

**DEPARTMENT OF HOMELAND SECURITY****8 CFR Parts 212, 214, 245, and 274a**

[CIS No. 2507–11; DHS Docket No. USCIS–2011–0010]

RIN 1615–AA59

**Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status****AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations governing the requirements and procedures for victims of human trafficking seeking T nonimmigrant status. The Secretary of Homeland Security (Secretary) may grant T nonimmigrant status (commonly known as a “T visa”) to aliens who are or were victims of severe forms of trafficking in persons, who are physically present in the United States on account of such trafficking, who have complied (unless under 18 years of age or unable to cooperate due to trauma) with any reasonable request by a Federal, State, or local law enforcement agency (LEA) for assistance in an investigation or prosecution of acts of trafficking in persons or the investigation of other crimes involving trafficking, and who would suffer extreme hardship involving unusual and severe harm if removed from the United States. In this interim rule, DHS is amending its regulations to conform with legislation enacted after the initial rule was published in 2002: the Trafficking Victims Protection Reauthorization Act of 2003 (TVPA 2003), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA 2008), and Titles VIII and XII of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).

DHS is also streamlining procedures, responding to public comments on the 2002 interim final rule, and providing guidance for the statutory requirements for T nonimmigrants. The intent is to make sure the T nonimmigrant status regulations are up to date and reflect USCIS adjudicative experience, as well as the input provided by stakeholders.

**DATES:** *Effective date.* This rule is effective January 18, 2017.

*Comment date.* Written comments must be submitted on or before February 17, 2017. Comments on the form, form instructions, and information collection revisions in this interim rule must be submitted on or before January 18, 2017.

**ADDRESSES:** You may submit comments, identified by DHS Docket No. USCIS–2011–0010, by *one* of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* You may submit comments directly to U.S. Citizenship and Immigration Services (USCIS) by email at [USCISFRComment@uscis.dhs.gov](mailto:USCISFRComment@uscis.dhs.gov).

Include DHS Docket No. USCIS–2011–0010 in the subject line of the message.

- *Mail:* Samantha Deshombres, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2140. To ensure proper handling, please reference DHS Docket No. USCIS–2011–0010 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.

- *Hand Delivery/Courier:* Samantha Deshombres, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2140. Contact Telephone Number (202) 272–8377.

**FOR FURTHER INFORMATION CONTACT:**

Elizabeth Dallam, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2099, telephone (202) 272–8377 (this is not a toll-free number).

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## I. Public Participation

DHS invites interested persons to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this interim rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim rule. DHS particularly encourages comments from individuals, organizations, and agencies with direct experience handling T nonimmigrant cases or issues. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the interim rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

**Instructions:** All submissions received must include the agency name (U.S. Citizenship and Immigration Services) and DHS Docket No. USCIS–2011–0010 for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See the **ADDRESSES** section above for

information on how to submit comments. Those wishing to submit anonymous comments should do so electronically at <http://www.regulations.gov>.

**Docket:** For access to the docket to read background documents or comments received go to <http://www.regulations.gov>.

## II. Executive Summary

### A. Purpose of the Regulatory Action

The T nonimmigrant status regulations—which include eligibility criteria, application process, evidentiary standards, and benefits associated with the T nonimmigrant classification (commonly known as the “T visa”<sup>1</sup>)—have been in effect since a 2002 interim rule. *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status*, 67 FR 4784 (Jan. 31, 2002) (2002 interim rule). Since the publication of that interim rule, the public has submitted comments on the regulations and Congress has enacted numerous pieces of related legislation. DHS is responding to the public comments on the 2002 interim rule, clarifying requirements based on experience operating the program for more than 14 years, and amending provisions as required by legislation.

#### 1. Need for the Regulatory Action and How the Action Will Meet That Need

Statutory amendments to the Trafficking Victims Protection Act of 2000 (TVPA) require that DHS amend and clarify the eligibility and application requirements to conform to current law. In addition, DHS needs to respond to public comments on the 2002 interim rule. DHS accomplishes both actions in this interim rule.

#### 2. Statement of Legal Authority for the Regulatory Action

The TVPA authorizes various means to combat trafficking in persons,

<sup>1</sup> T nonimmigrant status is known as the “T visa” colloquially, however “T visa” is not an entirely accurate term in light of the statutory scheme. Principal victims granted T–1 nonimmigrant status may seek derivative T nonimmigrant status for certain family members. 8 CFR 214.11(o)(1). Some of these family members may reside outside the United States and, if eligible, can join the victim in the United States. Before family members with approved derivative T nonimmigrant status can enter the United States, the family members must first undergo processing with the Department of State at a U.S. Embassy or Consulate to obtain a T visa abroad. This is known as consular processing. USCIS will decide on the basis of the application filed by the principal T–1 nonimmigrant whether an overseas family member qualifies for derivative T nonimmigrant status. The Department of State will then separately determine that family member’s eligibility to receive a visa in order to enter the United States.

including tools to effectively prosecute and punish perpetrators of trafficking in persons, and protection to victims of trafficking through immigration relief and access to Federal public benefits. See Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), div. A, TVPA, Public Law 106–386, 114 Stat. 1464 (Oct. 28, 2000), as amended by TVPRA 2003, Public Law 108–193, 117 Stat. 2875 (Dec. 19, 2003); VAWA 2005, Public Law 109–162, 119 Stat. 2960 (Jan. 5, 2006); Technical Corrections to VAWA 2005, Public Law 109–271, 120 Stat. 750 (Aug. 12, 2006); TVPRA 2008, Public Law 110–457, 122 Stat. 5044 (Dec. 23, 2008), and VAWA 2013, Public Law 113–4, titles viii, xii, 127 Stat. 54 (Mar. 7, 2013); Justice for Victims of Trafficking Act of 2015 (JVTA), Public Law 114–22, 129 Stat. 227 (May 29, 2015). The Immigration and Nationality Act of 1952 (INA), as amended, permits the Secretary to grant T nonimmigrant status to aliens who are or were victims of a severe form of trafficking in persons, who have complied with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime, or who are exempt from this compliance requirement, and who would suffer extreme hardship involving unusual and severe harm if removed from the United States. See INA section 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T).

### B. Summary of the Major Provisions of the Rule

#### 1. Statutory Changes

The legislative changes to the T nonimmigrant statute addressed in this interim rule are as follows:

- Expanding the definition and discussion of LEA to include State and local law enforcement agencies (added by VAWA 2005). See INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa); new 8 CFR 214.11(a).
- Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons, from 15 years to 18 years of age (added by TVPRA 2003). See INA section 101(a)(15)(T)(i)(III)(cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(cc); new 8 CFR 214.11(b)(3)(i) and (h)(4)(ii).
- In cases where the applicant is unable, due to physical or psychological trauma, to comply with any reasonable request by an LEA, exempting the

applicant from the requirement to comply (added by TVPRA 2008). *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); new 8 CFR 214.11(b)(3)(ii) and (h)(4)(i).

- Expanding the regulatory definition of physical presence on account of trafficking to include those whose entry into the United States was for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking (added by TVPRA 2008). *See* INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II); new 8 CFR 214.11(b)(2) and (g)(1).

- Allowing principal applicants under 21 years of age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years and parents as eligible derivative family members (added by TVPRA 2003). *See* INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I); new 8 CFR 214.11(k)(1)(ii).

- Providing age-out protection for a principal applicant's eligible family members under 21 years of age (added by TVPRA 2003). *See* INA section 214(o)(4), 8 U.S.C. 1184(o)(4); new 8 CFR 214.11(k)(5)(ii).

- Providing age-out protection for principal applicants under 21 years of age (added by TVPRA 2003). *See* INA section 214(o)(5), 8 U.S.C. 1184(o)(5); new 8 CFR 214.11(k)(5)(iii).

- Allowing principal applicants of any age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years of age and parents as eligible family members if the family member faces a present danger of retaliation as a result of the principal applicant's escape from a severe form of trafficking or cooperation with law enforcement (added by TVPRA 2008). *See* INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III); new 8 CFR 214.11(k)(1)(iii) and (k)(5)(iv).

- Allowing principal applicants of any age to apply for derivative T nonimmigrant status for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the principal's escape from a severe form of trafficking or cooperation with law enforcement (added by VAWA 2013). *See* INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III); new 8 CFR 214.11(k)(1)(iii).

- Permitting all derivative T nonimmigrants, if otherwise eligible, to apply for adjustment of status under INA section 245(l), 8 U.S.C. 1255(l). *See* new 8 CFR 245.23(b)(2).

- Removing the requirement that eligible family members must face

extreme hardship if the family member is not admitted to the United States or was removed from the United States (removed by VAWA 2005). *See* previous INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii); 8 CFR 214.11(o)(1)(ii)

- Exempting T nonimmigrant applicants from the public charge ground of inadmissibility (added by TVPRA 2003). *See* INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A); new 8 CFR 212.16(b).

- Limiting duration of T nonimmigrant status to 4 years but providing extensions for LEA need, for exceptional circumstances, and for the pendency of an application for adjustment of status (VAWA 2005 and TVPRA 2008). *See* INA section 214(o)(7)(B), 8 U.S.C. 1184(o)(7)(B); new 8 CFR 214.11(c)(1) and (l).

- Implementing a technical fix to clarify that presence in the Commonwealth of the Northern Mariana Islands after being granted T nonimmigrant status qualifies toward the requisite physical presence requirement for adjustment of status (added by VAWA 2013). *See* VAWA 2013, tit. viii, section 809; section 705(c) of the Consolidated Natural Resources Act of 2008 (CNRA), Title VII, Public Law 110–229, 122 Stat. 754 (2008); new 8 CFR 245.23(a)(3)(ii).

- Conforming the regulatory definition of sex trafficking to the revised statutory definition in section 103(10) of the TVPA (22 U.S.C. 7102(10)), as amended by section 108(b) of the JVT A, 129 Stat. 239. *See* new 8 CFR 214.11(a).

## 2. Discretionary Changes

In addition to the necessary statutory changes, DHS makes the following changes and clarifications related to the T nonimmigrant classification in this interim rule:

- Specifies how USCIS will exercise its waiver authority with respect to criminal inadmissibility grounds; new 8 CFR 212.16(b)(3).

- Discontinues the practice of weighing evidence as primary and secondary in favor of an “any credible evidence” standard; 8 CFR 214.11(f); new 8 CFR 214.11(d)(2)(ii) and (3).

- Provides guidance on the definition of “severe form of trafficking in persons” where an individual has not performed labor or services, or a commercial sex act; new 8 CFR 214.11(f)(1).

- Removes the current regulatory “opportunity to depart” requirement for those who escaped traffickers before law enforcement became involved; 8 CFR 214.11(g)(2).

- Addresses situations where trafficking has occurred abroad, but the applicant can potentially meet the physical presence requirement; new 8 CFR 214.11(g)(3).

- Eliminates the requirement that an applicant provide three passport-style photographs; 8 CFR 214.11(d)(2)(ii); new 8 CFR 214.11(d)(4).

- Removes the filing deadline for applicants victimized prior to October 28, 2000; 8 CFR 214.11(d)(4).

- Announces forthcoming updates to the forms used to apply for T nonimmigrant status.

- Updates the regulation to reflect the creation of DHS, and to implement current standards of regulatory organization, plain language, and USCIS efforts to transform its customer service practices.

## C. Costs and Benefits

With this interim rule, DHS incorporates in its regulations several statutory provisions associated with the T nonimmigrant status that have been enacted since 2002 and that DHS already has been implementing. While codifying these changes in the DHS regulations will not result in additional quantitative costs or benefits, ensuring that DHS regulations are consistent with applicable legislation will provide qualitative benefits. In addition, DHS will implement changes made necessary by VAWA 2013, and other discretionary changes. DHS estimates the changes made in this interim rule will result in the following costs:

- A per application opportunity cost for the T–1 principal alien of \$33.92 to complete and submit the Application for Family Member of T–1 Recipient, Form I–914 Supplement A, in order to apply for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the principal's escape from a severe form of trafficking and/or cooperation with law enforcement. The children of the principal's derivative relatives will be admitted under the T–6 classification. DHS has no basis to project the population of children of derivative family members that may be eligible for the new T–6 nonimmigrant classification.

- An individual total cost of \$89.70 for applicants who become eligible to apply for principal T–1 nonimmigrant status when the filing deadline for those trafficked before October 28, 2000 is removed. The total cost includes the opportunity cost associated with filing the Application for T Nonimmigrant Status, Form I–914, and the time and travel costs associated with submitting

biometrics. If the applicant includes the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS has no way of predicting how many individuals physically present in the United States may now be eligible for T-1 nonimmigrant status as a result of removing the filing deadline.

- An individual total cost of \$89.70 for those applicants trafficked abroad that will now become eligible to apply for T nonimmigrant status due to DHS's expanded interpretation of the physical presence requirement. As previously described, the total cost includes both the opportunity of time cost and estimated travel cost incurred with filing Form I-914 and submitting biometrics. If the applicant includes the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS is unable to project the size of this new eligible population.

Based on recent filing volumes, DHS estimates total cost savings of \$56,130 for T nonimmigrant applicants and their eligible family members as a result of no longer being required to submit three passport-style photographs with their T nonimmigrant applications. In addition, the interim rule will provide various qualitative benefits for victims of trafficking, their eligible family members, and law enforcement agencies investigating trafficking incidents. These qualitative benefits result from making the T nonimmigrant classification more accessible, reducing some burden involved in applying for this status in certain cases, and clarifying the process by which DHS adjudicates and administers the T nonimmigrant benefit.

#### D. Public Comments

DHS welcomes public comment on all aspects of this interim final rule.

### III. Background and Legislative Authority

Congress created the T nonimmigrant status in the TVPA. See Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), div. A, TVPA, Public Law 106-386, 114 Stat. 1464 (Oct. 28, 2000). Congress has since amended the TVPA, including the T nonimmigrant status provisions, several times: TVPRA 2003, Public Law 108-193, 117 Stat. 2875 (Dec. 19, 2003); VAWA 2005, Public Law 109-162, 119 Stat. 2960

(Jan. 5, 2006); Technical Corrections to VAWA 2005, Public Law 109-271, 120 Stat. 750 (Aug. 12, 2006); TVPRA 2008, Public Law 110-457, 122 Stat. 5044 (Dec. 23, 2008); VAWA 2013, Public Law 113-4, titles viii, xii, 127 Stat. 54 (Mar. 7, 2013); JVTA, Public Law 114-22, 129 Stat. 227 (May 29, 2015).

The TVPA and subsequent reauthorizing legislation provide various means to combat trafficking in persons, including tools to effectively prosecute and punish perpetrators of trafficking in persons, and protect victims of trafficking through immigration relief and access to federal public benefits. The T nonimmigrant status is one type of immigration relief available to victims of severe forms of trafficking in persons who assisted LEAs in the investigation or prosecution of the perpetrators of these crimes.

The INA permits the Secretary to grant T nonimmigrant status to individuals who are or were victims of a severe form of trafficking in persons, who have complied with any reasonable request by an LEA for assistance in an investigation or prosecution of crime involving acts of trafficking in persons (or who are under 18 years of age or are unable to cooperate due to physical or psychological trauma).<sup>2</sup> See INA Section 101(a)(15)(T)(i)(I), (III), 8 U.S.C. 1101(a)(15)(T)(i)(I), (III). Applicants for T nonimmigrant status must be physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto, on account of trafficking in persons, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking. See INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II). In addition, an applicant must demonstrate that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States. See INA section 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV). T nonimmigrant status allows eligible individuals to remain in the United States for a period of not more than 4 years (with the possibility for extensions), receive work

<sup>2</sup> The primary victim of trafficking is also referred to as the "principal T nonimmigrant" or "principal alien" and receives T-1 nonimmigrant status, if eligible. The principal alien may be permitted to apply for certain family members who are referred to as "eligible family members" or "derivative T nonimmigrants" and when approved those family members receive T-2, T-3, T-4, T-5, or T-6 nonimmigrant status. The term derivative is used in this context because the family member's eligibility derives from that of the primary nonimmigrant.

authorization, receive federal public benefits, and apply for derivative status for certain eligible family members. See INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii); INA section 214(o), 8 U.S.C. 1184(o); 8 U.S.C. 1641(c)(4).

On January 31, 2002, the former Immigration and Naturalization Service (INS)<sup>3</sup> published an interim final rule in the **Federal Register** titled *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status* implementing the T nonimmigrant status provisions of the TVPA. 67 FR 4784. INS outlined the eligibility criteria, application process, evidentiary standards, and benefits associated with the T nonimmigrant status. *Id.* Most of the provisions in this rule have been in effect since the 2002 interim rule and have been the subject of extensive public comment.<sup>4</sup> In this rule, DHS is responding to the 14 public submissions with comments on multiple provisions of the 2002 interim rule. No comments were received regarding the procedural aspects of the 2002 interim rule or the good cause arguments put forth in the rule for bypassing notice and comment.

As noted above, DHS also welcomes additional input by stakeholders in response to this action. As explained further in the Administrative Procedure Act section of this rule, DHS is publishing this rule as an interim final rule and requesting additional comment on all aspects of this rulemaking.

### IV. Eligibility and Application Requirements, Procedures, and Changes in This Rule

DHS provides a summary of the changes made in this rule in Section II.B. of this preamble above. In this section, DHS describes the changes in greater detail. The discussion is organized generally in the same order as the relevant regulatory provisions in this interim rule, and proceeds as follows:

<sup>3</sup> Various functions formerly performed by the INS, or otherwise vested in the Attorney General, were transferred to DHS in March 2003. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1103(a)(1), (g), 8 U.S.C. 1551 note. Even though INS published the 2002 interim rule, this rule refers to DHS because DHS is now the regulatory actor.

<sup>4</sup> Since the publication of the 2002 interim rule, DHS has amended the core regulatory provision relating to T nonimmigrant status, 8 CFR 214.11, multiple times. Most of these changes have been minor conforming changes as parts of other actions. See, e.g., *Removal of the Standardized Request for Evidence Processing Timeframe*, 72 FR 19100, 19107 (Apr. 17, 2007); *Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status*, 73 FR 75558 (Dec. 12, 2008); *Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands*, 74 FR 55738 (Oct. 28, 2009).

A. Eligibility Requirements for T Nonimmigrant Classification (including core eligibility factors such as victimization, physical presence on account of trafficking in persons, and extreme hardship involving unusual and severe harm upon removal),

B. Application Requirements (include filing deadlines, bona fide determinations, and processes and eligibility for derivative family members),

C. Adjudication and Post-Adjudication (including waivers of inadmissibility, confidentiality requirements, and duration of status), and

D. Filing and Biometric Services Fees. Throughout the discussion, DHS addresses and responds to the public comments received in connection with the 2002 interim rule.

#### A. Eligibility Requirements for T Nonimmigrant Classification

There are four statutory eligibility requirements for T nonimmigrant status. See INA section 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T). To be eligible, the applicant must meet the following criteria:

- The applicant must be or have been a victim of a severe form of trafficking in persons, as defined in 22 U.S.C. 7102 (section 103 of the TVPA);

- The applicant must be physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI),<sup>5</sup> or at a port-of-entry thereto, on account of such trafficking, including physical presence based on the applicant having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking; and

- The applicant must meet one of the following criteria:

- Has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime; or

- Is under 18 years of age; or
- Is unable to cooperate with a request due to physical or psychological trauma; and

- The applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

<sup>5</sup> The federalization of the CNMI immigration law took place on November 28, 2009. See Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110-229, title VII, 122 Stat. 754 (2008). This effectively replaced the CNMI's immigration laws with the INA and other applicable United States immigration laws, with few exceptions.

Below DHS addresses each of these requirements in turn.

#### 1. Victim of a Severe Form of Trafficking in Persons

First, an individual applying for classification as a T nonimmigrant must demonstrate that he or she is or was a victim of a severe form of trafficking in persons. See INA section 101(a)(15)(T)(i)(I), 8 U.S.C.

1101(a)(15)(T)(i)(I). In the 2002 interim rule, DHS defined “victim of a severe form of trafficking in persons” consistent with the statutory definitions in TVPA section 103(9) and (14), 22 U.S.C. 7102(9), (14). Under the interim rule, an applicant must show that he or she is a victim of one or more of the following:

- Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion;
- Sex trafficking in which the person induced to perform such an act is under the age of 18; or
- 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 subjection to involuntary servitude, peonage, debt bondage, or slavery.

See 8 CFR 214.11(a); see also TVPA section 103(9), 22 U.S.C. 7102(9).

DHS received public comments on the definition of “victim of a severe form of trafficking in persons,” and responds as follows:

- DHS clarifies that the term “involuntary servitude,” as used in 22 U.S.C. 7102(9), encompasses the use of psychological coercion. See 8 CFR 214.11(a).

- DHS clarifies that an individual need not perform labor, services, or a commercial sex act to meet the definition of a “victim of a severe form of trafficking in persons.” New 8 CFR 214.11(f)(1).

- DHS explains how a victim can meet the evidentiary burden to show victimization, even when the victim did not perform labor, services or a commercial sex act.

In order to simplify the regulatory text, DHS used and defined the term “victim” in this rule as shorthand to refer to “an alien who is or has been subject to a severe form of trafficking in persons,” as defined by TVPA section 103 (22 U.S.C. 7102). See 8 CFR 214.11(a).

