congress. This is not just a hypothetical concern. In the last several years, we have seen T visa applicants deported before their applications have been adjudicated, effectively eliminating any possibility of relief, since they are no longer present in the United States. A bona fide determination process, akin to the one recently established for the U visa program, would provide much needed protection for trafficking survivors. When advocates seek to pause survivors' removal proceedings to allow the T adjudication to proceed, ICE lawyers sometimes request a bona-fide determination. This places the burden on the survivor and her advocate to explain to DHS and EOIR that there is no functional process. In many cases, immigration judges then request a copy of the full T application filing, which implicates serious confidentiality and privacy concerns. One survivor was so concerned about sharing her file with EOIR and DHS that her trauma response flared and she required emotional support.

Worse, in the absence of a bona fide determination process, many immigration judges have required T applicants to proceed on other applications while a T application is pending. These parallel, alternative proceedings waste precious administrative resources and inflict needless additional trauma on survivors. In one case, a survivor in detention filed her T visa application; however, the immigration judge in her case required her to prepare an alternative application for relief to present before the court. This survivor worked intensively with her counsel to prepare and file an asylum application and all supporting materials and fully prepared to proceed with her individual hearing. One day before the hearing, she was released from detention, transferred to a different immigration judge's docket, and provided with administrative closure pending adjudication of the T application. After her T status was granted, her removal proceeding was terminated. A bona fide determination process would prevent such situations by allowing survivors with bona fide claims to quickly and easily seek administrative

¹⁶ 8 C.F.R. § 214.11(e).

¹⁷ In FY2015 T visa applications took 6.4 months to adjudicate. See USCIS. "Historic National Average Processing Times for All USCIS Offices" (captured March 12, 2019) available at <https://web.archive.org/web/20190312202427/https://egov.uscis.gov/processing-times/historic-pt>

¹⁸ <https://egov.uscis.gov/processing-times/>.

closure of their cases in immigration court—or even a joint motion to dismiss proceedings—pending USCIS’s adjudication of their petitions. Such a streamlined process would also further the victim-centered approach ICE has currently adopted.¹⁹

The lack of a BFD process has especially pernicious effects for survivors in immigration detention. One survivor, Sharma, was sex trafficked for many years as a young child. After her escape, she was held in immigration detention. While in detention, she filed her application for T nonimmigrant status. She requested that USCIS expedite her review or issue a bona fide determination, especially on the basis of her detention, but USCIS refused. Her experience in detention was so negative and, after a year, remained so indeterminate in length that she requested deportation to the country from which she was trafficked. Her T application was later denied on the basis that she was not present in the United States.

A bona fide determination process would also allow more survivors to be self-sufficient while they await adjudication of their claims by allowing them to work with authorization. At the same time, it would allow people with a serious need for support to access public benefits. For example, after Asha escaped a years-long trafficking situation, she suffered from epilepsy and severe depression, compromising her ability to work and support herself. While she awaited eligibility for federally funded benefits for trafficking survivors, she and her social services caseworker spent hundreds of hours coordinating free and low-cost medical and mental health resources, carefully timing her receipt of public benefits, and even researching free holiday meals and back-to-school supplies for her son. They cobbled together just enough support to keep the family afloat until her T status was granted. Now that she has T status, she is able to receive treatment from appropriate specialists with her expanded access to the benefits to which she is entitled. With a bona fide determination, she could have achieved stability and reliable medical care simply and more quickly.

V. The “Any Credible Evidence” Standard Should Apply to the Demonstration of a Present Danger of Retaliation for Purposes of Derivative Eligibility

A derivative who seeks T status on the basis of present danger of retaliation must provide evidence of that present danger. The regulations currently enumerate a series of types of evidence that may be provided. Although an applicant’s own statement of present danger is listed, it includes the limitation that “ordinarily an applicant’s statement alone is not sufficient to prove present danger.”²⁰ This limitation hamstring an applicant’s ability to prove present danger because very often the best evidence of the danger of retaliation is the applicant’s own accounting. Any credible evidence should be sufficient to prove a present danger of retaliation sufficient to support a derivative’s application for T nonimmigrant status.

¹⁹ See ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at:

<https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf>.

²⁰ 8 C.F.R. § 214.11(k)(6)(iii).

The regulations outline types of evidence favored for a determination of present danger of retaliation, although the statute requires no such elevated evidentiary standard.²¹ Where no family member has applied for or been granted advance parole, and law enforcement has not pursued an investigation (or no reporting has taken place due to an exemption), or the danger is not otherwise documented, an applicant's own declaration may be the best and only evidence available. The statute was designed to protect family members of trafficking survivors from retaliation against them, and the survivor applicant has the best vantage point from which to understand the current threat.

An assumption that there is other evidence is not realistic, especially in situations where the trafficker is a private individual or low-profile group, or in countries where there is no free press. In such cases, the only available evidence is that provided by the applicant.

Farah was trafficked to the United States from her home country, where her family remains. Her traffickers are a powerful group within her home country, with strong ties to media and government. Her family cannot avail themselves of police protection and they remain at risk. However, documentation of this danger remains elusive and in some ways threatens to elevate the risk to the family. If Farah's own affidavit documenting this risk were sufficient, she could expedite her filing on their behalf and assist them in quickly reaching safety in the United States.

VI. Conclusion

For the reasons described above, the regulations as currently promulgated fail to achieve fully the statute's aim of protecting survivors of trafficking and their families. Tahirih urges USCIS to adopt the changes above to optimize survivors' access to safety in a trauma-informed manner. We appreciate the opportunity to provide feedback and we look forward to your detailed response. Please contact us at rachels@tahirih.org, richardc@tahirih.org or laura@asistahelp.org for additional information.

Respectfully,

Tahirih Justice Center

ASISTA Immigration Assistance

Central American Resource Center of Northern California

Human Trafficking Legal Center

Immigration Center for Women and Children

Immigrant Law Center of Minnesota

National Immigrant Women's Advocacy Project

²¹ 8 C.F.R. § 214.11(k)(6).