#### a. Definition of “Involuntary Servitude”

DHS received four comments about the definition of “involuntary servitude” in 8 CFR 214.11(a). Commenters maintained that the

definition appeared to be too narrow because it cited *United States v. Kozminski*, 487 U.S. 931, 952 (1988). In *Kozminski*, the Supreme Court had occasion to construe “involuntary servitude” as used in the criminal provisions at 18 U.S.C. 241 (conspiracy to interfere with free exercise of constitutional rights, including Thirteenth Amendment guarantee against involuntary servitude) and 1584 (knowingly and willfully holding to involuntary servitude . . . any other person for any term). The Court, considering the historical context of the term as used in those criminal provisions, held that involuntary servitude excluded compulsion by psychological coercion.

The commenters stated that Congress intended the definition of involuntary servitude as used in 22 U.S.C. 7102(9) and defined in part in 22 U.S.C. 7102(6), to go beyond the *Kozminski* construction, and recommended striking the citation from the definition. We agree. In the 2002 interim rule, DHS did not intend to exclude psychological coercion from the definition of involuntary servitude. The citation to *Kozminski* in the definition was qualified by the word “includes,” and therefore did not limit the definition of involuntary servitude by excluding psychological coercion. Additionally, in the 2002 interim rule’s preamble, DHS specifically said that the TVPA definition of “forced labor” was meant to “expand[] the definition of involuntary servitude contained in *Kozminski*.” 67 FR 4784, at 4786. To avoid the potential for confusion, DHS is removing the citation to *Kozminski* from the definition of “involuntary servitude.”

#### b. Performing Labor, Services, or Commercial Sex Is Not Necessary

In this interim rule, DHS is clarifying 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.” See new 8 CFR 214.11(f)(1).

In the 2002 interim rule, DHS explained that it interpreted the term “severe form of trafficking in persons” to require a particular means (force, fraud, or coercion) and a particular end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery). See 67 FR at 4786 (construing the statutory definition at 22 U.S.C. 7102(9) and (14)). However, DHS did not discuss how it would address cases involving the means of force, fraud, or coercion and the intended ends of sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, where those illicit

ends are never realized. This would include, for example, a situation where the victim was recruited and came to the United States through force, fraud or coercion for the purpose of a commercial sex act, but the victim was rescued or escaped before performing a commercial sex act.

The definition of “severe form of trafficking in persons” at 22 U.S.C. 7102(9) includes the phrase “for the purpose of” subjection to a form of human trafficking; *i.e.*, the applicant may establish that he or she was recruited, transported, harbored, provided, or obtained through force, fraud, or coercion for the purpose of subjecting him or her to a commercial sex act, involuntary servitude, peonage, debt bondage, or slavery.<sup>6</sup> The statutory

<sup>6</sup>Note that the labor trafficking prong of the statutory definition of “severe forms of trafficking in persons” at 22 U.S.C. 7102(9)(B) directly uses the phrase “for the purpose of,” whereas the sex trafficking prong of the statutory definition does not. The sex trafficking prong, however, incorporates the definition of “sex trafficking” at 22 U.S.C. 7102(10) (“The term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act”), which employs the phrase “for the purpose of.” Although the statute requires the commercial sex act to be “induced,” the statute does not expressly provide that the inducement must be successful in order for a victim to satisfy the definition, nor does the term “induce” necessarily require that the desired end be achieved. *See, e.g., United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004) (“We have previously held that the term ‘induce’ in [18 U.S.C.] § 2422 is not ambiguous and has a plain and ordinary meaning. . . . By negotiating with the purported father of a minor, Murrell attempted to stimulate or cause the minor to engage in sexual activity with him. Consequently, Murrell’s conduct fits squarely within the definition of ‘induce.’”) (citations omitted); *cf. NLRB v. Associated Musicians of N.Y.*, 226 F.2d 900, 904 (2d Cir. 1955) (holding that “common understanding of the meaning” of “induce,” as used in the National Labor Relations Act, does not require the inducement to be successful). Moreover, the two prongs of the statutory definition should be read to fit harmoniously as part of “a symmetrical and coherent statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). We can discern neither a logical reason nor any congressional design to designate inchoate labor trafficking offenses as “severe forms of trafficking in persons,” but not so designate inchoate sex trafficking offenses. To the extent there is ambiguity in the statutes, it is reasonable for the Department to adopt the more expansive conception of “victim” for purposes of the T visa regime given the protection and humanitarian aims of the statutory scheme. *Cf., e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (construing “any lingering ambiguities” in Refugee Act of 1980 so as to “increase[] . . . flexibility” in protecting refugees in light of statute’s humanitarian aims); *Flores v. USCIS*, 718 F.3d 548, 554 (6th Cir. 2013) (observing that court’s more expansive reading of temporary protected status (TPS) provision is supported by clear congressional intent “to protect a class of people . . . due to an extraordinary circumstance”); *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004) (observing that “[i]n determining congressional intent” when seeking to resolve ambiguities in LIFE Act (“V visa” program),

definition does not require a victim to have actually performed labor, services, or a commercial sex act to be considered a victim of a severe form of trafficking, for T nonimmigrant status eligibility purposes.

The TVPA did not elaborate on the term “for the purpose of subjection to” a form of human trafficking. We therefore consider common definitions of the key terms:

- *Purpose*: “something set up as an object or an end to be attained.” *See Merriam-Webster Online Dictionary*, 2011, <http://merriam-webster.com>. Also defined as “an objective, goal, or end; specifically the business activity that a corporation is chartered to engage in.” *See Black’s Law Dictionary* (7th ed. 2000).

- *Subjection*: “the act of subjecting someone to something.” *See Black’s Law Dictionary* (7th ed. 2000). “Subjecting” is also defined as “bringing under control or dominion” or “causing or forcing to undergo or endure.” *See Merriam-Webster Online Dictionary*, 2011, <http://merriam-webster.com>.

The concept of “for the purpose of” speaks to the process of attaining an object or end or the intention to attain something, but not the end result. The inclusion of the “for the purpose of” language may reasonably be construed as encompassing situations where labor or commercial sex act has not occurred.

Furthermore, Congress amended the federal criminal code to punish attempts to violate any trafficking-related criminal provision in the same manner as a completed act of trafficking would be punished. *See TVPA* section 112; 18 U.S.C. 1594. The criminal code thus specifically allows for attempts and conspiracy to commit trafficking to be prosecuted. *Id.* The T nonimmigrant status was intended to assist LEAs and provide a tool to, in part, allow for prosecution and stop the traffickers from continuing to enslave human beings. *See TVPA* section 102. Congress intended to provide an incentive for victims to report these crimes by providing for an immigration benefit connected to assistance to LEAs. *Id.*

If victims who have been recruited, harbored, transported, provided, or obtained for the purposes of trafficking (or patronized or solicited in the case of sex trafficking) and have not yet performed any labor, services, or commercial sex acts are not eligible for T nonimmigrant status, Congress’s

“we should adhere to the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion”) (quotations marks omitted).

intent in the TVPA to prosecute traffickers would be thwarted. Such an interpretation would hinder victims from coming forward to report trafficking to LEAs and assist with investigations or prosecutions. This could amount to a chilling effect on LEAs’ ability to investigate and prosecute trafficking-related crimes. Since the 2002 interim rule, USCIS has seen far fewer filings than expected. However, based on the Federal Government estimates, the small number of filings is not due to a correspondingly small number of victims in the United States. *See U.S. Department of State, Trafficking in Persons Report* (June 2010). Victims already often find it difficult to report trafficking and work with law enforcement; excluding an entire class of potential victims from T nonimmigrant eligibility could thwart the purpose of the visa and hinder prosecutions. A narrow interpretation would also seem to punish a victim who was rescued by an LEA or escaped on their own before any labor, services or commercial sex acts were performed. That result is illogical and inconsistent with Congressional intent. Therefore, those who have been recruited, harbored, transported, provided, or obtained for the purposes of trafficking (or patronized or solicited in the case of sex trafficking) are eligible for T nonimmigrant status in this rule, irrespective of the actual performance of any labor, services or commercial sex acts.

Below, DHS includes a discussion of how victims can meet the evidentiary burden to show victimization when they did not perform labor, services or a commercial sex act.

#### c. Evidence of Victimization

An applicant can meet the victimization requirement in a number of ways. In the 2002 interim rule, DHS required the submission of primary or secondary evidence to establish victimization. *See* 8 CFR 214.11(f). Primary evidence of victimization included an LEA endorsement on the Declaration of a Law Enforcement Officer for Victim of Trafficking in Persons, Form I–914 Supplement B to the Application for T Nonimmigrant Status,<sup>7</sup> Form I–914, and a grant of Continued Presence from U.S. Immigration and Customs Enforcement (ICE) under 28 CFR 1100.35. Secondary evidence included any credible evidence that demonstrated that the applicant is or has been a victim of a

<sup>7</sup>Currently USCIS Form I–914. Available online at <http://www.uscis.gov/files/form/i-914.pdf>.



severe form of trafficking in persons, including evidence that explained the nonexistence or unavailability of the primary evidence.

As discussed later in this preamble, DHS received comments suggesting that the interim rule made the LEA endorsement mandatory because it was “primary” evidence. Commenters also thought the LEA endorsement created an imbalance between the needs of law enforcement and the rights of victims.

DHS amends the regulations in this rule to discontinue giving the two types of evidence different and unequal weight. *See* new 8 CFR 214.11(d)(3). Under new 8 CFR 214.11(d)(2)(ii), USCIS will accept any credible evidence of victimization, including but not limited to an LEA endorsement or a grant of Continued Presence. Following this change, USCIS will review applications where there is no LEA endorsement or grant of Continued Presence and give equal weight to other credible evidence based on the TVPA goals of protecting victims and enhancing law enforcement’s ability to investigate and prosecute human trafficking. *See* TVPA section 102. By making the LEA endorsement just one type of evidence of victimization, DHS clarifies a misconception of the LEA role in the T nonimmigrant process. An LEA does not determine if the victim meets the “severe form of trafficking definition” under Federal law. That is a determination that is made by USCIS.

Except in instances of sex trafficking involving victims under 18 years of age, severe forms of trafficking in persons must involve both a particular means (force, fraud, or coercion) and a particular end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery) or intended particular end. *See* new 8 CFR 214.11(f)(1). The applicant must demonstrate both elements, regardless of the evidence submitted.

As noted above, if the victim has not yet actually performed labor, services or a commercial sex act, he or she must establish that the trafficker acted “for the purpose of” subjecting the victim to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery. *See* new 8 CFR 214.11(f)(1). The clearest evidence of this purpose would be that the victim did in fact perform labor, services, or commercial sex acts. In the absence of that evidence, a victim can submit any credible evidence from any reliable source that shows the purpose for which the victim was recruited, transported, harbored, provided or obtained. Examples of evidence that may be submitted to demonstrate the trafficker’s purpose include, but are not

limited to: Correspondence with the trafficker, evidence from an LEA, trial transcripts, court documents, police reports, news articles, and affidavits. *See* new 8 CFR 214.11(f)(1).

## 2. Physical Presence on Account of Trafficking in Persons

Second, an alien applying for T nonimmigrant status must demonstrate physical presence in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of trafficking. *See* INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II).

In this interim rule, DHS makes the following changes and clarifications:

- If a victim departed from the United States but the victim is allowed reentry into the United States to participate in an investigative or judicial process<sup>8</sup> associated with an act or a perpetrator of trafficking, USCIS will consider the victim to have met the physical presence requirement. New 8 CFR 214.11(g)(1)(v) and (2).

- If the trafficking occurred abroad, but the victim is allowed entry into the United States for the purpose of participating in an investigative or judicial process associated with an act or a perpetrator of trafficking, USCIS will consider the victim to have met the physical presence requirement. New 8 CFR 214.11(g)(1)(v) and (3).

- If the victim escaped a trafficker before an LEA became involved in the matter, DHS will no longer require the victim to show that he or she did not have a clear chance to leave the United States, or an “opportunity to depart.” New 8 CFR 214.11(g)(1).

- Where a victim is allowed entry into the United States to participate in

<sup>8</sup> Congress used different language in INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II), than in INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i), which specifically requires the LEA to “certify that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity.” Congress could have inserted “prosecution” in INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II), as it did in INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa), and INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i), but did not. Instead it used the broader concept of “judicial processes.” DHS does not interpret the phrase “judicial processes” as referring only to criminal investigations or prosecutions, nor will DHS require LEA “sponsorship.” For example, if DHS were to parole a victim to pursue civil remedies associated with an act or perpetrator of trafficking, *see, e.g.*, 18 U.S.C. 1595, the applicant may potentially meet this physical presence requirement. DHS does not interpret this provision to require the victim enter the United States through an LEA sponsored entry, such as Significant Public Benefit Parole, although practical use of this parole may be the most common way these applicants enter the United States.

an investigative or judicial process associated with an act or a perpetrator of trafficking, the victim must show documentation of entry through a legal means such as parole and must submit evidence that the entry is for the purpose of participation in investigative or judicial processes associated with an act or perpetrator of trafficking. New 8 CFR 214.11(g)(3). DHS discusses each change in turn below.

### a. LEA Returns a Victim to the United States

DHS received six comments suggesting that if a victim leaves the United States and then returns to the United States for an investigation or prosecution, USCIS should consider the victim to have met the physical presence requirement. DHS agrees that victims who left but who are allowed valid reentry into the United States for the purposes of an investigation or prosecution meet the physical presence requirement. Moreover, TVPRA 2008 amended section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), to include physical presence on account of the victim having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or perpetrator of trafficking. *See* TVPRA 2008 section 201(a)(1)(C). DHS codifies this change in this rule at new 8 CFR 214.11(b)(2) and 214.11(g)(1)(v).

In the 2002 interim rule, DHS presumed that individuals who have traveled outside of the United States and then returned are not here on account of trafficking in persons. To overcome this presumption, an applicant must show that his or her presence in the United States is the result of continued victimization or a new incident of a severe form of trafficking in persons. *See* 8 CFR 214.11(g)(3). DHS clarifies in this rule that the presumption does not apply when the victim who previously left the United States is allowed reentry in order for the victim to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking. *See* new 8 CFR 214.11(g)(2)(iii).

### b. Victim Who Has Been Trafficked Abroad Is Allowed Entry Into the United States

The physical presence language introduced in TVPRA 2008 broadens the physical presence requirement. It applies not only to valid reentry to the United States as discussed above, but also to initial entry to the United States to participate in investigative or judicial processes associated with trafficking.

For these types of cases, DHS has identified two primary examples where a victim may qualify for T nonimmigrant status:

- When trafficking occurred in the United States or the victim was physically present in the United States on account of trafficking, but the victim has left the United States and is allowed valid reentry into the United States for participation in investigative or judicial processes associated with trafficking; or
- When trafficking occurred outside the United States, but the victim is allowed valid entry into the United States in order to participate in investigative or judicial processes associated with trafficking.

DHS anticipates limited types of cases when trafficking occurred outside the United States that could lead to eligibility for T nonimmigrant status. One type could be when criminal activities occur outside the United States, but the relevant statutes provide for extraterritorial jurisdiction, and the activity involved would meet the Federal definition of “severe forms of trafficking in persons.” Statutes establishing extraterritorial jurisdiction generally require some nexus between the criminal activity and the United States’ interests. For example, under 18 U.S.C. 2423(c), the United States has jurisdiction to investigate and prosecute cases involving citizens or nationals who engage in illicit sexual conduct outside the United States, such as sexually abusing a minor. This offense is referred to as “sex tourism.”

Sex tourism often interplays with crimes of human trafficking. According to the Federal definition of “severe forms of trafficking in persons,” where a minor (*i.e.*, a person under the age of 18) engages in a commercial sex act, that minor meets the definition without having to show force, fraud, or coercion. See TVPA section 103(9), 22 U.S.C. 7102(9). The TVPA definition of “commercial sex act” is any sex act on account of which anything of value is given to or received by any person. TVPA section 103(4), 22 U.S.C. 7102(4). Violations of the sex tourism statute could involve commercial sex acts involving a minor. Such a minor would also meet the Federal definition of a victim of “severe forms of trafficking in persons,” and if the victim is allowed valid entry into the United States in order to participate in investigative or judicial processes associated with trafficking, the victim may qualify for T nonimmigrant status.

Even absent extraterritorial jurisdiction, there are other cases which could lead to eligibility for T nonimmigrant status when the

trafficking occurred outside the United States. DHS understands that the nature of human trafficking crimes often means that traffickers operate internationally and may commit crimes in a number of countries. If the victim is allowed valid entry into the United States in order to participate in investigative or judicial processes, the victim could potentially qualify for T nonimmigrant status. DHS notes that the victim would need to meet every eligibility requirement in order to qualify for T nonimmigrant status and DHS adjudicates every application on a case-by-case basis.

Even before the statutory expansion of the physical presence requirement, it was possible that trafficking that occurred abroad could qualify a victim for T nonimmigrant status. INA section 101(a)(15)(T)(i)(II); 8 U.S.C. 1101(a)(15)(T)(i)(II), allows victims at a port of entry to qualify, so long as they can show that their presence at the port is on account of trafficking. This means that the recruitment, harboring, transportation, provision, or obtaining of a person for a severe form of trafficking that occurs abroad and results in the person’s presence at a port of entry of the United States qualifies a victim for T nonimmigrant status. INA section 101(a)(15)(T)(i)(II); 8 U.S.C. 1101(a)(15)(T)(i)(II). DHS notes that not every instance of trafficking occurring abroad would qualify a victim for T nonimmigrant status. The victim must establish that he or she is now in the United States or at a port of entry on account of trafficking or the victim was allowed valid entry into the United States to participate in a trafficking-related investigation or a prosecution or other judicial process. If a victim of trafficking abroad makes his or her way to the United States and the reason is not related to or on account of the trafficking and the victim was not allowed valid entry to participate in an investigative or judicial process related to trafficking or a trafficker, this victim cannot meet the physical presence requirement and would not be eligible for T nonimmigrant status on account of that trafficking incident.

#### c. Removal of the “Opportunity To Depart” Requirement

DHS is also amending the former “opportunity to depart” aspect of the physical presence requirement. DHS provided in the 2002 interim rule that the general physical presence requirement can cover applicants who are currently being trafficked, were recently liberated from trafficking, or were subject to trafficking in the past. For those who escaped a trafficker before an LEA became involved, DHS

required in the 2002 interim rule that the applicant show that, evaluated in light of the applicant’s circumstances, he or she did not have a clear chance to leave the United States, or an “opportunity to depart.” 8 CFR 214.11(g)(2). This requirement was intended to ensure that the applicant’s continuing presence in the United States is directly related to the trafficking.

Most commenters on the subject of physical presence objected to USCIS requiring a victim liberated from traffickers to demonstrate that his or her continuing presence in the United States is directly related to the trafficking. Commenters also opposed the requirement that a victim who escaped the traffickers and remains in the United States must show he or she had no clear chance to leave, asserting it is burdensome, vague, and may frustrate congressional intent to protect victims.

Although DHS has tempered this requirement by looking at the opportunity to depart in light of the individual’s circumstances such as trauma, injury, and lack of resources, DHS agrees that this requirement is unnecessary and may be counterproductive. DHS therefore is removing the requirement that an applicant must show that he or she did not have a clear chance to leave (*i.e.*, “opportunity to depart”) the United States.

Notwithstanding this change, every applicant must still establish that they are physically present in the United States on account of trafficking. Section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), requires that a victim be physically present “on account of such trafficking.” Unlike the requirement of victimization, which is phrased in both the present and past tense, the physical presence requirement is only phrased in the present tense. DHS interprets this language to require a consideration of the victim’s current situation, and a consideration of whether the victim can establish that his or her current presence in the United States is on account of trafficking. A victim who is liberated from trafficking is not exempt from the statutory requirement to show that his or her presence is on account of trafficking. Applicants who have not performed labor or services, or a commercial sex act also need to demonstrate physical presence in the United States on account of trafficking.



#### d. Evidence of Physical Presence on Account of Trafficking in Persons

For those victims demonstrating physical presence on account of “the alien having been allowed entry into the United States,” DHS interprets this language to require the victim’s entry through a lawful means. *See* INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II); new 8 CFR 214.11(g)(3). The victim must provide evidence of the lawful entry. New 8 CFR 214.11(g)(3).

DHS does not interpret the phrase “judicial processes” as referring only to criminal investigations or prosecutions, nor will DHS require LEA “sponsorship.” For example, if DHS were to parole a victim to pursue civil remedies associated with an act or perpetrator of trafficking, *see, e.g.,* 18 U.S.C. 1595, the applicant may potentially meet this physical presence requirement. DHS does not interpret this provision to require the victim to enter the United States through an LEA sponsored entry, such as Significant Public Benefit Parole (SPBP).

Practically, SPBP may be the most common way these applicants enter the United States, because United States law enforcement may investigate or prosecute the trafficking crime, and law enforcement could sponsor an individual for SPBP for access to United States courts that would likely have jurisdiction over the related trafficking incidents. In these cases, the victim is in the United States on account of trafficking because DHS facilitated the victim’s entry into the United States for participation in an investigation or prosecution.

The lawful entry must be connected to the victim’s participation in an investigative or judicial process associated with an act or perpetrator of trafficking. The victim must include evidence of the lawful entry and of how he or she entered to participate in an investigative or judicial process associated with an act or perpetrator of trafficking. Evidence could include a Form I-914 Supplement B, or other evidence from an LEA to describe the victim’s participation. The victim can also provide other credible evidence, such as a personal statement, or attach supporting documentation.

When the physical presence requirement is met by the victim’s entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking, the victim must still establish his or her eligibility for all the other requirements for T nonimmigrant status. The compliance with the any

reasonable request for assistance requirement would not be met simply by the entry into the United States with the intent to assist the LEA, but by the victim actually complying with any reasonable request by an LEA or meeting an exception to the compliance requirement. The requirement to comply with any reasonable request is an ongoing requirement, meaning that applicants must continue to cooperate with the LEA from the time of their initial application through the time they apply for adjustment of status to lawful permanent resident. *See* new 8 CFR 214.11(h)(1) and (m)(2)(ii)–(iii); 8 CFR 245.23(a)(6)(i). Failure to comply with any reasonable request from the LEA can result in revocation of the T nonimmigrant status. *See* new 8 CFR 214.11(m)(2)(ii)–(iii). However, if the LEA chooses not to pursue an investigation or prosecution, that decision will not affect the applicant’s eligibility so long as the applicant complied with any reasonable LEA request.

DHS notes that victims must also meet the other eligibility requirements, including the requirement that the victim establish that she or he would suffer extreme hardship involving unusual and severe harm upon removal from the United States. 8 CFR 214.11(i). The victim must include evidence of extreme hardship following the guidelines laid out in 8 CFR 214.11(i). One example of where this requirement may be met when the victimization occurred abroad is if the traffickers abroad are now threatening the victim or the victim’s family because the victim is no longer under the trafficker’s control or because the victim is cooperating with an LEA or judicial process in the United States. DHS will make “extreme hardship” determinations in accordance with the law and DHS policy, as discussed below in this preamble.

#### 3. Compliance With Any Reasonable Request

Third, a victim is required to comply with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where an act of trafficking in persons is at least one central reason for the commission of that crime. *See* INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa); new 8 CFR 214.11(b)(3). A “reasonable request for assistance” is defined as “a reasonable request made by an LEA or prosecutor to a victim of a severe form of trafficking in persons to assist an LEA in the

investigation or prosecution of acts of trafficking in persons or the investigation of a crime where an act of trafficking in persons is at least one central reason for the commission of that crime.” 8 CFR 214.11(a).

In this rule, DHS makes the following changes and clarifications:

- Expanding the factors that DHS may consider in the totality of the circumstances test to determine the “reasonableness” of LEA requests. New 8 CFR 214.11(h)(2).
  - Clarifying that DHS will continue to use a “comparably situated crime victims” standard to determine reasonableness, rather than a “subjective trafficked persons” standard.
  - Clarifying that the proper standard to determine “reasonableness” is whether the LEA request was reasonable, not whether the victim’s refusal was unreasonable. New 8 CFR 214.11(m)(2)(ii).
  - Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons from 15 years to 18 years of age. New 8 CFR 214.11(h)(4)(ii).
  - According no special weight to an LEA endorsement and moving to an “any credible evidence” standard. New 8 CFR 214.11(h)(3).
  - In cases where the applicant is unable, due to physical or psychological trauma, to cooperate with any reasonable request by an LEA, exempting the applicant from the requirement to comply. New 8 CFR 214.11(h)(4)(i).
- DHS discusses each change in turn below.

#### a. Totality of the Circumstances Test To Determine the “Reasonableness” of LEA Requests

In the 2002 interim rule, DHS accounted for situations in which a request made to a victim was not reasonable. *See* 8 CFR 214.11(a). Under that rule, the reasonableness of a request depended on the totality of the circumstances, taking into account general law enforcement and prosecutorial practices, the nature of victimization, and the specific circumstances of the victim, including fear, severe traumatization (both mental and physical), and the age and maturity of young victims. *Id.*

In the 2002 interim rule, DHS sought specific comments on this requirement. Of the total 191 public comments received, 37 comments related to some aspect of this issue. Fifteen commenters commended DHS for adopting a totality

of the circumstances test to determine the reasonableness of an LEA request and for balancing law enforcement needs and the protection of victims. Some commenters appreciated the comprehensiveness of the totality of the circumstances test. Some commenters also provided a broad, non-exhaustive list of factors to be considered when implementing the totality of the circumstances test, including fear of retribution against family members outside the United States for whom foreign law enforcement cannot or will not provide protection. Six commenters also thought the regulations were too vague regarding how long a victim must comply with any reasonable requests for assistance. The commenters urged DHS to take into account circumstances that may delay or limit an applicant's compliance with LEA requests when determining whether an applicant meets the compliance requirement. These circumstances could include responses to trauma and psychological issues, delays necessary to ensure the safety of the applicant or the applicant's family members, delays or difficulties accessing social services, and the time it takes an applicant to build trust with law enforcement.

DHS appreciates the public's input with respect to the "reasonable requests for assistance" requirement. DHS strives to implement the aims of the TVPA while striking the proper balance between the law enforcement need to investigate and prosecute and the need to ensure that victims are not overburdened. DHS includes in this rule almost all of the commenters' suggested factors to consider when evaluating the reasonableness of an LEA request, including factors related to time. *See* new 8 CFR 214.11(h)(2). DHS will evaluate the totality of the circumstances using a broad range of factors, and is not limited by those listed in this rule. *Id.*

#### b. "Comparably-Situated Crime Victims" Standard

In the 2002 interim rule, DHS noted that it is generally reasonable for an LEA to ask a victim of a severe form of trafficking in persons similar things an LEA would ask other comparably-situated crime victims, thus articulating a "comparably-situated crime victims" standard. 67 FR 4784, at 4788. Some commenters suggested, however, that in the application of the test, DHS could go further by replacing the "comparably-situated crime victims" standard with a "subjective trafficked person" standard that would take into account the unique situation of the particular trafficking victim. DHS has determined, however,

that a "subjective trafficked persons" standard could actually be narrower than the existing "comparably-situated crime victims." 67 FR 4784, at 4788. DHS also notes that many factors of the totality of the circumstances test are unique to trafficking victims.

The definition of "severe forms of trafficking in persons" can be limiting in that elements of force, fraud, and coercion are required. By adopting a "subjective trafficked persons" standard, USCIS would be bound by the federal trafficking definition. The existing comparably-situated crime victim standard can go beyond the scope of the federal trafficking definition to victims of other crimes, such as domestic violence. Law enforcement practice regarding sensitivity to domestic violence victims is long standing and has evolved over the course of several decades. DHS did not limit who it envisioned as a comparably-situated crime victim, intending to keep the evaluation of reasonableness as broad as possible. After considering the comments, DHS has determined that it will retain the reasonableness test and use the comparably-situated crime victim standard in its application, as it properly focuses on the protection of victims and provides more flexibility than the alternative suggested by commenters.

In addition, DHS notes that when comments on the 2002 interim rule were submitted, Congress had not yet added the trauma exemption from compliance with any reasonable requests. In part because of the trauma exemption that Congress enacted following the 2002 interim rule and that is discussed later in this Preamble, DHS sees no need to amend current practice.

#### c. Proper Standard Is the Reasonableness of the LEA Request

DHS received six comments asserting that USCIS inconsistently implements the statutory requirement that a victim must comply with "any reasonable request for assistance" by sometimes trying to determine whether the victim's refusal to assist was reasonable, instead of whether the request itself was reasonable. The commenters pointed out that the 2002 interim rule discusses the victim's refusal to assist an LEA at page 4788 under, "What is the Law Enforcement Agency Endorsement?" and at 8 CFR 214.11(s)(1)(iv), *Grounds for notice of intent to revoke*.

Commenters also suggested the word "reasonable" should be added to Part D (Cooperation of Victim) checklist item of the Declaration of Law Enforcement Officer for Victim of Trafficking in

Persons, Form I-914 Supplement B. The item would then read that the applicant "has complied with reasonable requests for assistance . . . ."

DHS agrees that the statute focuses on whether an LEA request was reasonable and not whether a victim unreasonably refused to assist. (DHS notes, however, that whether a request is reasonable can depend on victim-specific factors, such as whether the victim and the victim's family are sufficiently safe or emotionally able to assist law enforcement at any given time.) DHS is amending the revocation standards to reflect the statutory language. New 8 CFR 214.11(m)(2)(iii). DHS has also revised Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B to the Application for T Nonimmigrant Status, Form I-914, to add the term "reasonable" to refer to requests made to a victim.

#### d. Minors Exempt From Compliance With Any Reasonable Request

DHS received eight comments specific to minors and the requirement for compliance with any reasonable request. These commenters proposed that DHS consider the applicant's age and any developmental delays for minors above the age of 15. Persons under the age of 15 were not required to comply with any reasonable requests for assistance under the 2002 interim rule. The commenters requested special consideration for those between the ages of 15 and 18.

Since the 2002 interim rule, the statute has been amended to exempt from this requirement children under 18 years of age and those who cannot comply with a request for assistance due to physical or psychological trauma. *See* INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 U.S.C. 1101(1)(15)(T)(i)(III)(bb) and (cc); new 8 CFR 214.11(b)(3)(i) and (ii). Therefore, there is no longer a population of 15 to 18 year olds to which this comment would apply. *See* new 8 CFR 214.11(b)(3)(i) and 214.11(h)(4)(ii).

#### e. Evidence of Compliance With Any Reasonable Request

Under the 2002 interim rule, evidence of compliance was weighed as primary evidence or secondary evidence, similar to the evidentiary requirement for victimization. *See* 8 CFR 214.11(h). An LEA endorsement was primary evidence of compliance with reasonable requests. *Id.* Secondary evidence was any credible evidence submitted to explain the nonexistence or unavailability of the primary evidence and to demonstrate

compliance with any reasonable request. *Id.*

DHS received 10 comments relating to the creation of an LEA endorsement, an optional part of an application for T nonimmigrant status. Commenters believed that in practice the endorsement is mandatory since it is primary evidence, and that it creates an imbalance between the needs of law enforcement and the rights of victims. Commenters asserted that the use of an LEA endorsement is not specifically required by statute. Furthermore, commenters believed that Congress did not intend for the LEA endorsement to be required because an endorsement was required in the U nonimmigrant statute concerning victims of certain qualifying criminal activity under INA section 214(p)(1), which includes human trafficking, but not specifically required in the T nonimmigrant statute. Commenters also suggested allowing State or local LEAs to issue an endorsement in addition to Federal LEAs.

DHS is amending the regulations with this rule to discontinue the “primary” and “secondary” evidentiary distinctions in favor of an “any credible evidence” standard. *See* new 8 CFR 214.11(d)(2)(ii) and (3). Under new 8 CFR 214.11(h)(3), USCIS will accept any credible evidence of compliance with reasonable requests, including, but not limited to, an LEA endorsement. *See* new 8 CFR 214.11(d)(3). DHS notes that under the “any credible evidence” standard, the absence of an LEA endorsement will not adversely affect an applicant who can meet the evidentiary burden with the submission of other evidence of sufficient reliability and relevance.

Even though the statute creating T nonimmigrant status did not explicitly require an LEA endorsement, DHS considers such an endorsement a useful and convenient form of evidence, among other types of credible evidence. In TVPRA 2003, Congress added section 214(o)(6) of the INA, 8 U.S.C. 1184(o)(6), which instructs USCIS to consider statements from State and local LEAs that a victim has complied with any reasonable requests for assistance in investigations or prosecutions where trafficking appears to have been involved. *See* TVPRA 2003 section 4(b)(2)(B). TVPRA 2003 also added State and local LEAs to the compliance requirement at section 101(a)(15)(T)(i)(III)(aa) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa). *Id.* TVPRA 2003 endorsed and codified the LEA endorsement process by directing USCIS to consider statements from State and local LEAs. *See* TVPRA 2003

section 4(b)(2)(B), INA section 214(o)(6), 8 U.S.C. 1184(o)(6).

In creating the T nonimmigrant status, Congress intended to provide law enforcement with a tool to combat and prosecute human trafficking and to protect victims of human trafficking. DHS intends to equally balance the goals of law enforcement and victim protection by moving to an “any credible evidence” standard. DHS has amended the evidentiary standard as described above.

This change to an “any credible evidence” standard also clarifies some misconceptions of the LEA role in the T nonimmigrant process. Signing an endorsement does not grant T nonimmigrant status, nor does it lead to automatic approval. Only USCIS can grant T nonimmigrant status after reviewing evidence and completing security and background checks. An “any credible evidence” standard may assist LEAs in better understanding their role in the T nonimmigrant process. This new standard may also result in LEAs being more likely to sign endorsements, increasing the likelihood that T nonimmigrant status will be utilized as the law enforcement tool that it is intended to be. Even in the absence of an LEA endorsement, in order to determine whether a victim meets the “compliance with any reasonable request” requirement, DHS may contact the LEA that is involved in the case at its discretion to document the victim’s compliance (or inability to comply) with reasonable requests for assistance.

Consistent with DHS’ adoption of an any credible evidence standard, this rule also expands the definition of “Law Enforcement Agency (LEA)” to allow for 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 to complete an LEA endorsement. New 8 CFR 214.11(d)(2); 8 CFR 214.11(h)(3). Federal LEAs include but are not limited to: U.S. Attorneys’ Offices, Civil Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Diplomatic Security Service (Department of State); and U.S. Department of Labor. State and local LEAs include but are not limited to: Police departments, sheriff’s offices, district attorney’s offices, human rights commissions, departments of labor, and child protective services. An agency that has the responsibility to detect severe forms of trafficking in persons may be

an LEA even if the agency does not investigate or prosecute acts of trafficking.

Further, commenters suggested that the act of filing an application for T nonimmigrant status amounts to contacting law enforcement and DHS should require no additional action. At a minimum, commenters asked USCIS to ensure that Federal LEAs issue LEA endorsements without undue delay if a prosecution does not proceed as originally charged, a prosecution moves forward for a lesser offense, or a State or local prosecution proceeds in lieu of a Federal prosecution.

Since the regulations were promulgated, INS was dissolved and its responsibilities transferred to several components of DHS. Unlike the Department of Justice (DOJ) or law enforcement components within DHS, such as ICE, USCIS has no authority to investigate or prosecute trafficking. Therefore, applying for T nonimmigrant status with USCIS is not the same as contacting an LEA to report a trafficking crime. DHS cannot assure applicants that LEAs will issue endorsements, but has clarified with this rule that a formal investigation or prosecution is not required in order for an LEA to complete an endorsement. *See* new 8 CFR 214.11(d)(3)(i). DHS has created awareness materials and training for LEAs that describe the LEA role in the process and emphasize that a formal investigation or prosecution is not required to complete an endorsement.

DHS is removing language that described how to obtain an LEA endorsement if the victim has not had contact with an LEA. *See* former 8 CFR 214.11(f)(4). That provision directed applicants to contact the DOJ hotline to file a complaint and be referred to an LEA. This level of specificity is overly-detailed for regulations and it does not provide sufficient flexibility to adapt to changes in the future. Since the publication of the 2002 regulations, DHS and many other Federal agencies and nongovernmental partners have engaged in various public education campaigns and posted information on Web sites, which are better vehicles than regulations for conveying this type of guidance.

Finally, the 2002 interim rule created a requirement that the LEA endorsement be signed by a supervising official responsible for the detection, investigation or prosecution of severe forms of trafficking in persons. *See* 8 CFR 214.11(f)(1). This interim final rule maintains that requirement at new 8 CFR 214.11(d)(3)(i). USCIS did not receive any comments on this requirement in connection with the

2002 interim rule. More recently, however, USCIS has received public feedback on a similar requirement in the U nonimmigrant status process. USCIS will consider any changes related to the U nonimmigrant status process in a separate rulemaking.

#### f. Trauma Exception

Legislation enacted since the publication of the 2002 interim rule exempts victims who cannot cooperate with an LEA request due to physical or psychological trauma from compliance with the any reasonable request requirement. *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); new 8 CFR 214.11(b)(3)(ii). DHS adds this statutory change in this rule and provides guidance on how an applicant can demonstrate the requisite trauma. New 8 CFR 214.11(h)(4)(i). DHS welcomes comments on how it should evaluate whether an applicant cannot comply with a request for cooperation from an LEA due to trauma. DHS will require that an applicant submit an affirmative statement describing the trauma, and any other credible evidence. Other supporting evidence may include a signed attestation as to the victim's physical or psychological indicators of trauma from a person qualified to make such determinations in the course of his or her job, such as a medical professional, social worker, or victim advocate, or any medical, psychological, or other records that are relevant to the trauma. *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); new 8 CFR 214.11(h)(4)(i). In order to show that the person providing the signed attestation is qualified to make such a determination in the course of his or her job, the applicant could provide a description of the person's qualifications or education or a description of the person's contact and experience with the applicant.

Although a victim's affidavit alone may suffice to satisfy the victim's evidentiary burden, USCIS encourages applicants to submit additional evidence that will assist them in establishing the trauma exception from the general requirement that they comply with any reasonable LEA request for assistance. In order to determine whether a victim meets the trauma exception, DHS may contact the LEA that is involved in the case at its discretion to document the victim's inability to assist in the law enforcement process. *See* new 8 CFR 214.11(h)(4)(i). In these trauma exception cases, the applicant is not required to have had contact with an

LEA, including reporting the trafficking. In those cases with no LEA contact, DHS will not contact an LEA because there will not be an LEA involved with the applicant's case.

Congress instructed DHS to consult with DOJ as appropriate when adjudicating the trauma exception from compliance with reasonable LEA requests. *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb). USCIS already collaborates with DOJ on certain T nonimmigrant matters and it will follow a similar process for the trauma exception. USCIS may consult with DOJ regarding the trauma exception when the underlying criminal case is being handled by DOJ.

#### 4. Extreme Hardship Involving Unusual and Severe Harm Upon Removal

The fourth and final eligibility requirement for T nonimmigrant status is that the applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States. *See* INA section 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV); new 8 CFR 214.11(b)(4). When evaluating whether removal would result in such extreme hardship, USCIS considers a number of factors and uses an "any credible evidence" standard. *See* 8 CFR 214.11(i)(3); new 8 CFR 214.11(d)(5).

In this rule, DHS clarifies two points regarding the extreme hardship requirement based on public comment:

- Minors are not exempt from the extreme hardship requirement.
- The applicant bears the burden of proof for the extreme hardship requirement.

DHS discusses these in turn below.

Nine commenters suggested a rule that minors would always suffer extreme hardship involving unusual and severe harm on removal.

Congress did not exempt minors from the extreme hardship requirement. *See* INA section 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV). In contrast, Congress did exempt minors from compliance with reasonable LEA requests. *See* INA section 101(a)(15)(T)(i)(III)(cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(cc). As noted above, Federal law also defines "severe forms of trafficking in persons" differently with respect to victims under 18 years old than with respect to victims 18 years and older. *See* 22 U.S.C. 7102(9)(A). Consistent with the different treatment of minors with regard to certain eligibility criteria in the statute, DHS will not adopt a per se rule that minors would suffer extreme hardship. USCIS, however, considers an

applicant's age, maturity, and personal circumstances (among other factors) when evaluating the extreme hardship requirement. *See* new 8 CFR 214.11(i)(2).

One commenter stated that it is unrealistic to place the burden of proof on the applicant to show extreme hardship. This comment appears to be based on a lack of general understanding of USCIS immigration benefit processing. The applicant bears the burden of proving he or she is eligible to receive any immigration benefits requested; the government is not required to prove an applicant's ineligibility. *See* INA section 291, 8 U.S.C. 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); 8 CFR 103.2(b)(1). The applicant may document his or her extreme hardship through a personal statement or other evidence. New 8 CFR 214.11(i)(3). USCIS can consider relevant country condition reports and any other public or private sources of information, when appropriate. *Id.* By allowing such a broad "any credible evidence" standard, including the applicant's own statement, USCIS is recognizing and taking into account difficulties applicants may encounter in obtaining certain documents.

#### B. Application Requirements

##### 1. Filing the Application

An applicant must submit a complete Application for T Nonimmigrant Status, Form I-914, in accordance with the form instructions. *See* new 8 CFR 214.11(d)(1). DHS is making the following changes and clarifications in this rule:

- Removing the filing deadline.
  - Amending the related forms to reflect public comments.
  - Continuing to require proof of identity and relationship for family members of minor applicants. New 8 CFR 214.11(k)(3).
  - Amending the law enforcement referral language to account for the creation of DHS. New 8 CFR 214.11(o).
- DHS discusses each of these in turn.

##### a. Filing Deadline

DHS required anyone victimized prior to October 28, 2000, to apply for T nonimmigrant status before January 31, 2003. 8 CFR 214.11(d)(4). DHS received seven comments against the adoption of this filing deadline. Commenters noted that Congress did not impose a deadline and further noted T nonimmigrant status is meant for a person who is or has been a victim of severe form of trafficking in persons. Commenters also

thought the deadline would hinder victims from coming forward and receiving protection, as well as LEA efforts to combat trafficking.

DHS acknowledges that Congress did not impose a filing deadline. At the time of the 2002 interim rule, DHS anticipated a large volume of applications for T nonimmigrant status. The deadline was intended to prevent application backlogs. T nonimmigrant application volume has not reached expected levels. To protect as many victims as possible, DHS is removing the deadline in this interim rule. As of January 18, 2017, USCIS will accept applications regardless of when the applicant was victimized.

#### b. Form-Related Changes

DHS received 11 specific comments about particular fields on the Application for T Nonimmigrant Status, Form I-914 and the Application for Family Member of T-1 Recipient, Form I-914 Supplement A. Commenters asked USCIS to change a question on victimization to allow for the past tense, remove a question on public benefits, and add a safe address for the eligible family members of an approved T-1 nonimmigrant.

USCIS has updated the Application for T Nonimmigrant Status, Form I-914, and Application for Family Member of T-1 Recipient, Form I-914 Supplement A, several times since the publication of the 2002 interim rule. The current version of the form allows victimization in the past tense. Forms I-914 and Supplement A for T nonimmigrant derivatives contain a safe address. In addition, the application no longer contains a question about public benefits. In the Paperwork Reduction Act (PRA) section of this rule, DHS requests public comments on the revised Application for T Nonimmigrant Status, Form I-914; Application for Family Member of T-1 Recipient, Form I-914 Supplement A; and Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B. 44 U.S.C. 3507. DHS is renaming the Application for Family Member of T-1 Recipient, Form I-914 Supplement A. DHS is removing the phrase "immediate family member" because, as explained in this preamble, the derivative categories have been statutorily expanded to include family members who are not traditionally thought of as "immediate family members"

Four comments suggested that USCIS should return incomplete forms to the applicant with a rejection notice and allow an applicant to re-file using the process USCIS established for VAWA

self-petitioners. USCIS is not aware of the process for VAWA self-petitioners to which the commenter is referring. Nonetheless, 8 CFR 103.2(a) requires benefit requests to be executed and filed in accordance with the form instructions and provides that a benefit request that is not executed may be rejected. Accordingly, USCIS properly returns substantially incomplete forms (including U nonimmigrant petitions and VAWA self-petitions) to the petitioner, who is instructed in the rejection notice that they may correct the deficiencies that are noted and refile their request.

#### c. Proof Required for Family Members of a Minor Applicant

One commenter also asserted that the standards for proving identity and eligibility for eligible family members of a minor principal are too burdensome and recommended approving the eligibility of family members of a minor principal regardless of the incomplete application. DHS declines to accept the commenter's proposal because all applicants for immigration benefits generally must submit all required initial evidence, and supporting documentation, with an application completed according to form instructions. 8 CFR 103.2(a). There are already allowances in regulations if original documentation to prove age and identity are not available. 8 CFR 103.2(b)(2) (permitting the submission of secondary evidence to overcome the unavailability of primary evidence, and affidavits to overcome the unavailability of both primary and secondary evidence).

In addition, many eligible family members are outside the United States and need to be processed by the Department of State (DOS) at a United States embassy or consulate in order to receive a T visa to apply for admission to the United States. These eligible family members must prove identity, age, and relationship during consular processing according to DOS standards. DHS does not believe it would be beneficial to applicants for DHS to relax the standard USCIS requires to prove identity because that may result in a situation where USCIS approves a Form I-914, but DOS will not grant a T visa for entry to the United States.

#### d. Referral to Law Enforcement and Department of Health and Human Services

One commenter also recommended that a filing from a victim under 18 years of age should trigger a proactive investigation by law enforcement and experts in child protective services.

USCIS cannot initiate this type of investigation because USCIS is not a law enforcement agency, but the 2002 interim rule contained provisions for referring cases to investigators. See 8 CFR 214.11(v). DHS is amending this language to account for the creation of DHS and will instruct USCIS officers who come into contact with a possible victim who is not already working with an LEA to refer the case to ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence, as appropriate. See new 8 CFR 214.11(o).

Furthermore, child protective services are generally under the jurisdiction of States, and USCIS cannot require States to investigate claims of crimes or abuse against children. TVPRA 2008 vested responsibility for the care and custody of unaccompanied alien children with the U.S. Department of Health and Human Services (HHS).<sup>9</sup> See TVPRA 2008 section 235(b)(1), 8 U.S.C. 1232(b)(1). Federal agencies must notify HHS upon apprehension or discovery of an unaccompanied alien child or any claim or suspicion that an individual in custody is under 18 years of age. See TVPRA 2008 section 235(b)(2), 8 U.S.C. 1232(b)(2). TVPRA 2008 also provided that federal agencies would notify HHS to facilitate the provision of public benefits to trafficking victims. Minors are eligible to receive federally funded benefits and services to the same extent as a refugee as soon as they are identified by HHS as a possible victim of trafficking, unlike adults who are eligible for public benefits only upon a grant of continued presence by DHS under 28 CFR 1100.35, a bona fide determination, or approval of T nonimmigrant status. Federal officials also must notify HHS upon discovering that a person under the age of 18 may be a victim of a severe form of trafficking in persons to facilitate provision of interim assistance to the minor victim. See TVPRA 2008 section 212(a)(2), 22 U.S.C. 7105(b)(1)(H). Upon receiving a T nonimmigrant status application from a minor, USCIS will notify HHS in order for the minor to be advised of public benefits that may be available as a minor victim of trafficking. See new 8 CFR 214.11(d)(1)(iii).

<sup>9</sup> An unaccompanied alien child is defined as one who has no lawful immigration status in the United States, has not attained 18 years of age, and has no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. 279(g)(2).

## 2. Initial Evidence

All applicants for immigration benefits generally must submit all required initial evidence, and supporting documentation, with an application completed according to form instructions. 8 CFR 103.2(a). DHS is amending what constitutes acceptable initial evidence that must accompany the application for T nonimmigrant status. *See* new 8 CFR 214.11(d)(2). DHS will allow the following initial evidence:

- A signed statement in the applicant's own words describing the victimization and cooperation with any LEA reasonable request for assistance or applicable exemptions from cooperation with such an LEA request, and any other eligibility requirements;
- Evidence that the applicant is or has been a victim of a severe form of trafficking in persons;
- Evidence that the applicant meets the physical presence requirement;
- Evidence of any one of the following:
  - The applicant has complied with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of crime where acts of trafficking are at least one central reason for the commission of that crime;
  - The applicant is under 18 years of age; or
    - The applicant is unable to cooperate with a reasonable request due to physical or psychological trauma;
  - Evidence that the applicant would suffer extreme hardship involving unusual and severe harm if removed from the United States; and
  - If the applicant is inadmissible, an Application for Advance Permission to Enter as Nonimmigrant, Form I-192, and supporting evidence to explain the inadmissibility.

As discussed above, DHS is removing the provisions requiring USCIS to weigh evidence as primary or secondary, and will accept any credible evidence to demonstrate each eligibility requirement for T nonimmigrant status. *See* new 8 CFR 214.11(d)(2)(ii). USCIS will determine the credibility and weight of evidence at its sole discretion. *See* new 8 CFR 214.11(d)(5). As is the case in all other immigration benefits, the applicant bears the burden of establishing eligibility. *Id.*

## 3. Bona Fide Determinations

Current regulations provide for USCIS to conduct an initial review of each T nonimmigrant status application package to determine if the application is a bona fide application. An application will be determined to be

bona fide if the application is complete and ready for adjudication. Among other requirements, the application must include biometrics, background checks, and prima facie evidence for each eligibility requirement. *See* 8 CFR 214.11(k). In conjunction with this pre-adjudication bona fide determination review, USCIS may grant the applicant deferred action when the application for T nonimmigrant status is bona fide, which allows the applicant to request employment authorization. *See* Memorandum from Stuart Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS, Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status (May 8, 2002).<sup>10</sup>

One commenter recommended that USCIS make a bona fide determination and grant deferred action within 90 days of the receipt of the application.

Since 2002, USCIS has received fewer applications for T nonimmigrant status than were expected. USCIS generally adjudicates the merits of T nonimmigrant applications as quickly as it can make a bona fide determination. Nevertheless, in the event of processing backlogs, DHS recognizes that a bona fide determination may offer a victim of trafficking some protection for immigration status purposes, employment authorization, and the availability of public benefits through HHS.

In reference to a 90-day deadline, USCIS cannot guarantee a bona fide determination within 90 days in every case because the bona fide determination is dependent on the unique circumstances of each case, and the completion of biometric and background checks. Typically, these checks will be completed within 90 days, but occasionally the checks will take longer than 90 days. The completion of biometric and background checks depends on several factors, such as the schedule of the applicant, the workload of the Federal Bureau of Investigation (FBI) and other factors over which USCIS does not have control. DHS will retain the current regulatory process for bona fide determinations and make no additional changes at this time. *See* new 8 CFR 214.11(e).

This commenter also asked USCIS to notify HHS of a bona fide determination so that HHS can facilitate federal public benefits available to trafficking victims, as well as amend the bona fide determination notice to include

information about the federal benefits. USCIS currently notifies HHS upon approval of an application or a bona fide determination. As discussed elsewhere in this preamble, DHS will also notify HHS in accordance with TVPRA 2008 section 212(a)(2), 22 U.S.C. 7105(b)(1)(G). *See* new 8 CFR 214.11(d)(1)(iii).

## 4. Derivative Family Members

An applicant may be permitted to apply for certain family members to receive derivative T nonimmigrant status. In this rule, DHS is making the following changes and clarifications:

- Defining terms used to refer to victims and their family members to provide clarity. New 8 CFR 214.11(a).
- Adding new derivative categories since publication of the 2002 interim rule. New 8 CFR 214.11(k)(1).

DHS will discuss each in turn.

### a. Definitions

DHS is defining “principal T nonimmigrant,” “eligible family member” and “derivative T nonimmigrant” to clarify these terms used throughout the regulations. New 8 CFR 214.11(a). Principal T nonimmigrant means the victim of trafficking who has been granted T-1 nonimmigrant status. *Id.* DHS uses the term “victim” to refer to aliens who were subject to a severe form of trafficking in persons, and who may be eligible to apply for T-1 nonimmigrant status. *Id.* Eligible family member means someone who has the relationship to a principal applicant required for derivative T nonimmigrant status. *Id.* Derivative T nonimmigrant refers to an eligible family member in the United States who has been granted T-2, T-3, T-4, T-5, or T-6 nonimmigrant derivative status or an eligible family member who has been admitted to the United States as a T-2, T-3, T-4, T-5, or T-6 nonimmigrant. *Id.*

### b. Eligibility of Certain Family Members

The law governing T nonimmigrant status was changed in 2003 to allow a principal alien under 21 years of age to apply for admission of his or her parents and unmarried siblings under 18 years of age. *See* TVPRA 2003 section 4(b)(1)(B) and (b)(2), INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). In 2008, the law was amended to allow any principal, regardless of age, to apply for derivative T nonimmigrant status for parents or unmarried siblings under 18 years of age if the family member faces a present danger of retaliation as a result of the principal's escape from the severe form of trafficking in persons or cooperation

<sup>10</sup> Available for review in the rulemaking docket for this rule (DHS Docket No. USCIS-2011-0010) at <http://www.regulations.gov>.



with law enforcement. *See* TVPRA 2008 section 201(a)(2)(D), INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III). In 2013, the derivative categories were further expanded to allow any principal, regardless of age, to apply for children (adult or minor) of the principal's derivative family members if the derivative's child (adult or minor) faces a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement. *See* VAWA 2013 section 1221, INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III). DHS is amending the T nonimmigrant status regulations accordingly in this rule. New 8 CFR 214.11(k)(1)(ii)–(iii).

There are two general categories of family members eligible for T nonimmigrant status: those whose eligibility is based on the age of the principal and those whose eligibility is based on a showing of a present danger of retaliation. *See* INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii).

Under INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I), eligible family members of a principal alien under 21 years of age are the principal's:

- Spouse,
- Child(ren),<sup>11</sup>
- Unmarried sibling(s) under 18 years of age; and/or
- Parent(s).

Under INA section 101(a)(15)(T)(ii)(II), 8 U.S.C. 1101(a)(15)(T)(ii)(II), eligible family members of a principal alien over 21 years of age are the principal's:

- Spouse, and/or
- Child(ren).

Under INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III), eligible family members whose eligibility is based on a showing of a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement (regardless of the age of the principal or, except where noted below, the age of the derivative) are the principal's:

- Parent(s) (added by TVPRA 2008),
- Unmarried sibling(s) under 18 years of age (added by TVPRA 2008),<sup>12</sup>

<sup>11</sup> See definition of child at INA section 101(b)(1), 8 U.S.C. 1101(b)(1), which includes stepchildren.

<sup>12</sup> Practically, the “parent(s)” and “unmarried sibling(s) under 18 years of age” derivative categories added by TVPRA 2008 benefit principal aliens who are over 21 years of age. This is because regardless of whether the family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of

• Child(ren) or stepchild(ren),<sup>13</sup> namely the adult or minor child of the principal alien's spouse (added by VAWA 2013),

• Grandchild(ren), namely the adult or minor child of the principal alien's child (added by VAWA 2013),

• Niece or nephew, namely the adult or minor child of the principal alien's sibling (added by VAWA 2013), and/or

• Sibling(s) (regardless of age or marital status), namely the adult or minor child of the principal alien's parent (added by VAWA 2013).<sup>14</sup>

The VAWA 2013 derivative expansion for children (adult or minor) of the principal's derivative family members if the derivative's child (adult or minor) faces a present danger of retaliation does not extend to the family members of the adult or minor child. For example, the spouse of an adult niece would not be eligible for derivative T nonimmigrant status.

The principal applicant may file an Application for Family Member of T–1 Recipient, Form I–914 Supplement A on behalf of these eligible family members, in accordance with form instructions. When relevant, and as described below, evidence that demonstrates a present danger of retaliation to the eligible family member must be included.

New 8 CFR 214.1(a)(1)(viii) classifies the principal alien and eligible derivative family members as:

trafficking or cooperation with law enforcement, the parent(s) and unmarried sibling(s) under 18 years of age of a principal who is under 21 years of age qualify for derivative T nonimmigrant status under INA section 101(a)(15)(T)(ii)(II).

<sup>13</sup> Stepchildren are eligible under the definition of child at INA section 101(b)(1). Delineating stepchildren in this list is not intended to mean stepchildren are not already eligible. DHS includes this because the new T–6 category is complex and this list is intended to aid the reader.

<sup>14</sup> Section 1221 of VAWA 2013 provided, “Section 101(a)(15)(T)(ii)(III) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)(ii)(III)) is amended by inserting ‘, or any adult or minor children of a derivative beneficiary of the alien, as’ after ‘age.’” 127 Stat. 144. The resulting statutory text in INA section 101(a)(15)(T)(ii)(III) is awkwardly worded: “any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, *as of an alien* described in subclause (I) or (II) who the Secretary . . . determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or with law enforcement” (emphasis added). DHS believes that this provision is most reasonably construed as encompassing parents of principal T–1 nonimmigrants (regardless of the T–1's age), unmarried siblings of T–1 nonimmigrants (regardless of the T–1's age), and adult and minor children of derivative T nonimmigrants described in INA section 101(a)(15)(T)(ii)(I) or (II). A contrary reading would result in the inclusion of at-risk parents and unmarried siblings under 18 of derivative T nonimmigrants but the exclusion of at-risk parents and unmarried siblings under 18 of adult principal T–1 nonimmigrants. DHS does not believe that Congress intended such a counterintuitive outcome.

- T–1 (principal alien);
- T–2 (spouse);
- T–3 (child);
- T–4 (parent);
- T–5 (unmarried sibling under 18 years of age); and/or
- T–6 (adult or minor child of a principal's derivative).

VAWA 2013 did not amend INA section 245(l), 8 U.S.C. 1255(l) to explicitly provide for adjustment of status for individuals who were granted derivative T nonimmigrant status as the children (adult or minor) of the principal's derivative family members who face a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement.<sup>15</sup> However, USCIS may adjust the status of the principal and any person admitted under INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii), as the spouse, parent, sibling or child. *See* INA section 245(l)(1), 8 U.S.C. 1255(l)(1). Even though section 245(l)(1) of the INA specifically names only the “spouse, parent, sibling or child” of the T–1 nonimmigrant, the statute is reasonably construed as allowing for the adjustment of status of any eligible derivative given its general reference to “any person admitted under section 101(a)(15)(T)(ii),” which as amended by VAWA 2013 includes the new derivative classes. The plain text, therefore, could reasonably be construed to encompass the new derivative class of children of derivative T nonimmigrants.

To conclude otherwise would be to impute to Congress, by virtue of this apparently inadvertent omission, an improbable intent to preclude the new class of derivatives from adjusting status, thwarting the very protection, family unity, and victim stabilization aims animating the expansion of derivative eligibility in the 2008 TVPRA and 2013 VAWA reauthorizations. *See, e.g., United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012) (“[W]e do not impute to Congress an intent to create a law that produces an unreasonable result.”). The practical effect of precluding adjustment of status would be to require these children of derivative T nonimmigrants to return, upon the expiration of their T nonimmigrant status, to the danger of retaliation that DHS and the LEA believed warranted their admission to the United States.

<sup>15</sup> In section 809 of VAWA 2013, however, Congress did amend section 705(c) of the CNRA to clarify that physical presence in the CNMI on, before or after November 28, 2009 will be considered physical presence in the United States for purposes of INA section 245(l).

Nothing in the greater statutory scheme or the legislative history of either law suggests that such a result was congressionally designed or that the failure to provide a conforming amendment to section 245(l)(1) was intentional or due to anything other than oversight or inadvertence.<sup>16</sup>

Thus, individuals who were granted derivative T nonimmigrant status as the children (adult or minor) of the principal's derivative family members who face a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement, may apply for adjustment of status under INA section 245(l) provided they are otherwise eligible. *See* new 8 CFR 245.23(b)(2).

#### 5. Age-Out Protection of Eligible Family Members

In some USCIS benefits, a principal alien is said to "age-out" if the alien was a certain age, generally under 21 years of age, at the time of filing, but then turns a certain age before USCIS adjudicates the application or petition. This type of age-out does not occur for principal aliens applying for T nonimmigrant status because they are protected by statute. *See* INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). However, as described in the following, DHS is addressing other types of age-out situations related to the ability of eligible family members to seek T nonimmigrant status.

In this rule, DHS makes the following changes and clarifications:

<sup>16</sup>This conclusion is bolstered by the fact that Congress similarly did not update the identical reference to "spouses, sons, daughters, siblings, or parents of such aliens [(T-1 nonimmigrants)]" in the provision establishing that the annual numerical limitation on grants of T nonimmigrant visas or status does not apply to derivative beneficiaries. INA section 214(o)(3), 8 U.S.C. 1184(o)(3); *cf.*, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489, 2495 (2015) (observing that court's "duty is to construe statutes, not isolated provisions," that the meaning of a phrase "may seem plain when viewed in isolation, [but] turns out to be untenable in light of the statute as a whole" and that "the context and structure of the [act may] compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase") (quotation marks and citation omitted); *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1045–46 (D.C. Cir. 2015) (noting that courts "must . . . avoid statutory interpretations that bring about an anomalous result when other interpretations are available") (quotation marks omitted); *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 169 (4th Cir. 2014) ("Even the plain meaning of a statute is not conclusive 'in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (alteration in original)).

- A child principal can apply for all eligible family members, including parents and unmarried siblings under 18 years of age, so long as the child was under 21 years of age when he or she filed for T-1 nonimmigrant status. New 8 CFR 214.11(k)(5)(ii).

- An unmarried sibling of a child principal need only be under 18 years of age at the time the principal files for T-1 nonimmigrant status. New 8 CFR 214.11(k)(5)(ii).

- A child derivative need only be under 21 years of age at the time the principal parent filed for T-1 nonimmigrant status. New 8 CFR 214.11(k)(5)(iii).

- Clarifying the distinction between age-out protections and marital status of a child or a sibling. New 8 CFR 214.11(k)(5)(v).

#### a. Age-Out Protection for Child Principal To Apply for Eligible Family Members

Seven commenters noted that a principal applicant under 21 years of age could turn 21 years of age before adjudication of the T nonimmigrant application, or age-out, and not be able to apply for a parent as a T-4 derivative. These commenters urged DHS to adopt the standard that if a principal applicant is under 21 years of age at the time of filing an application for T-1 nonimmigrant status, the ability to include a parent as a T-4 derivative is preserved. One commenter wrote that DHS should lock in the child's age for purposes of eligibility as of the date the child comes to the attention of law enforcement.

TVPR 2003 fixed this potential age-out problem. *See* TVPR 2003 section 4(b)(2)(B). A principal who files an application for T nonimmigrant status while under 21 years of age will continue to be treated as an alien described in INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I) (a principal alien under 21 years of age), even if the alien attains 21 years of age while the T-1 application is pending. *See* INA section 214(o)(5), 8 U.S.C. 1184(o)(5). This means that as long as a principal applicant was under 21 years of age at the time of filing for T-1 status, he or she can still file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, to include T-4 parents or T-5 unmarried siblings under 18 years of age, even if the principal applicant turns 21 years of age before the principal alien's T-1 application is adjudicated. *See* new 8 CFR 214.11(k)(5)(ii).

#### b. Age-Out Protection for Unmarried Sibling Derivative of Child Principal

Similarly, TVPR 2003 provides that an unmarried sibling of a principal T-1 applicant under 21 years of age need only be under the age of 18 at the time the principal T-1 applicant files the Application for T Nonimmigrant Status, Form I-914 for T-1 nonimmigrant status. *See* TVPR 2003 section 4(b)(1)(B), INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I); new 8 CFR 214.11(k)(5)(ii). It does not matter if the unmarried sibling turns 18 years of age before the principal applicant files an Application for Family Member of T-1 Recipient, Form I-914 Supplement A.

#### c. Age-Out Protection for Child Derivative

In addition, INA section 214(o)(4), 8 U.S.C. 1184(o)(4) was revised to provide that as long as a child T-3 derivative was under 21 years of age on the date the principal T-1 parent applied for T-1 nonimmigrant status, he or she will continue to be classified as a child and allowed entry as a derivative child. *See* TVPR 2003 section 4(b)(2)(B). This means that age at the time of classification, entry into the United States, or the date the child came to the attention of law enforcement, does not matter. Therefore, DHS has provided in this rule that for a child to be T-3 derivative, he or she must be under the age of 21 when the parent T-1 filed the Application for T Nonimmigrant Status, Form I-914 for T-1 nonimmigrant status. *See* new 8 CFR 214.11(k)(5)(iii).

#### d. Marriage of Eligible Family Members

In order to be eligible for T-3 or T-5 status, this interim rule requires a child or a sibling under the age of 18 to be unmarried:

- At the time the Application for T Nonimmigrant Status, Form I-914 for the principal is filed and adjudicated;
- At the time the Application for Family Member of T-1 Recipient, Form I-914 Supplement A for the eligible family member is filed and adjudicated; and
- At the time of admission to the United States (if an eligible family member is outside the United States). *See* new 8 CFR 214.11(k)(5)(v).

The law uses the term "children" in the derivative categories for family members. *See* INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii). The term "child" is defined as a person who is under 21 years of age and unmarried. *See* INA section 101(b)(1), 8 U.S.C. 1101(b)(1). The derivative category for siblings

clarifies that the sibling must be unmarried and under the age of 18 years. See INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii).

The age-out protections described above are linked specifically to age, but are not linked to marital status. For example, INA section 214(o)(4), 8 U.S.C. 1184(o)(4), specifies that an “unmarried alien,” who is the eligible family member of a parent and was under 21 years of age when the parent applied for T-1 status, can continue to be classified as a child if he or she turns 21 before adjudication. DHS believes that in giving a specific time frame related to age only and by using the term “unmarried alien,” Congress did not intend a similar time-of-filing standard with respect to marital status.

Similarly, Congress used the phrase “children, unmarried siblings under 18 years of age on the date on which such alien applied for status” in listing eligible family members for a principal who is under 21 years of age. See INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). Congress provided a specific time frame related to when siblings need to be under the age of 18, but does not give a time frame for marriage of either children or siblings. DHS believes that Congress intended that derivative status for T-3 children and T-5 unmarried siblings under the age of 18 should be limited to unmarried children and unmarried siblings through time of adjudication of both the principal’s and derivative’s T nonimmigrant application, as well as the admission into the United States of the family member. See new 8 CFR 214.11(k)(5)(v); *cf.*, *e.g.*, *Akhtar v. Gonzales*, 406 F.3d 399, 407–08 (6th Cir. 2005) (concluding that Congress’ provision of special age-out protections for derivative asylees but not similar protections based on marital status is reasonable and “easily withstand[s] constitutional scrutiny”).

#### e. Evidence for Eligible Family Members

The principal applicant must submit an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, for each eligible family member with all required initial evidence and supporting documentation according to form instructions. See new 8 CFR 214.11(k)(2) and (3). DHS will require the following initial and supporting evidence:

- Evidence demonstrating the relationship of the eligible family member to the principal applicant;
- If seeking T-4, T-5, or T-6 status based on present danger of retaliation to the eligible family member, evidence of this danger; and

- If the eligible family member is inadmissible, a copy of the eligible family member’s Application for Advance Permission to Enter as Nonimmigrant, Form I-192 and attachments.

As discussed above, DHS has removed the provisions weighing evidence as primary or secondary and will accept any credible evidence to demonstrate each eligibility requirement for derivative T nonimmigrant status. As is the case in all other immigration benefits, the applicant bears the burden of establishing eligibility. See 8 CFR 103.2(b). USCIS will consider any credible evidence relevant to the application for derivative T nonimmigrant status. See new 8 CFR 214.11(k)(7) and (d)(2)(ii). USCIS will exercise its sole discretion to determine what evidence is credible and the weight of such evidence. *Id.*

DHS is removing regulatory language that required demonstration of extreme hardship to an eligible family member if the eligible family member was not allowed to accompany or follow to join the T-1 principal applicant. See 8 CFR 214.11(o)(1)(ii) and (5). This was a statutory requirement that was removed by VAWA 2005. See VAWA 2005 section 801(a)(2).

The provisions under new 8 CFR 214.11(k)(6) describe how an applicant can demonstrate a present danger of retaliation to an eligible parent or unmarried sibling under the age of 18, or to a child (adult or minor) of a derivative applying for derivative T nonimmigrant status. USCIS will consider any credible evidence of a present danger of retaliation to the eligible family member. Present danger will be evaluated on a case-by-case basis. An applicant may submit a statement describing the danger the family member faces and how the danger is linked to the victim’s escape from trafficking or cooperation with law enforcement. An applicant’s statement alone, however, may not be sufficient. Other examples of evidence include, but are not limited to: a previous grant of advance parole to a family member; a signed statement from an LEA describing the danger of retaliation; trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court; documentation from their country of origin or place of residence (*e.g.* foreign government agencies, local law enforcement, social services), and affidavits from other witnesses. Regardless of whether the applicant submits a statement from an LEA, USCIS reserves the right to contact the LEA most likely to be involved in the

criminal case, if appropriate. Applicants who believe such contact could further endanger them or their family member should indicate that in a cover letter in the application for the family member’s T derivative status or otherwise contact USCIS.

#### C. Adjudication and Post-Adjudication

##### 1. Prohibitions on Use of Information

In this rule, DHS makes the following changes and clarifications relating to the disclosure and use of an applicant’s information provided to USCIS:

- Updating the regulations to account for statutory confidentiality provisions applicable to T nonimmigrants. See new 8 CFR 214.11(p)
- Confirming the legal requirement to turn over information to prosecutors. *Id.*
- Confirming the warning on the T nonimmigrant application that information an applicant provides could be used to remove the applicant.

DHS discusses each in turn.

##### a. Applicability of Confidentiality Provisions

The confidentiality provisions of section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified at 8 U.S.C. 1367, apply to applicants for T nonimmigrant status. See IIRIRA section 384, 8 U.S.C. 1367. DHS issued the 2002 interim rule before the confidentiality provisions were applicable to those seeking T nonimmigrant status. Congress extended the confidentiality provisions to T nonimmigrant applicants in VAWA 2005. See VAWA 2005 section 817. In the 2002 interim rule, DHS did include some information about disclosure of an applicant’s information. For example, DHS allowed for disclosure of information to LEAs with the authority to detect, investigate, or prosecute severe forms of trafficking in persons. See 8 CFR 214.11(e). In this rule, DHS is incorporating the confidentiality provisions provided at 8 U.S.C. 1367, as amended, and including implementing provisions similar to those provided in the DHS U nonimmigrant status regulations. See new 8 CFR 214.11(p).

DHS, however, does not see a need to include the full list of protections and exceptions, as it would essentially reiterate the language of 8 U.S.C. 1367(a)(2) and (b). By citing to the statutory confidentiality provisions, DHS is protecting applicants while also ensuring that the regulations remain up to date. DHS has issued department-wide guidance on how these confidentiality provisions are interpreted and how they will be

implemented. *See, e.g.*, Department of Homeland Security Directive 002–02 and Instruction 002–02–001, Implementation of Section 1367 Information Provisions. DHS components plan to issue further guidance specific to component operations.

T nonimmigrant applicants are protected under 8 U.S.C. 1367 in two ways. First, adverse determinations of admissibility or deportability against an applicant for T nonimmigrant status, with a limited exception for individuals convicted of certain crimes, cannot be made based on information furnished solely by the perpetrator of the acts of trafficking in persons. *See* IIRIRA section 384(a)(1)(F), 8 U.S.C. 1367(a)(1)(F). Second, the statute prohibits the use or disclosure to anyone of any information relating to the beneficiary of a pending or approved application for T nonimmigrant status except in certain limited circumstances. *See* IIRIRA section 384(a)(2), (b), 8 U.S.C. 1367(a)(2), (b). Section 1367(a)(2) allows the release of information to a sworn officer or employee of DHS, DOJ, DOS, or a bureau or agency of either of those Departments for legitimate Department, bureau, or agency purposes. *Id.* Section 1367(b) also enumerates specific exceptions to confidentiality. The statute permits, for example, disclosure of protected information, in certain limited circumstances, to law enforcement and national security officials and nongovernmental victim services providers.

This rule, at new 8 CFR 214.11(p), also essentially reflects the same restrictions on use and disclosure of information relating to applicants for and beneficiaries of T nonimmigrant status that are described in DHS' interim U nonimmigrant status regulations at 8 CFR 214.14(e). *See* New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 FR 53014, 53039 (Sept. 17, 2007). These restrictions are based on the statutory directive that DHS not "permit use by or disclosure to anyone" (other than a sworn officer or employee of DHS, DOJ, or DOS) of "any information which relates to" an applicant for or beneficiary of T or U nonimmigrant status or VAWA immigration relief, with limited exceptions (*e.g.*, law enforcement or national security purposes). *See* 8 U.S.C. 1367(a)(2), (b). The intent of the restrictions in 8 U.S.C. 1367(a) on the use and disclosure of protected information was to "ensure that abusers and perpetrators of crime cannot use the immigration system against their victims," either to silence

them or to commit further abuse. 151 Cong. Rec. E2605, E2607 (statement of Rep. John Conyers in support of VAWA 2005 amendments to 8 U.S.C. 1367).

#### b. Disclosure Required in Relation to Criminal Prosecution

In the 2002 interim rule, DHS allowed for disclosure of information to DOJ officials responsible for prosecution in all cases involving an ongoing or impending prosecution of any defendants who are or may be charged with severe forms of trafficking in persons in connection with the victimization of the applicant. *Id.* This provision complies with constitutional requirements that pertain to the government's duty to disclose information, including exculpatory evidence or impeachment material, to defendants. *See, e.g.*, U.S. Const. amends. V, VI; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

DHS received seven comments relating to the provision that allows federal authorities and defendants in criminal proceedings to review any information from an application for T nonimmigrant status. Commenters suggested that the standard for disseminating information should be that:

1. Federal authorities should have to make a request in writing for release of information;

2. Prosecutors should be prohibited from releasing information to a defendant unless the information is needed for impeachment; and

3. In the event a prosecutor determines evidence to be exculpatory, a judge should review the information and give time for victim safety planning before information will be released.

In the 2002 interim rule, DHS explained its position on timely disclosure of information, including DOJ's obligation to provide statements by witnesses and certain other documents to defendants in pending criminal proceedings. *See* 67 FR at 4789. These obligations stem from constitutional, statutory and other legal requirements pertaining to the duty to disclose exculpatory evidence or impeachment material to a criminal defendant in order to prepare a defense. *Id.* DHS appreciates the need for confidentiality and especially the desire to protect the safety of victims. However, we must balance the need to take measures to protect victims from perpetrators with the need to comply with constitutional requirements, and DHS believes that the regulations as currently drafted reflects the best way to balance these considerations. In

addition, the determination of whether constitutional or other legal obligations require disclosure in a criminal matter is a determination reserved to prosecuting attorneys. DHS therefore declines to amend its regulation regarding the dissemination of information, other than some minor edits to account for the creation of DHS and streamline the language.

#### c. Use of Information on the T Nonimmigrant Status Application

Commenters also raised concerns that the Application for T Nonimmigrant Status, Form I-914 warns that any information provided could be used to remove an unsuccessful applicant. The commenters asserted that this policy would hinder applications because victims may be reluctant to work with law enforcement if a victim thought he or she would be removed. USCIS does not have a policy to refer applicants for T nonimmigrant status for removal proceedings absent serious aggravating circumstances, such as the existence of an egregious criminal history, a threat to national security, or where the applicant is implicit in the trafficking. USCIS includes a standard warning on many applications that information within the application could lead to removal. USCIS believes it is a sound practice to warn applicants of this fact, and not including it would be unfair to applicants for whom such a warning could prove important.

#### 2. Waivers of Grounds of Inadmissibility

An applicant for T nonimmigrant status must be admissible to the United States, or otherwise obtain a waiver of any grounds of inadmissibility. In this rule, DHS is making the following changes and clarifications:

- Clarifying the waiver authority for T nonimmigrants and the public charge exemption. New 8 CFR 212.16(b).

- Changing the standard for exercising waiver authority only in "extraordinary circumstances" over criminal grounds of inadmissibility when the crime does not relate to the trafficking victimization. New 8 CFR 212.16(b)(2).

- Removing language that waiver authority should not be exercised for inadmissibility grounds that may limit the ability of the applicant to adjust status. 8 CFR 212.16(b)(3).

- Clarifying that DHS takes into account trafficking victimization when exercising waiver authority. New 8 CFR 212.16(b)(2).

- Retaining the current separate waiver application process. New 8 CFR 212.16(a).

• Clarifying the waiver process at adjustment of status.

a. Waiver Authority for T Nonimmigrants

Under INA section 212(d)(13), 8 U.S.C. 1182(d)(13), DHS has broad discretionary authority to waive grounds of inadmissibility.<sup>17</sup> DHS may waive INA section 212(a)(1) (health-related grounds), 8 U.S.C. 1182(a)(1), if DHS considers it to be in the national interest to grant a waiver. *See* INA section 212(d)(13)(B)(i), 8 U.S.C. 1182(d)(13)(B)(i). DHS may waive almost any other ground of INA section 212(a), 8 U.S.C. 1182(a), if DHS considers it to be in the national interest to grant a waiver and determines that the activities rendering the applicant inadmissible were caused by, or were incident to, the trafficking victimization. *See* INA section 212(d)(13)(B)(ii), 8 U.S.C. 1182(d)(13)(B)(ii). DHS, however, may not waive INA sections 212(a)(3) (security and related grounds), (10)(C) (international child abduction), or (10)(E) (former U.S. citizens who renounced citizenship to avoid taxation), 8 U.S.C. 1182(a)(3), (10)(C), (10)(E).

In addition, because INA section 212(a)(4) (public charge), 8 U.S.C. 1182(a)(4), does not apply to an applicant for T nonimmigrant status (but would apply at the time of adjustment of status to lawful permanent resident), *see* INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A), no waiver of that ground is necessary. TVPRA 2003 added INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A), to eliminate the public charge ground at the time the applicant seeks T nonimmigrant status. TVPRA 2003 section 4(b)(4), codified at INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A). DHS is amending the regulations as necessary in this interim rule. *See* new 8 CFR 212.16(b).

b. Criminal Grounds of Inadmissibility

DHS received 21 comments relating to different aspects of waivers of inadmissibility. Eight commenters objected to the language of 8 CFR 212.16(b)(2), stating that USCIS will exercise its discretion to waive criminal grounds of inadmissibility under INA

section 212(a)(2), 8 U.S.C. 1182(a)(2) (criminal and related grounds), only in “exceptional cases” where the criminal activity was not caused by or was not incident to the trafficking in persons. Commenters thought the language about “exceptional cases” was not statutorily required, replaced a simple exercise of discretion, and was unnecessary. In addition, commenters encouraged DHS to consider the type of crimes and the seriousness of the offenses when exercising discretion based on criminal grounds. DHS has the discretionary authority to waive the criminal grounds of inadmissibility for T nonimmigrant status applicants if the criminal activities were caused by or incident to the trafficking victimization. *See* INA section 212(d)(13)(B)(ii), 8 U.S.C. 1182(d)(13)(B)(ii). DHS implemented this provision in the 2002 interim rule and explained that it was choosing to exercise its discretion in cases where the criminal grounds of inadmissibility were not caused by or incident to trafficking, only in “exceptional cases.” *See* 67 FR 4789; 8 CFR 212.16(b)(2). In this interim rule, DHS is revising its regulations to describe how USCIS will consider the nature and seriousness of the offenses and the number of convictions in exercising its discretion. *See* new 8 CFR 212.16(b)(3). In this rule, DHS is replacing the general “exceptional cases” limitation. Instead, in cases where the applicant has a conviction for a violent or otherwise dangerous crime, DHS will allow waivers, in its discretion, in “extraordinary circumstances” only. *See* new 8 CFR 212.16(b)(3). A similar standard applies in the related U nonimmigrant status regulations at 8 CFR 212.17.<sup>18</sup>

c. Waivers Relating to Adjustment of Status

Five commenters expressed concern with the language of 8 CFR 212.16(b)(3), stating that USCIS will exercise its discretion to waive grounds of inadmissibility that would prevent or limit the applicant from adjusting to permanent resident status only in exceptional cases. Commenters objected to the connection between inadmissibility at the application phase of T nonimmigrant status with inadmissibility at the adjustment of status phase. Commenters urged DHS to take note of INA section 245(l)(2), 8 U.S.C. 1255(l)(2), which provides a waiver authority for the adjustment of

status phase that is similar to the authority contained at INA section 212(d)(13), 8 U.S.C. 1182(d)(13). Since the publication of the 2002 interim rule, DHS published a rule on adjustment of status to permanent resident for T nonimmigrants. *See* 8 CFR 245.23 and *Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status*, 73 FR 75540 (Dec. 12, 2008). The regulations at 8 CFR 245.23 clarify that any grounds of inadmissibility waived at the time USCIS grants T nonimmigrant status will be considered waived for purposes of adjustment of status under INA section 245(l) and that any grounds of inadmissibility that an applicant acquires while in T nonimmigrant status require a new waiver. In this interim rule, DHS is removing 8 CFR 212.16(b)(3), as it is no longer necessary in light of the adjustment of status regulations.

d. Waivers of Inadmissibility Grounds Related to the Trafficking Victimization

A number of commenters expressed general concerns over particular grounds of inadmissibility that relate to victimization based on trafficking in persons. DHS received two comments about waivers of inadmissibility for those with the human immunodeficiency virus (HIV), one comment about waivers of inadmissibility for those engaged in prostitution, and one comment about waivers of inadmissibility for drug users. Commenters stated that victims may become HIV positive as a result of trafficking. Commenters noted that often trafficking victims are forced to engage in prostitution by traffickers, or continue in prostitution for basic survival. Commenters also expressed concern about victims who self-medicate with illegal drugs to ease the effects of trauma and/or other psychological conditions due to the victimization they suffered. These commenters did not provide specific recommendations, beyond asking DHS to take special note of those concerns.

DHS acknowledges that victims of trafficking in persons are an especially vulnerable population, and therefore considers the special circumstances of victims when exercising its waiver authority. As of January 4, 2010, HIV infection is no longer defined as a “communicable disease of public health significance” according to HHS regulations. *See* 74 FR 56547 (Nov. 2, 2009) (effective Jan. 4, 2010). Therefore, HIV infection does not make an applicant inadmissible on health-related grounds for any immigration benefit. In addition, USCIS personnel who

<sup>17</sup> Section 212(d)(13)(B) of the INA states, in part, “[I]f the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General’s discretion, may waive the application of” various grounds of inadmissibility. 8 U.S.C. 1182(d)(13)(B) (emphasis added). The vestigial reference to the Attorney General in that sentence is clearly a drafting oversight. DHS therefore reads the provision as referring, instead, to the Secretary’s discretion.

<sup>18</sup> This approach also is consistent with DHS and DOJ practice in other immigration contexts. *See, e.g.,* 8 CFR 212.7(d) (INA section 212(h)(2) waivers); *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002) (INA section 209(c) waivers).

adjudicate applications for T nonimmigrant status and waivers of inadmissibility are trained on various aspects of the dynamics of victimization. DHS has not made any changes to the regulation as a result of these comments.

#### e. Requesting a Waiver

In the 2002 interim rule, DHS directed applicants to file the form designated by USCIS to request a waiver of inadmissibility. *See* 8 CFR 212.16(a). This form is the Application for Advance Permission to Enter as Nonimmigrant, Form I-192.<sup>19</sup> Five commenters asserted that this waiver application procedure was overly complicated and suggested a simpler procedure of providing space on the Application for T Nonimmigrant Status, Form I-914, itself for victims to explain any grounds of inadmissibility and attach evidence.

DHS is not adopting the suggestion. DHS is concerned that additional inadmissibility concerns can arise after an application for T nonimmigrant status is approved. Without a waiver of inadmissibility on a separate form, USCIS would be unable to address inadmissibility concerns other than to revisit the underlying approval itself, which could cause problems for the applicant. In addition, USCIS has developed a process with DOS for eligible family members abroad so that DOS officers are made aware of the inadmissibility grounds waived by USCIS. This process might be compromised if a separate waiver form were not used, resulting in potential delays or problems for eligible family members consular processing to apply for admission to the United States. DHS believes the Application for Advance Permission to Enter as Nonimmigrant, Form I-192 process is working well and does not need to be modified at this time; however, DHS welcomes further comments on this process.

In addition, one commenter asserted that the waiver application process at the time of adjustment was burdensome. The commenter recommended sparing victims from applying for a waiver of inadmissibility both at the time of application and the time of adjustment of status.

Since publication of the 2002 interim rule, DHS published an interim rule with request for comments on adjustment of status to lawful

permanent resident for T nonimmigrants. *See* 8 CFR 245.23 and 73 FR 75540. The regulations only require a new request for a waiver of inadmissibility at the adjustment of status phase for any new ground of inadmissibility that has arisen since the grant of T nonimmigrant status. Typically, T nonimmigrants applying for adjustment of status do not need to file a request for a new waiver of inadmissibility for inadmissibility grounds that were waived at the T nonimmigrant stage. In this interim rule, DHS is mainly addressing the T nonimmigrant application phase; DHS will consider comments and recommendations that relate to adjustment of status in a separate rulemaking.

#### 3. Decisions

At new 8 CFR 214.11(d)(8)–(10), DHS describes approval and denial procedures for applications for T nonimmigrant status. USCIS will issue written decisions to grant or deny T nonimmigrant status. If USCIS denies an application, it will provide written reasons for the denial. In any case where USCIS denies an application for T nonimmigrant status, an applicant may appeal to the USCIS Administrative Appeals Office (AAO) under established procedures in 8 CFR 103.3.

#### 4. Benefits

DHS provides for employment authorization incident to a grant of principal T nonimmigrant status. *See* 8 CFR 214.11(l)(4). One commenter pointed out that even after a bona fide determination is made, the applicant would not receive an employment authorization document (EAD) until T nonimmigrant status is granted. This commenter highlighted this fact because, even though a victim could be certified by HHS on the basis of a bona fide application, he or she would not be eligible for certain types of cash assistance and would not be accepted into the federal Matching Grant Program. This commenter recommended granting an EAD when USCIS determined that an application is bona fide. DHS is authorized to grant an EAD in connection with a bona fide determination. *See* Memorandum from Stuart Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (May 8, 2002). In its discretion, USCIS may grant deferred action to an applicant when a T nonimmigrant application is deemed bona fide, while awaiting final adjudication. *Id.* Once an application is

deemed bona fide and USCIS grants deferred action, the applicant can request employment authorization based on the grant of deferred action. *See* 8 CFR 274a.12(c)(14).

#### 5. Duration of Status

Originally, T nonimmigrant status was granted for a period of 3 years from the date of approval. *See* 8 CFR 214.11(p) (2002). Upon approval, USCIS would notify the recipient of the future expiration of his or her nonimmigrant status and of a requirement to apply for adjustment of status to permanent resident within the 90 days immediately preceding the third anniversary of the approval. *Id.* At the time of the 2002 interim rule, there was no ability to extend T nonimmigrant status. *Id.* DHS provided that an applicant who properly applied for adjustment of status would remain in T nonimmigrant status until a final decision was rendered on the application. *Id.* DHS received seven comments related to the 90 day adjustment of status application period requirement.

In 2008, DHS published an interim rule implementing adjustment of status procedures for T and U nonimmigrants. *See* 73 FR 75540. DHS amended 8 CFR 214.11(p) to incorporate VAWA 2005 legislative changes that lengthened the duration of status from 3 years to 4 years, but also limited the status to 4 years unless an applicant could qualify for an extension. *See* VAWA 2005 section 821(a), INA section 214(o)(7)(A), 8 U.S.C. 1184(o)(7)(A). DHS also removed the 90-day adjustment of status application period requirement; instead, a T nonimmigrant may apply for adjustment of status after accruing three years in valid T nonimmigrant status. *See* 8 CFR 245.23(a)(3).

#### 6. Extension of Status

Commenters on the 2002 interim rule also objected to the lack of extensions available for T nonimmigrant status. Since the publication of the 2002 interim rule, legislation allowed for extensions of T nonimmigrant status in the following circumstances:

- An LEA, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking certifies that the presence of the victim in the United States is necessary to assist in the investigation or prosecution of such activity;<sup>20</sup>

<sup>20</sup> *See* VAWA 2005 section 821(a); INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i).

<sup>19</sup> On August 29, 2011, as part of USCIS's business transformation initiative, USCIS replaced specific references to Form I-192 to read, "the form designated by USCIS." Immigration Benefits Business Transformation, Increment I, Final Rule, 76 FR 53764 (Aug. 29, 2013), at 53788.



• DHS determines that an extension is warranted due to exceptional circumstances;<sup>21</sup> or

• During the pendency of an application for adjustment of status under INA section 245(l), 8 U.S.C. 1255(l).<sup>22</sup>

INA section 214(o)(7)(B) and (C), 8 U.S.C. 1184(o)(7)(B) and (C). DHS is implementing the extension of status provisions at new 8 CFR 214.11(l).<sup>23</sup> Below, DHS discusses each extension category in turn.

#### a. Extension of Status for Law Enforcement Need

In this interim rule, DHS is implementing the discretionary extensions for law enforcement need at new 8 CFR 214.11(l)(1)(i). The T nonimmigrant bears the burden of establishing eligibility for an extension of status. *Id.* As outlined in new 8 CFR 214.11(l)(2), to request an extension, the T nonimmigrant will file an Application to Extend/Change Nonimmigrant Status, Form I-539, along with supporting evidence. The Application to Extend/Change Nonimmigrant Status should be filed before the individual's T nonimmigrant status expires.

To establish law enforcement need, supporting evidence may include a newly executed Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form 914 Supplement B, or other evidence from a law enforcement official, prosecutor, judge, or other authority who can investigate or prosecute human trafficking activity and was involved in the applicable case (*e.g.*, a letter on the agency's letterhead, emails, or faxes). *See* new 8 CFR 214.11(l)(5). The applicant must include evidence that comes directly from an LEA (as listed above). *Id.* The applicant may also submit any other credible evidence. *Id.* DHS believes this is necessary under INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i), because that section allows for an extension only if a law

enforcement official (which includes prosecutors, judges, and others with the authority to investigate or prosecute human trafficking) at the Federal, State, or local level "certifies" that the presence of the victim is necessary. The use of the word "certifies" does not allow for the substitution of evidence that does not come directly from an LEA. Applicants are not required to use Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B, to seek an extension of T nonimmigrant status.

#### b. Extension of Status for Exceptional Circumstances

In this interim rule, DHS is implementing the discretionary extensions for exceptional circumstances at new 8 CFR 214.11(l)(1)(ii). As described above, to request an extension, the T nonimmigrant will file an Application to Extend/Change Nonimmigrant Status, Form I-539, along with supporting evidence. New 8 CFR 214.11(l)(2).

An applicant may submit his or her own statement and any other credible evidence to establish exceptional circumstances for an extension of status. Such evidence could include, but is not limited to, medical records, police or court records, news articles, correspondence with an embassy or consulate, and affidavits of witnesses. *See* new 8 CFR 214.11(l)(6). An exceptional circumstance could exist when a principal T nonimmigrant's status will expire and an approved family member had not yet received a T visa from a consulate to apply for admission to the United States. In this example, without an extension, if the principal T nonimmigrant's status expires, the family member could not apply for a T visa to apply for admission to the United States. In the evidence submitted to establish exceptional circumstances in this example, the principal should explain what exceptional circumstances prevented the family member(s) from applying for admission to the United States.

Applicants should apply for an extension before the T nonimmigrant status has expired. USCIS, however, has discretion to grant an extension after T nonimmigrant status expires. *See* new 8 CFR 214.11(l)(3). The T nonimmigrant should explain in writing, in accordance with 8 CFR 214.1(c)(4), why he or she is filing the Application to Extend/Change Nonimmigrant Status, Form I-539, after the T nonimmigrant status has expired. If USCIS grants an extension of T nonimmigrant status, USCIS will issue a new Notice of Action valid from the date the previous status expired

until 1 year after approval of the extension. Once an applicant receives this new Notice of Action, he or she may then file an Application to Register Permanent Residence or Adjust Status, Form I-485, to adjust status to lawful permanent resident before the extension expires.

#### c. Extension of Status While an Application for Adjustment of Status Is Pending

In this interim rule, DHS implements a mandatory extension for those who apply for adjustment of status at new 8 CFR 214.11(l)(7), and does not require a separate application or additional supporting evidence to request an extension of status when an application for adjustment of status has been properly filed. INA section 214(o)(7)(C), 8 U.S.C. 1184(o)(7)(C), requires USCIS to grant this extension; therefore no evidentiary burden rests on the applicant.

#### 7. Waiting List

Congress has established a 5,000-person limit on the number of grants of T-1 nonimmigrant status per fiscal year (from October 1 through September 30). *See* INA section 214(o)(2)-(3), 8 U.S.C. 1184(o)(2)-(3). In the 2002 interim rule, DHS implemented a waiting list procedure in the event that the numerical limit is reached in a particular fiscal year. *See* former 8 CFR 214.11(m)(2). USCIS has not had to utilize the waiting list procedure created in the 2002 interim rule because approvals have not approached 5,000 in any given fiscal year. The 2002 interim rule provided that an applicant on the waiting list would "maintain his or her current means to prevent removal." *Id.*

DHS received three comments pointing out that DHS did not address protection from removal for those without current means. The commenters urged DHS to provide protection from removal or a legal means to stay in the United States for this population of applicants.

DHS agrees with this comment, and has determined that this provision is superfluous and confusing. DHS has therefore removed the provision, to clarify that applicants who may be placed on the waiting list for T nonimmigrant status can either maintain their "current means" to prevent removal (deferred action, parole, or stay of removal) and any employment authorization, or attain "new means." *See* new 8 CFR 214.11(j)(2).

Although DHS retains the authority to protect applicants on the waiting list from being removed, the 2002 interim

<sup>21</sup> *See* TVPRA 2008 section 201(b)(1); INA section 214(o)(7)(B)(iii), 8 U.S.C. 1184(o)(7)(B)(iii).

<sup>22</sup> *See* TVPRA 2008 section 201(b)(2); INA section 214(o)(7)(C), 8 U.S.C. 1184(o)(7)(C).

<sup>23</sup> In addition, TVPRA 2008 provided an extension of status for T nonimmigrants who were eligible for adjustment of status relief under INA section 245(l), 8 U.S.C. 1255(l), but could not obtain adjustment of status relief because DHS had not issued implementing regulations. *See* TVPRA 2008 section 201(b)(1); INA section 214(o)(7)(B)(ii), 8 U.S.C. 1184(o)(7)(B)(ii). TVPRA 2008 was enacted on December 23, 2008. DHS issued regulations on adjustment of status on December 12, 2008. *See* 73 FR 75540. Therefore, when TVPRA 2008 was enacted, regulations on adjustment of status existed. Because INA section 214(o)(7)(B)(ii), 8 U.S.C. 1184(o)(7)(B)(ii), is obsolete, DHS will not reference this language in this interim rule.

rule's implication that the applicant may not seek other means to prevent removal was problematic. DHS has existing policies, procedures, and regulations for exercising its discretion in providing parole, deferred action, or a stay of removal to individuals on a case-by-case basis. *See, e.g.*, 8 CFR 241.6 (administrative stay of removal); 8 CFR 274a.12(c)(14) (employment authorization for deferred action grantees demonstrating economic necessity); 8 CFR 212.5 (parole of aliens into the United States). DHS will consider providing temporary relief on a case by case basis to applicants on the waiting-list who are participating in law-enforcement investigations in the United States pursuant to those policies, regulations and procedures.

This change maintains the protections in the previous regulation while providing DHS and the applicant with more flexibility, particularly as to those applicants who may have no "current means" to prevent removal, and allows applicants the flexibility to seek alternate avenues of relief if their "current means" may not be sustainable or the most beneficial.

#### 8. Revocation

In the 2002 interim rule, DHS created several grounds for revocation on notice at 8 CFR 214.11(s). T nonimmigrant status could be revoked on notice if:

- The T nonimmigrant violated the requirements of T nonimmigrant status;
- The approval of the T nonimmigrant application violated 8 CFR 214.11 or involved an error in preparation, procedure, or adjudication;
- In the case of a T-2 spouse, the T-2 spouse's divorce from the T-1 principal became final;
- The LEA notifies USCIS that the principal T nonimmigrant has unreasonably refused to cooperate with the investigation or prosecution and provides USCIS with a detailed explanation in writing; or
- The LEA withdraws its endorsement or disavows the contents of the endorsement in a detailed written explanation.

#### a. Streamlining Revocation Based on Violation of the Requirements of T Nonimmigrant Status

Six commenters asserted that the ground of revocation at 8 CFR 214.11(s)(1)(i), based on a violation of the requirements of the status by the T nonimmigrant, needs clarification. Commenters suggested that the meaning is unclear because if the applicant satisfied the eligibility requirements, the status should not be revoked, unless there was an error in granting the status

(which is provided for in another ground of revocation).

DHS agrees that the ground of revocation on notice at 8 CFR 214.11(s)(1)(i) could benefit from greater clarification. The requirements of INA section 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T) generally are victimization, physical presence, compliance with any reasonable LEA request for assistance, and extreme hardship involving unusual and severe harm if the applicant is removed. If USCIS has evidence that one of these requirements was not met, it could revoke under 8 CFR 214.11(s)(1)(ii). If the violation is based on a victim not complying with reasonable requests, USCIS could revoke under 8 CFR 214.11(s)(1)(iv) or (v), based on information from an LEA or a withdrawal or disavowal of an LEA endorsement (bullets 4 and 5 above, respectively). In this interim rule, DHS is therefore removing 8 CFR 214.11(s)(1)(i). *See* new 8 CFR 214.11(m)(2). Relatedly, for clarity, DHS is incorporating a statutory citation into the "errant approval" ground of revocation (bullet 2 above). *Id.*

#### b. Revocation Based on Information Provided by Law Enforcement

Commenters were also concerned that an LEA could provide information to USCIS that a victim is no longer cooperating and this information could serve as the basis for revocation. The commenters noted that revocation could be problematic in these cases, because USCIS would have already determined the individual would face extreme hardship involving unusual and severe harm if removed.

DHS is not persuaded that there is a problem with receiving information from an LEA about a victim with T nonimmigrant status. Consistent with the goals of the TVPA, DHS must balance law enforcement needs with the protection of victims of trafficking. Law enforcement may provide USCIS with valuable probative information, and it would be illogical for USCIS to reject this information solely because it came from an LEA or because USCIS made a prior adjudication of eligibility. USCIS does not revoke automatically upon receiving this LEA information; rather, it can revoke after providing notice to the T nonimmigrant of the intent to revoke and an opportunity for the victim to respond. As new 8 CFR 214.11(m)(2) and 8 CFR 103.3 explain, USCIS will issue a notice of intent to revoke in writing, providing the applicant with an opportunity to respond, and potentially provide additional evidence to rebut the

information provided by the LEA. USCIS will accept any relevant evidence under new 8 CFR 214.11(d)(2)(ii) and (3). Evidence could include, but is not limited to, information about the mental or physical health of the applicant, including any ongoing trauma, information about the safety concerns involved for the applicant or his or her family, information about how the victim has been cooperative, information about the disposition of the case, or information about how the LEA requests were not reasonable. *Id.*

USCIS will then review all the evidence considering the totality of the circumstances, and will not revoke based solely on any one factor or piece of evidence, including the information provided by the LEA. When USCIS initially approves the T nonimmigrant status, including making the determination that the victim would face extreme hardship upon removal, USCIS also accounts for victimization and compliance with reasonable requests. If USCIS learns after approval that there are grounds sufficient for revocation under new 8 CFR 214.11(m), USCIS may exercise its discretion to revoke the T nonimmigrant status.

#### c. Revocation of Derivative Nonimmigrant Status

In this interim rule, DHS is adding a ground for automatic revocation applicable only to family members outside of the United States. DHS will revoke an approved derivative application if the family member notifies USCIS that he or she will not apply for admission into the United States. *See* new 8 CFR 214.11(m)(1). This provision closely mirrors a provision in the U nonimmigrant status regulations at 8 CFR 214.14(h)(1).

#### 9. Technical Fix for T Nonimmigrants Residing in the CNMI

Physical presence in the CNMI will be considered in determining whether an applicant for T nonimmigrant status meets the physical presence requirement. *See* INA section 101(a)(15)(T)(i)(II); 8 CFR 214.11(b)(2); *see also* INA section 101(a)(38) (defining "United States" for immigration purposes as including the CNMI).

Prior to the federalization of CNMI immigration law on November 28, 2009, victims in the CNMI had to travel to Guam or elsewhere in the United States to actually be admitted as a T nonimmigrant. *See* Title VII of the Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110-229, 122 Stat. 754 (2008) (effectively replacing the CNMI's immigration laws with the INA and other applicable U.S.

immigration laws, with few exceptions). The adjustment of status provisions for T nonimmigrants require 3 years of continuous physical presence in the United States since admission as a T nonimmigrant. See INA section 245(l)(1)(A), 8 U.S.C. 1255(l)(1)(A). An approved T nonimmigrant in the CNMI would not accrue this time in the United States for purposes of adjustment of status until on or after November 28, 2009, when the CNRA took effect, and only if he or she was actually admitted to the United States. The CNRA included a rule of construction that time in the CNMI before November 28, 2009 does not count as time in the United States (except for limited purposes). See CNRA section 705(c).

VAWA 2013 added a new exception to this rule, so that time in the CNMI, whether before or after November 28, 2009, counts as time admitted as a T nonimmigrant for establishing physical presence for purposes of adjustment of status to lawful permanent residence, so long as the applicant was granted T nonimmigrant status. See VAWA 2013, tit. viii, section 809. DHS interprets this to mean that when T nonimmigrant status was granted to an individual in the CNMI, the 3-year continuous physical presence required for adjustment of status began to run at that time, even if he or she was not actually admitted in T nonimmigrant status. See new 8 CFR 245.23(a)(3)(ii).

#### D. Filing and Biometric Services Fees

DHS received 17 comments on the interim rule regarding fees. Commenters thought application fees for T nonimmigrant status, derivative T nonimmigrant status, and waivers of inadmissibility were excessive and burdensome. Some commenters recommended eliminating or greatly reducing fees associated with applying for T nonimmigrant status, especially for minor victims.

Since the publication of the 2002 interim rule, intervening events resolved commenters' concerns. In 2007, DHS eliminated the fee to file the Application for T Nonimmigrant Status, Form I-914, and the Application for Family Member of a T-1 Recipient, Form I-914 Supplement A. See *Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule*, 72 FR 29851, at 29865 (Feb. 1, 2007). Further, USCIS may waive the fee for any request from the time of application for T nonimmigrant status until USCIS adjudicates an application for adjustment of status. See TVPRA 2008 section 201(d)(3); INA section 245(l)(7),

8 U.S.C. 1255(l)(7). DHS added this waiver authority at 8 CFR 103.7(c)(3)(xviii). See *U.S. Citizenship and Immigration Services Fee Schedule*, 75 FR 58961 (Sept. 24, 2010). Thus, an applicant may request a fee waiver for any other form associated with the application for T nonimmigrant status.

DHS will require biometric services for all applicants for T nonimmigrant status between the ages of 14 and 79. See new 8 CFR 214.11(d)(4) and 8 CFR 103.16 (providing that any individual may be required to submit biometric information if the regulations or form instructions require such information).<sup>24</sup> In addition, regarding the biometric services fee, at the time of the 2002 interim rule, DHS charged applicants for biometric services. DHS regulations now provide that no fee will be charged for biometric services for T nonimmigrant applicants. See 8 CFR 103.7(b)(1)(i)(C)(3); *U.S. Citizenship and Immigration Services Fee Schedule; Final Rule*, 75 FR 58962, 58991, 58967, 58986 (Sept. 24, 2010).

One commenter suggested that taking fingerprints as part of the application process was duplicative since many victims have already had fingerprints taken. Biometric capture is a necessary measure in any USCIS application process to ensure identity and prevent fraud. USCIS must determine the identity of the individual through biometric capture. In addition, not all victims of trafficking or all applicants for T nonimmigrant status will have had contact with law enforcement or have had fingerprints taken by law enforcement and USCIS will not have access to the applicant's fingerprints from those who do.

DHS will not amend its general biometric capture requirements as requested by the commenter. DHS, however, is removing the requirement at 8 CFR 214.11(d)(2)(ii) that applicants submit three photographs with an application for T nonimmigrant status. At the time of the 2002 interim rule, the DHS biometric process did not include taking photographs of applicants. USCIS now takes photographs when capturing biometrics, so this requirement is no longer necessary.

<sup>24</sup> Any individual may be required to submit biometric information if the regulations or form instructions require such information or if requested in accordance with 8 CFR 103.2(b)(9). DHS may collect and store for present or future use, by electronic or other means, the biometric information submitted by an individual. DHS may use this biometric information to conduct background and security checks, adjudicate immigration and naturalization benefits, and perform other functions related to administering and enforcing the immigration and naturalization laws. 8 CFR 103.16(a).

## V. Regulatory Requirements

### A. Administrative Procedure Act

As explained below, the changes made in this interim rule do not require advance notice and opportunity for public comment, because they are (1) required by various legislative revisions, (2) exempt as procedural under 5 U.S.C. 553(b)(A), (3) logical outgrowths of the 2002 interim rule, or (4) exempt from public comment under the "good cause" exception to notice-and-comment under 5 U.S.C. 553(b)(B). DHS nevertheless invites written comments on this interim rule, and will consider any timely submitted comments in preparing a final rule.

#### 1. Statutorily Required Changes

As noted elsewhere in the preamble, DHS is conforming its T nonimmigrant regulations to statutory changes that provide little agency discretion in their interpretation and promulgation. When regulations merely restate the statute they implement (*i.e.*, when the rule does not change the established legal order), the APA does not require the agency to use notice-and-comment procedures. See 5 U.S.C. 553(b)(B); *Gray Panthers Advocacy Comm. v. Sullivan*, 936 F.2d 1284, 1291 (D.C. Cir. 1991). So long as the agency does not expand the substantive reach of the statute to impose new obligations, penalties, or substantive eligibility requirements—*i.e.*, so long as the agency "merely restate[s]" the statute—notice and comment are unnecessary. See *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 65 (D.D.C. 2000). The following changes meet these criteria:

(a) Victims who leave the United States and are allowed reentry for participation in investigative or judicial processes are eligible. New 8 CFR 214.11(b)(2), (g)(1)(v), (g)(2)(iii), INA 101(a)(15)(T)(i)(II), *as amended by* TVPRA 2008 section 201(a)(1)(C). As discussed above in the preamble, section 201(a)(1)(C) of TVPRA 2008 amended section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), to include physical presence on account of the victim having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or perpetrator of trafficking. DHS codifies this change in this rule at new 8 CFR 214.11(b)(2) and 214.11(g)(1)(v), which provide, respectively, that, "the alien is physically present in the United States," and the presence requirement reaches an alien who is present, "on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes

associated with an act or perpetrator of trafficking.” This change in regulation merely codifies intervening statutory changes. Advance notice and opportunity for public comment are therefore unnecessary.

Incident to expanding the definition of presence as described above, this rule also establishes that applicants claiming entry into the United States for participation in investigative or judicial processes must document that their entry was valid and that it was for participation in investigative or judicial processes associated with trafficking. New 8 CFR 214.11(g)(3). This provision makes no changes to the established legal order, other than to reiterate the public’s statutory rights and establish procedures for adjudication. Similar to a number of other evidentiary requirements in this rule, the documentation requirement affords the public maximum flexibility in presenting their case to the agency. The change does not impose any limitation on the types of evidence that would be acceptable to show valid entry. Advance notice and opportunity for public comment are therefore unnecessary.

(b) Victims of trafficking which occurred abroad, who have been allowed entry for investigative or judicial processes, are eligible. New 8 CFR 214.11(b)(2), (g)(1)(v), (g)(3). INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i).

As noted above, DHS is revising its regulations at new 8 CFR 214.11(g)(3) to provide that the victim may be physically present in the United States on account of having been allowed initial entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking that did not occur in the United States. This change expands the scope of the regulation as required by section 201(a)(1)(C) of TVPRA 2008 to account for eligibility when the trafficking occurred abroad but the victim was allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking. Similar to the change described directly above, this change in regulation merely codifies intervening statutory changes. Advance notice and opportunity for public comment are therefore unnecessary.

(c) Exemption for victims under 18 years old from compliance with any reasonable request for assistance. INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb) and (cc); new 8 CFR 214.11(b)(3)(i), (ii).

Under the 2002 interim rule, persons under the age of 15 were not required

to comply with any reasonable request for assistance in a prosecution or investigation from an LEA. Former 8 CFR 214.11(b)(3)(ii). The statute was amended by TVPRA 2008 to exempt from this requirement children under 18 years of age. See INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb) and (cc). In this rule, DHS is codifying the intervening statutory changes without modification.<sup>25</sup> New 8 CFR 214.11(b)(3)(i) and (ii).

(d) Exemption for victims who suffer trauma from compliance with reasonable requests for assistance. INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); New 8 CFR 214.11(h)(4)(i).

INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa) requires that victims comply with any reasonable request for assistance from an LEA, but the INA exempts victims who are, “unable to cooperate with a request described in item (aa) due to physical or psychological trauma.” INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb). DHS provides in this rule that, if the applicant is unable to cooperate with a reasonable request due to physical or psychological trauma or age, an applicant who has not had contact with an LEA or who has not complied with any reasonable request may be exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution. New 8 CFR 214.11(h)(4)(i). In this rule, DHS is codifying the intervening statutory changes without modification.<sup>26</sup>

This rule also establishes general procedures for an applicant to demonstrate the trauma necessary for this exception. The victim will be required to submit evidence of the trauma by submitting an affirmative statement describing the trauma and any other credible evidence. This includes, for instance, a signed statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim’s mental state, and medical, psychological, or other records which are relevant to the trauma. *Id.* USCIS reserves the authority and discretion to contact the law enforcement agency

<sup>25</sup> USCIS has implemented this change in practice. See Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

<sup>26</sup> USCIS has implemented the trauma exception in practice. See Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

involved in the case, if appropriate. *Id.* These provisions are procedural and make no changes to the established legal order, other than to reiterate the public’s statutory rights. Although notice-and-comment requirements do not apply to this provision, DHS welcomes comments from the public on this matter.

(e) Requirement to notify HHS upon discovering that a person under the age of 18 may be a victim of trafficking. TVPRA 2008 section 212(a)(2); New 8 CFR 214.11(d)(1)(iii).

Federal agencies must notify HHS within 48 hours upon (1) apprehension or discovery of an unaccompanied alien child or (2) any claim or suspicion that an alien in custody is under 18 years of age. See TVPRA 2008 section 235(b)(2), codified at 8 U.S.C. 1232(b)(2). In addition, to facilitate the provision of public benefits to trafficking victims, federal agencies must notify HHS not later than 24 hours after discovering that a person under the age of 18 may be a victim of a severe form of trafficking in persons. See TVPRA 2008 section 212(a)(2), codified at 22 U.S.C. 7105(b)(1)(G). In this rule, DHS is codifying the statutory changes without modification; receipt of a T nonimmigrant status application from a minor will result in DHS notifying HHS. See new 8 CFR 214.11(d)(1)(iii).

(f) Expansion of family members an alien victim is permitted to apply for derivative T nonimmigrant status. INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). New 8 CFR 214.11(k)(1)(ii), (iii).

The INA allows a principal applicant under 21 years of age to apply for admission in T nonimmigrant status of his or her parents and unmarried siblings under 18 years of age. See INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). In addition, the INA allows any principal, regardless of age, to apply for parents or unmarried siblings under 18 years of age if the family member faces a present danger of retaliation as a result of the principal’s escape from the severe form of trafficking in persons or his or her cooperation with law enforcement. See INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III). Finally, any principal, regardless of age, may apply for the adult or minor children of the principal’s derivative family members if the derivative’s child faces a present danger of retaliation as a result of the principal’s escape from the severe form of trafficking or cooperation with law enforcement. See INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III).

In this rule, DHS is codifying the change made by TVPRA 2003 to expand eligibility by allowing a victim granted T-1 nonimmigrant status (principal) to apply for the admission of his or her spouse, child, and, if the principal is under 21 years of age, his or her parent, or unmarried sibling under the age of 18. New 8 CFR 214.11(k)(1)(ii). In addition, DHS is codifying the change made by TVPRA 2003 that provides that, regardless of the age of the principal, if the eligible family member faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement, the principal alien can apply for the admission of his or her parents. New 8 CFR 214.11(k)(1)(iii). Finally, DHS is codifying the change made in VAWA 2013 that permits the adult or minor children of a principal's derivative family member to be an eligible family member if he or she faces a present danger of retaliation. *Id.* DHS is codifying these statutory changes without modification; notice and comment thereon are therefore unnecessary.<sup>27</sup>

Finally, this rule includes a procedural provision at new 8 CFR 214.11(k)(3) requiring the principal applicant to demonstrate that the derivative applicant is a family member who meets one of the categories in new 8 CFR 214.11(k)(1)(ii)–(iii), *i.e.*, that the family member meets statutory eligibility requirements as a family member accompanying or following to join the principal applicant. Similar to a number of other evidentiary requirements in this rule, the documentation requirement concerning eligible family members affords the public maximum flexibility in presenting their case to the agency. DHS nonetheless invites public comment on this matter.

<sup>27</sup> USCIS implemented the statutory directive to allow a T-1 to apply for their spouse, child, and, if the principal is under 21 years of age, their parent, or unmarried sibling under the age of 18 in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004). USCIS has also implemented the change allowing the principal, regardless of his or her age, to apply for the admission of parents, unmarried siblings under the age of 18, or the adult or minor children of their derivative family members if the family member faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement was implemented by USCIS in a memorandum dated July 21, 2010. *See* Mem., USCIS, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions*; Revisions to Adjudicators Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38) (July 21, 2010).

(g) Age-out protection for child principal applicant to petition for eligible family members. INA section 214(o)(5), 8 U.S.C. 1184(o)(5). New 8 CFR 214.11(k)(5)(ii).

TVPRA 2003 section 4(b)(2)(B) revised the INA to provide that a principal who files an application for T nonimmigrant status while under 21 years of age will continue to be eligible even if the principal turns 21 while the application is pending. INA section 214(o)(5), 8 U.S.C. 1184(o)(5). DHS has revised the regulations in this rule to provide that a principal who was under 21 years of age at the time of filing for T-1 status can file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, to include T-4 parents even if the principal turns 21 years of age before the principal's T-1 application is adjudicated. *See* new 8 CFR 214.11(k)(5)(ii). DHS is codifying this statutory change without modification; notice and comment thereon are therefore unnecessary.<sup>28</sup>

(h) The unmarried sibling of a child principal need only be under 18 years of age when the child principal files for T-1 status. INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). New 8 CFR 214.11(k)(5)(ii).

TVPRA 2003 sections 4(b)(1)(B) and (b)(2) provide that a principal under 21 years of age may apply for admission of his or her parents and unmarried siblings under 18 years of age. Thus, the INA now provides that an unmarried sibling who is seeking status as a T-5 derivative of a principal T-1 applicant under 21 years of age need only be under the age of 18 at the time the principal T-1 applicant files for T-1 nonimmigrant status. INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). It does not matter if the unmarried sibling turns 18 years of age between the time the principal files his or her own application and before the principal files the application for his or her sibling. *Id.* The age of an unmarried sibling when USCIS adjudicates the T-1 application, when the unmarried sibling files the derivative application, when USCIS adjudicates the derivative application, or when the unmarried sibling is admitted to the United States does not affect eligibility. 8 CFR 214.11(k)(5)(ii). DHS is codifying this statutory change without modification; notice and

<sup>28</sup> USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

comment thereon are therefore unnecessary.<sup>29</sup>

(i) A child derivative only needs to be under 21 at the time the principal parent filed for T-1 status. INA section 214(o)(4), 8 U.S.C. 1184(o)(4); New 8 CFR 214.11(k)(5)(iii).

TVPRA 2003 section 4(b)(2)(B) revised INA section 214(o)(4), 8 U.S.C. 1184(o)(4), to provide that as long as a child derivative (T-3) was under 21 years of age on the date the principal T-1 parent applied for T-1 nonimmigrant status, he or she will continue to be classified as a child and allowed entry as a derivative child. DHS implements this statutory requirement in this rule by providing that the derivative's age at the time of classification or entry does not matter as long as the child T-3 derivative was under the age of 21 when the parent T-1 filed for T nonimmigrant status. *See* new 8 CFR 214.11(k)(5)(iii). DHS is codifying this statutory change without modification; notice and comment thereon are therefore unnecessary.<sup>30</sup>

(j) Exemption for the public charge ground of inadmissibility. INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A); New 8 CFR 212.16(b).

The INA generally prohibits DHS and immigration judges from admitting as an immigrant or granting adjustment of status to lawful permanent residence to any alien who is likely to become a public charge at any time. *See* INA section 212(a)(4), 8 U.S.C. 1182(a)(4). TVPRA 2003 section 4(b)(4), however, provided that inadmissibility as a public charge does not apply to an applicant for T nonimmigrant status. *See* INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A). DHS is amending the regulations in this interim rule and on the form to comply with the statutory requirements. *See* new 8 CFR 212.16(b). DHS is codifying these statutory provisions without modification; notice and comment thereon are therefore unnecessary.<sup>31</sup>

(k) Allowing extensions of status and the process to request them for LEA need, exceptional circumstances, and applying for adjustment of status. INA

<sup>29</sup> USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

<sup>30</sup> USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

<sup>31</sup> USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

section 214(o)(7), 8 U.S.C. 1184(o)(7); New 8 CFR 214.11(l).

VAWA 2005 section 821(a) requires DHS to allow extensions of T nonimmigrant status for law enforcement need. TVPRA 2008, section 201(b)(1), requires DHS to allow extensions of T nonimmigrant status in cases of exceptional circumstances, and TVPRA 2008 section 201(b)(2) requires extensions for T nonimmigrants who apply for adjustment of status. INA section 214(o)(7), 8 U.S.C. 1184(o)(7). DHS provides in this rule that USCIS may grant extensions of T-1 nonimmigrant status beyond 4 years from the date of approval in 1-year periods from the date the T-1 nonimmigrant status ends, if the presence of the victim in the United States is necessary to assist in the investigation or prosecution of such activity, an extension is warranted due to exceptional circumstances, or the T-1 nonimmigrant has a pending application for adjustment of status to lawful permanent resident. New 8 CFR 214.11(l)(1). DHS is codifying this statutory change without substantive modification; notice and comment thereon are therefore unnecessary.

This rule also establishes general procedures for an applicant to demonstrate that he or she has met the requirements for an extension of stay including prescribing an application and supporting evidence to establish eligibility. New 8 CFR 214.11(l)(2)–(7). The victim will be required to document his or her eligibility by submitting the form designated by USCIS with the prescribed fee in accordance with form instructions before the expiration of T-1 nonimmigrant status, including: Evidence to support why USCIS should grant the extension; evidence of law enforcement need that comes directly from a law enforcement agency, including a new LEA endorsement; evidence from a law enforcement official, prosecutor, judge, or appropriate authority; or any other credible evidence. New 8 CFR 214.11(l)(2)–(5). An applicant may demonstrate exceptional circumstances by submitting an affirmative statement or any other credible evidence, including medical records, police or court records, news articles, correspondence with an embassy or consulate, and affidavits of witnesses. New 8 CFR 214.11(l)(6). USCIS will automatically extend T nonimmigrant status when a T nonimmigrant properly files an application for adjustment of status, and a separate application for extension of T nonimmigrant status is not required. New 8 CFR 214.11(l)(7). These broad procedural provisions

make no changes to the established legal order, other than to reiterate the public's statutory rights, and to allow the applicants to exercise such rights. DHS has therefore determined it is not required to publish these procedures for public notice and comment. DHS nevertheless welcomes comments from the public on these changes.<sup>32</sup>

(l) Time of physical presence in the CNMI counts as time admitted as a T nonimmigrant for establishing physical presence required at adjustment of status. INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II); New 8 CFR 214.11(b)(2), 245.23(a)(3)(ii).

Title VIII, section 809 of VAWA 2013 provides that aliens in the CNMI are eligible for T nonimmigrant status because status in the CNMI meets the requirement for an alien to be physically present in the United States. INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II) (aliens eligible for T nonimmigrant status include those who are “physically present in the . . . [CNMI] . . . on account of such trafficking”). This means that under the statute, when T nonimmigrant status was granted for someone in the CNMI, the 3-year continuous physical presence required for adjustment of status began to toll at that time, even if he or she was not actually admitted in T nonimmigrant status. DHS provides in this rule that if the individual was granted T nonimmigrant status under 8 CFR 214.11, such individual's physical presence in the CNMI before, on, or after November 28, 2009, including physical presence subsequent to the grant of T nonimmigrant status, is considered as equivalent to presence in the United States pursuant to an admission in T nonimmigrant status. New 8 CFR 245.23(a)(3)(ii). DHS is codifying this statutory directive without substantive modification; notice and comment thereon are therefore unnecessary.

(m) The definition of sex trafficking includes patronizing or soliciting of a person for the purpose of a commercial sex act. *See* INA 101(a)(15)(T)(i)(I), 22 U.S.C. 7102.

The Justice for Victims of Trafficking Act of 2015 (JVTA), Public Law 114–22, 129 Stat 227 (May 29, 2015), expanded the definition of sex trafficking at 22 U.S.C. 7102(10) to add “patronizing or soliciting of a person for the purpose of a commercial sex act” to the list of activities constituting sex trafficking. DHS believes the terms “patronizing or

soliciting of a person for the purpose of a commercial sex act” are clear both in terms of USCIS adjudications and LEA certification and do not require clarification of their intent or meaning in regulatory text. Because DHS is codifying this statutory change without modification, notice and comment on those provisions are unnecessary. New 8 CFR 214.11(a), (f)(1).

## 2. Procedural Changes Only

Binding agency rules that do not themselves alter the substantive rights or interests of parties are exempt from the APA notice and comment requirements. 5 U.S.C. 553(b)(A); *Public Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002). Although the exception for procedural rules is to be construed narrowly, its purpose is clear: to provide agencies with flexibility to implement and modify administrative procedures efficiently, so long as such procedures do not intrude on the public's substantive rights or interests. Above, DHS notes that in revising its regulation to codify intervening statutory changes, DHS has included a number of procedural provisions that provide the public with maximum flexibility to exercise statutory rights. In addition to such provisions, DHS is also making a number of procedural changes, as described below and in the succeeding sections.

This rule includes at least one change to reflect changes to agency organization. The 2002 interim rule provided that any Service officer who receives a request for T nonimmigrant status shall be referred to the local Service office with responsibility for investigations relating to victims of severe forms of trafficking in persons for a consultation. Former 8 CFR 214.11(v). DHS provides in this rule that a USCIS employee who comes into contact with an alien believed to be a victim of a severe form of trafficking in persons should consult with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence, as appropriate. New 8 CFR 214.11(o). This change is necessary because the former INS was split into separate components responsible for the adjudication of immigration benefits and investigations and enforcement.

## 3. Logical Outgrowth

A number of the changes made in this interim rule are logical outgrowths of the 2002 rule, and made in response to the public comments on that rule. When issuing a final or interim final rule following an interim rule, an agency must maintain “a flexible and open-

<sup>32</sup>In addition, USCIS has already implemented these statutory requirements through policy guidance. *See* Mem., USCIS, *Extension of Status for T and U Nonimmigrants*; Revisions to AFM Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11–28) (Apr. 19, 2011).



minded attitude” toward comments that support changing the original interim rule. *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (quoting *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), and citing *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994)). The agency should change its original rule if the data before the agency justify the change. Substantial changes may be made so long as the interim final rule provided a clear signal to the affected public as to what changes may be made, they are in character with the original scheme, and they are a logical outgrowth of the notice provided. See *id.*; *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225 (D.C. Cir. 1994); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979).

The following changes made in this rule are logical outgrowths of the 2002 interim rule because they were suggested by commenters or they are clearly within the scope and in character with the original scheme of the interim rule. Notwithstanding the passage of time since the 2002 interim rule was published and intervening legislation that affects the T nonimmigrant visa program, comments provided, the factual circumstances surrounding the rule, and the administration of the T nonimmigrant visa program have not changed to an extent that would render the comments on the 2002 rule not germane or otherwise inapplicable. As described more fully in the section-by-section analysis above, in each case, the justification for the change is either as strong as or stronger than it was in 2002. Among these changes are the following:

(a) No need to actually perform labor or services to qualify as victim. New 8 CFR 214.11(f)(1); TVPA sections 103(9), (10), (14); 22 U.S.C. 7102(9), (10), (14).

(b) Removal of filing deadline. Former 8 CFR 214.11(d)(4).

(c) Eliminating citation to *United States v. Kozminski*, 487 U.S. 931 (1998), and otherwise clarifying the definition of “involuntary servitude” for purposes of TVPA section 103(9), 22 U.S.C. 7102(9). New 8 CFR 214.11(a).

(d) For evidence of victimization, accept LEA endorsements as any credible evidence. New 8 CFR 214.11(f)(1).

(e) Remove the requirement to show no clear chance to depart the United States. Former 8 CFR 214.11(g)(2).

(f) Provide a non-exhaustive list of factors used in the “totality of the circumstances” test to determine reasonableness of failure to cooperate

with law enforcement. New 8 CFR 214.11(h)(2).

(g) Consolidate the grounds for revocation of status for violation of requirements of T status from two into one ground. New 8 CFR 214.11(m)(2)(i).

(h) Provide for revocation of derivative nonimmigrant status if the family member will not apply for admission to the United States. New 8 CFR 214.11(m)(1).

(i) Clarify that the standard for judging a victim’s refusal to satisfy an LEA request is not whether the victim’s refusal was reasonable, but whether the LEA request was reasonable. New 8 CFR 214.11(m)(2)(iii).

(j) For evidence of compliance with an LEA request, accept any credible evidence and ascribe no special weight to the LEA endorsement. New 8 CFR 214.11(h)(3).

(k) Changing the standard for when DHS will exercise its discretionary criminal waiver authority with respect to crimes that do not involve a link to the victimization; whereas the former standard allowed for discretionary waiver in “exceptional cases” only, the new standard allows for discretionary waiver in a broader category of cases (and in cases involving violent or dangerous crimes, only in “extraordinary circumstances”). New 8 CFR 212.16(b)(2).

(l) Revise 8 CFR 212.16(b)(3), which previously provides that USCIS would waive a ground of inadmissibility only in exceptional cases when the ground of inadmissibility would prevent or limit the ability of the applicant to adjust to permanent resident status after the conclusion of 3 years. Former 8 CFR 212.16(b)(3). DHS is replacing “exceptional cases” with the term “extraordinary circumstances.” New 8 CFR 212.16(b)(3).

(m) Remove language that applicants on the wait list would maintain current means to prevent removal, to clarify that people can maintain current means or attain new means to prevent removal, in accordance with existing practice. Former 8 CFR 214.11(m)(2); new 8 CFR 214.11(j)(2).

(n) Updating nondisclosure protections for information relating to an applicant or beneficiary of an application for T nonimmigrant status. 8 U.S.C. 1367; New 8 CFR 214.11(p)(1).

#### 4. Contrary to the Public Interest

Finally, public notice and comment is also not required when an agency for good cause finds that notice and public comment procedure are contrary to the public interest. The good cause exception is an important safety valve to be used where delay would do real

harm. *N. Am. Coal Corp. v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 854 F.2d 386, 389 (10th Cir. 1988). To the extent DHS is filling any gaps in promulgating provisions to implement the new statutory provisions, DHS has determined that delaying the effect of this rule during the period of public comment is contrary to the public interest. Congress created the T nonimmigrant classification to protect victims of human trafficking in the United States and encourage victims to fully participate in the investigation or the prosecution of the traffickers. See TVPA, sec. 102(b). Since the 2002 interim rule, Congress enacted legislation to encourage victims of human trafficking to assist law enforcement. Public Law 108–193, 117 Stat. 2875 (Dec. 19, 2003); Public Law 109–162, 119 Stat. 2960 (Jan. 5, 2006); Public Law 109–271, 120 Stat. 750 (Aug. 12, 2006); Public Law 110–457, 122 Stat. 5044 (Dec. 23, 2008), Public Law 113–4, 127 Stat. 54 (Mar. 7, 2013), and Public Law 114–22, 129 Stat. 227 (May 29, 2015). Even if DHS has some remaining discretion in their execution, each of the specific changes made in the underlying law were intended to reduce the number of people who will be exposed to the dangers associated with human trafficking.

It is contrary to the public interest to delay the changes made by this rule to provide for pre-promulgation public comment. For example, adult or minor children of the principal’s derivative family members who face a present danger of retaliation as a result of the victim’s escape from a severe form of trafficking or cooperation with law enforcement may now qualify for adjustment of status after expiration of their T nonimmigrant derivative status. Without this change taking effect immediately, family members of victims who can get nonimmigrant status would not be able to adjust status to that of a lawful permanent resident and could be required to depart the United States after their nonimmigrant status runs out. This would expose them to danger from traffickers in their home country as a result of the principal’s cooperation with law enforcement. In order to be eligible to adjust status, the family member must continue to hold status at the time of the application. 8 CFR 245.23(b)(2). If this provision is delayed, there is a risk the T–6 derivative status period will expire and the family member will not be able to adjust status, as his or her time in T–6 status will have ended.

USCIS does not have another source of authority to preserve the eligibility of the T–6 status of the family member to

adjust status in lieu of implementing this provision immediately. In addition to potential harm to family members and reduced incentive for principals to participate in the T nonimmigrant visa program, delaying this change would also harm law enforcement's ability to leverage the knowledge and experience of family members themselves. Family members coming to the United States from abroad may have knowledge of the actions of the trafficker that even the victim cooperating with the LEA may not know. DHS has seen situations where the assistance of the family members has greatly furthered the investigation. DHS has decided to avoid these harms by not delaying this change for a period of public notice and comment.

#### *B. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. As a result, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *C. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States companies to compete with foreign-based companies in domestic and export markets.

#### *D. Executive Orders 12866 and 13563*

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS considers this to be a "significant regulatory action," although not an

economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

#### 1. Summary

With this interim rule, DHS incorporates in its regulations several statutory provisions associated with the T nonimmigrant status that have been passed since 2002. All statutory changes made before VAWA 2013 have already been implemented by DHS, and codifying these changes in the DHS regulations will result in no additional quantitative costs or benefits to impacted stakeholders nor the Federal government in administering the T nonimmigrant status program. Ensuring that DHS regulations are consistent with applicable legislation will provide qualitative benefits. Additionally, with the enactment of VAWA 2013, the following legislative changes were made to the statute and later implemented into DHS policy: (a) Expanding the derivative categories of family members that are eligible for derivative T nonimmigrant status; and (b) providing a technical fix to clarify that physical presence in the CNMI while in T nonimmigrant status will count as continuous presence in the United States for purposes of adjustment of status. DHS will assess the impact of the statutory provisions that will be codified into regulation in this interim rule. In addition, DHS is making several discretionary changes that will: (1) Clarify DHS policy in adjudicating T nonimmigrant applications; (2) eliminate a redundant requirement to include three passport-style photographs with applications; and, (3) make the T nonimmigrant status more accessible to victims of severe forms of trafficking in persons and their eligible family members. DHS estimates the statutory and discretionary changes made in this interim rule will result in the following impacts:

- A per application opportunity cost of time of \$33.92 for the T-1 nonimmigrant principal alien to complete and submit the Application for Family Member of T-1 Recipient, Form I-914 Supplement A, in order to apply for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the victim's escape from a severe form of trafficking and/or cooperation with law enforcement.<sup>33</sup> The cost is due

<sup>33</sup> There is no filing fee for the Form I-914 and its supplements. The opportunity cost of time refers to the estimated cost associated with the time it

to the VAWA 2013 statutory change that permits eligible children of the principal's derivative relatives to be admitted under the T-6 classification. DHS has no basis to project the population of children of derivative family members that may be eligible for the new T-6 nonimmigrant classification. Like current T nonimmigrant derivative classifications, the new T-6 visa classification is not subject to a statutory cap.

- An individual total cost of \$89.70 for aliens who become eligible to apply for principal T-1 nonimmigrant status due to the discretionary change that removes the filing deadline for aliens trafficked before October 28, 2000. The total cost includes the opportunity cost associated with pulling together supporting evidence and filing the Application for T Nonimmigrant Status, Form I-914, and the time and travel costs associated with submitting biometrics. If the applicant includes the Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS has no way of predicting how many victims physically present in the United States may now be eligible for T-1 nonimmigrant status as a result of removing the filing deadline. Those that are newly eligible for T-1 nonimmigrant status as a result of removing the date restriction will still be subject to the statutory cap of 5,000 T-1 nonimmigrant visas allotted per fiscal year.

- An individual total cost of \$89.70 for victims trafficked abroad that will now become eligible to apply for T nonimmigrant status due to the discretionary change that expands DHS's interpretation of the physical presence requirement. As previously described, the total cost includes both the opportunity of time cost and estimated travel cost incurred with filing Form I-914 and submitting biometrics. If the applicant includes the Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS is unable to project the size of this new eligible population, but note that all victims newly eligible for T-1 nonimmigrant status due to this change are still subject to the statutory cap of

takes for an individual to complete and file the Form I-914 and its supplements.

5,000 T-1 nonimmigrant visas allotted per fiscal year.

Based on recent filing volumes, DHS estimates total cost savings of \$56,130 for T nonimmigrant applicants and their eligible family members as a result of the discretionary change that eliminates the requirement to submit three passport-style photographs with their T nonimmigrant applications. In addition, the interim rule will provide various qualitative benefits for victims of trafficking, their eligible family members, and law enforcement agencies investigating trafficking incidents. These qualitative benefits result from making the T nonimmigrant classification more accessible, reducing some burden involved in applying for this status in certain cases, and clarifying the process by which DHS adjudicates and administers the T nonimmigrant benefit.

2. Background

Congress created the T nonimmigrant status in the TVPA of 2000. The TVPA provides various means to combat trafficking in persons, including tools for LEAs to effectively investigate and prosecute perpetrators of trafficking in persons. The TVPA also provides protection to victims of trafficking through immigration relief and access to federal public benefits. DHS published an interim final rule on January 31, 2002 implementing the T nonimmigrant status and the provisions put forth by the TVPA 2000.<sup>34</sup> The 2002 interim final rule established the eligibility criteria, application process, evidentiary standards, and benefits associated with obtaining T nonimmigrant status.

T nonimmigrant status is available to victims of severe forms of trafficking in persons who comply with any reasonable request for assistance from LEAs in investigating and prosecuting

the perpetrators of these crimes. T nonimmigrant status provides temporary immigration benefits (nonimmigrant status and employment authorization) and a pathway to permanent resident status, provided that established criteria are met. Additionally, if a victim obtains T nonimmigrant status then certain eligible family members may also apply to obtain T nonimmigrant status.<sup>35</sup>

Table 1 provides the number of T nonimmigrant application receipts, approvals, and denials for principal victims and derivative family members for fiscal year 2005 through fiscal year 2015. Although the maximum annual number of T nonimmigrant visas that may be granted is 5,000 for T-1 principal aliens per fiscal year, this maximum number has never been reached and is not projected to be reached in the foreseeable future under current practice.<sup>36</sup>

TABLE 1—USCIS PROCESSING STATISTICS FOR FORM I-914<sup>37</sup>

| FY   | Victims (T-1) |          |        | Family of victims (T-2,3,4,5) |          |        | I-914 Totals |          |        |
|------|---------------|----------|--------|-------------------------------|----------|--------|--------------|----------|--------|
|      | Receipts      | Approved | Denied | Receipts                      | Approved | Denied | Receipts     | Approved | Denied |
| 2005 | 379           | 113      | 321    | 34                            | 73       | 21     | 413          | 186      | 342    |
| 2006 | 384           | 212      | 127    | 19                            | 95       | 45     | 403          | 307      | 172    |
| 2007 | 269           | 287      | 106    | 24                            | 257      | 64     | 293          | 544      | 170    |
| 2008 | 408           | 243      | 78     | 118                           | 228      | 40     | 526          | 471      | 118    |
| 2009 | 475           | 313      | 77     | 235                           | 273      | 54     | 710          | 586      | 131    |
| 2010 | 574           | 447      | 138    | 463                           | 349      | 105    | 1,037        | 796      | 243    |
| 2011 | 967           | 557      | 223    | 795                           | 722      | 137    | 1,762        | 1,279    | 360    |
| 2012 | 885           | 674      | 194    | 795                           | 758      | 117    | 1,680        | 1,432    | 311    |
| 2013 | 799           | 848      | 104    | 1,021                         | 975      | 91     | 1,820        | 1,823    | 195    |
| 2014 | 944           | 613      | 153    | 925                           | 788      | 105    | 1,869        | 1,401    | 258    |
| 2015 | 1,062         | 610      | 294    | 1,162                         | 694      | 192    | 2,224        | 1,304    | 486    |

From the publication of the interim final rule in 2002 through 2016, Congress passed various statutes amending the original TVPA 2000. These include: The Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), and the Violence Against Women

Reauthorization Act of 2013 (VAWA 2013). After the passage of each of the statutes, as noted in section I.A.1 of this preamble, USCIS issued policy and guidance memorandum to both implement the provisions of the Acts and to ensure compliance with the legal requirements of the Acts.<sup>38</sup>

This interim final rule codifies DHS policy and guidance from these statutes into the Code of Federal Regulations (CFR). The statutory changes from TVPRA 2003, TVPRA 2008, and VAWA

2005 are reflected in Table 2, below. Codifying existing USCIS policy and guidance ensures that the regulations are consistent with the applicable legislation, and that the general public has access to these policies through the CFR without locating and reviewing multiple policy memoranda. DHS provides the impact of these provisions in Table 2 assuming a pre-statutory baseline per OMB Circular A-4 requirements.

<sup>34</sup> See 67 FR 4784.

<sup>35</sup> The current T nonimmigrant categories are: T-1 (principal alien), T-2 (spouse), T-3 (child), T-4 (parent), and T-5 (unmarried sibling under 18 years of age). This interim rule creates a new T nonimmigrant category, T-6 (adult or minor child of a principal's derivative).

<sup>36</sup> There is no statutory cap for grants of T nonimmigrant derivative status or visas.

<sup>37</sup> Approved and denied volumes may not sum to the receipts in a given fiscal year because the processing and final decision for T nonimmigrant

status applications may overlap fiscal years. USCIS records indicate that processing an application for T nonimmigrant status requires an estimated 6 to 9 months. Data source for the table: Performance Analysis System (PAS), USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch (DARB).

<sup>38</sup> See Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004); see also Mem., USCIS, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status*

*and Adjustment of Status Provisions; Revisions to AFM Chapters 23.5 and 39 (AFM Update AD10-38)* (July 21, 2010); Mem., USCIS, *Extension of Status for T and U Nonimmigrants; Revisions to AFM Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-28)* (Apr. 19, 2011); Mem., USCIS, *New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands; Revisions to Chapters 23.5 and Chapter 39.2 (AFM Update AD14-05)* (Apr. 15, 2015).

TABLE 2—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF TVPRA 2003, TVPRA 2008 AND VAWA 2005 STATUTORY CHANGES CODIFIED BY THIS INTERIM RULE

| Provision  | Current policy  | Expected cost of the interim rule   | Expected benefit of the interim rule  |
|--|---|---|---|
| Expanding the definition and discussion of LEA (added by VAWA 2005).   | LEA includes State and local law enforcement agencies.  | None .....  | Provides clarity and consistency in DHS practice with DHS regulations will lead to a qualitative benefit providing transparency to both the victims of trafficking and USCIS adjudicators.  |
| Removing the requirement that eligible family members must face extreme hardship if the family member is not admitted to the United States or was removed from the United States (removed by VAWA 2005).         | Family members may be eligible for T nonimmigrant status without having to show extreme hardship.   | No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A. However, DHS reiterates that this is a voluntary provision.                       | Provides a broader definition of an eligible family member and may increase the number of eligible family members.  |
| Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons (added by TVPRA 2003).              | The provision increased the minimum age requirement from 15 years to 18 years of age.   | None .....  | Provides a benefit by acknowledging the significance of an applicant's maturity in understanding the importance of participating with an LEA.   |
| Exempting T nonimmigrant applicants from the public charge ground of inadmissibility (added by TVPRA 2003).  | DHS may grant T nonimmigrant status to applicants even if they are likely to become a public charge.  | No additional costs, other than the opportunity cost of time to file Form I-914 and if necessary Supplement B.  | Victims who are likely to become a public charge are able to apply for T nonimmigrant status and receive the benefits associated with that status.  |
| Exemptions to an applicant's requirement, to comply with any reasonable request by an LEA (added by TVPRA 2008).   | Applicants are exempt from the requirement to comply with any reasonable request by an LEA in cases where the applicant is unable to comply, due to physical or psychological trauma.   | None .....  | Provides a benefit by acknowledging the significance of an applicant's mental capacity in understanding the importance of participating with an LEA.  |
| Limiting duration of T nonimmigrant status but providing extensions for LEA need, for exceptional circumstances, and for the pendency of an application for adjustment of status (VAWA 2005 and TVPRA 2008).     | Extends the duration of T nonimmigrant status from 3 years to 4 years, but limits the status to 4 years unless an applicant can qualify for an extension.   | None .....  | Provides T nonimmigrants status for an additional year with the possibility of extension.   |
| Expanding the regulatory definition of physical presence on account of trafficking (added by TVPRA 2008).  | DHS will consider victims as having met the physical presence requirement if they were allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator trafficking for purposes of eligibility for T nonimmigrant classification.                         | None .....  | Provides a broader definition of physical presence on account of trafficking and may increase the number of eligible applicants.  |
| Allowing principal applicants under 21 years of age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years and parents as eligible derivative family members (added by TVPRA 2003). | Unmarried siblings under 18 years of age and parents of the principal applicant may now be eligible for T nonimmigrant status under the T-4 and T-5 derivative category, if the principal applicant is under age 21.  | No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A on behalf of the principal's unmarried siblings under 18 years of age and parents. | Provides a broader definition of eligible family member and may increase the number of eligible family members.   |
| Providing age-out protection for child principal applicants to apply for eligible family members (added by TVPRA 2003).  | A principal applicant who was under 21 years of age at the time of filing the Form I-914 can file Form I-914 Supplement A on behalf of eligible family members, including parents and unmarried siblings under age 18, even if the principal alien turns 21 years of age before the principal T-1 application is adjudicated. | None .....  | Provides a qualitative benefit by removing an age-out restriction, allowing principal applicants to apply for parents and unmarried siblings under age 18, even if the principal applicant turns 21 years of age before the T-1 application is adjudicated. |

TABLE 2—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF TVPRA 2003, TVPRA 2008 AND VAWA 2005 STATUTORY CHANGES CODIFIED BY THIS INTERIM RULE—Continued

| Provision  | Current policy   | Expected cost of the interim rule   | Expected benefit of the interim rule  |
|--|--|---|---|
| Providing age-out protection for child derivatives (added by TVPRA 2003).  | An unmarried child of the principal who was under age 21 on the date the principal applied for T-1 nonimmigrant status may continue to qualify as an eligible family member, even if he or she reaches age 21 while the T-1 application is pending.  | None .....  | Provides a qualitative benefit by removing an age-out restriction, allowing a principal applicant parent to apply for a child as a derivative beneficiary, even if the child reaches age 21 while the principal's T-1 application is pending.   |
| Allowing principal applicants of any age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years of age and parents as eligible family members if the family member faces a present danger of retaliation as a result of the principal applicant's escape from a severe form of trafficking or cooperation with law enforcement (added by TVPRA 2008). | Allows any principal applicant, regardless of age, to apply for derivative T nonimmigrant status for parents or unmarried siblings under 18 years of age if they face a present danger of retaliation.   | No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A, on behalf of the derivative's unmarried siblings under 18 years of age and parents.                                     | If eligible, unmarried siblings under 18 years of age and parents of principal applicants may qualify for T-4 and T-5 nonimmigrant status, and obtain the immigration benefits that accompany that status. In addition, LEAs may benefit if more victims come forward to report trafficking crimes. |
| Care and custody of unaccompanied children with the HHS (added by TVPRA 2008).   | Federal agencies must notify HHS upon apprehension or discovery of an unaccompanied child or any claim or suspicion that an individual in custody is under 18 years of age. Minors are eligible to receive federally funded benefits and services as soon as they are identified by HHS as a possible victim of trafficking. | DHS may have some additional administrative costs associated with informing HHS of unaccompanied children. As a result, HHS may have some additional costs in providing benefits and services to the affected minors. | Provides a qualitative benefit by enabling the health and well-being of a minor victimized by trafficking. These victims also obtain federally funded benefits and services.  |

3. Changes Implemented in This Interim Rule

This regulatory evaluation will provide a more in-depth analysis of the costs and benefits of the two statutory provisions added by VAWA 2013 and implemented in this interim rule. In addition, this analysis will address the impacts of several new discretionary provisions DHS is making in this interim rule.

a. Statutory Provisions

The legislative changes to the T nonimmigrant statutes added by VAWA 2013 and addressed in this analysis include:

- Allowing principal applicants of any age to apply for derivative T nonimmigrant status for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the applicant's escape from a severe form of trafficking or cooperation with law enforcement. See INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III); new 8 CFR 214.11(k)(1)(iii). Harmonizing with current allowances for T derivatives, this interim rule will also permit those classified as children of derivative

aliens to apply for adjustment of status under INA section 245(l), 8 U.S.C 1255(1); new 8 CFR 245.23(b)(2).

- Implementing a technical fix to clarify that presence in the Commonwealth of the Northern Mariana Islands (CNMI) after being granted T nonimmigrant status qualifies toward the requisite physical presence requirement for adjustment of status to lawful permanent resident. See section 705(c) of the Consolidated Natural Resources Act of 2008 (CNRA), Title VII, Public Law 110-229, 122 Stat. 754 (May 8, 2008); new 8 CFR 245.23(a)(3)(ii).

VAWA 2013 expanded the eligibility of family members who may qualify for T nonimmigrant derivative status. The new statutory provision allows for the eligibility of the children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the victim's escape from a severe form of trafficking or cooperation with law enforcement. Family members that may be eligible as a result of this new provision could, for example, include: Stepchild(ren) (the adult or minor child(ren) of the principal's spouse); grandchild(ren) (the adult or minor child(ren) of the principal's

child); niece(s) or nephew(s) (the adult or minor child(ren) of the principal's sibling); and/or sibling(s) (the adult or minor child of the principal's parent). The principal must file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, on behalf of these eligible family members, in accordance with form instructions. Evidence that demonstrates a present danger of retaliation to the family member must be included with the application.

New 8 CFR 214.1(a)(7) classifies the principal and eligible family members (including the new category as set forth by VAWA 2013) as:

- T-1 (principal alien);
- T-2 (spouse);
- T-3 (child);
- T-4 (parent);
- T-5 (unmarried sibling under 18 years of age); or
- T-6 (adult or minor child of a principal's derivative).

The final relevant provision in VAWA 2013 is a clarification that presence in the CNMI after being granted T nonimmigrant status qualifies toward the physical presence requirement for adjustment of status. T nonimmigrants may adjust to lawful permanent resident status after three years of continuous

physical presence in the United States. See INA section 245(l)(1)(A), 8 U.S.C. 1255(l)(1)(A). Prior to the enactment of VAWA 2013, an approved T nonimmigrant in the CNMI would not accrue time that counts toward the three year continuous physical presence requirement for adjustment of status until on or after November 28, 2009. Title VII of the CNRA extended, with limited exceptions, the U.S. immigration laws to the CNMI, effective November 28, 2009. Before the U.S. immigration laws were in effect in the CNMI, aliens in the CNMI had to travel to Guam or the United States to be admitted as a T nonimmigrant. In addition, the CNRA noted that time in the CNMI prior to the date the U.S. immigration laws became effective would not count as time in the United States. DHS data does not track aliens who were admitted as T nonimmigrants in the United States or Guam who relocated to the CNMI, and who may have been unable to adjust to lawful permanent resident because their time in the CNMI prior to November 28, 2009 did not qualify towards the three year physical presence requirement. VAWA 2013 added an exception to this provision so that time in the CNMI prior to November 28, 2009 would count as time admitted as a T nonimmigrant for establishing physical presence for purposes of adjustment of status to lawful permanent resident. See new 8 CFR 245.23(a)(3)(ii).

#### b. Discretionary Changes

In addition to the statutory provisions, DHS will make the following discretionary changes to DHS regulations governing the T nonimmigrant classification:

- Specify how USCIS will exercise its waiver authority over criminal inadmissibility grounds; new 8 CFR 212.16(b)(3).
- Discontinue the practice of weighing evidence as primary and secondary in favor of an “any credible evidence” standard; 8 CFR 214.11(f); new 8 CFR 214.11(d)(2)(ii) and (3).
- Eliminate the requirement that an applicant provide three passport-style photographs; 8 CFR 214.11(d)(2)(ii); new 8 CFR 214.11(d)(4).
- Remove the filing deadline for those victimized prior to October 28, 2000; 8 CFR 214.11(d)(4).
- Removes the restriction in the 2002 interim rule that an eligible applicant who is placed on the waiting list shall maintain his or her current means to prevent removal (deferred action, parole, or stay of removal) and any employment authorization, subject to any limits imposed on that. See former

8 CFR 214.11(m)(2). DHS will clarify that applicants on the waiting-list can either maintain their “current means” to prevent removal or find a “new means” to attain relief from removal. This will provide USCIS with avenues to exercise its discretion to provide temporary assistance to applicants on a case-by-case basis, even if applicants have no current means of protection if the statutory cap is met in a given fiscal year; new 8 CFR 214.11(j)(1).

- Remove the current regulatory “opportunity to depart” requirement for those who escaped traffickers before law enforcement became involved; former 8 CFR 214.11(g)(2).

- Provide guidance on meeting the definition of “severe forms of trafficking in persons” in those cases where an individual has not actually performed labor or services, or a commercial sex act; new 8 CFR 214.11(f)(1).

- Addresses situations where trafficking has occurred abroad, but the victim can potentially meet the physical presence eligibility requirement; new 8 CFR 214.11(g)(3).

- Update DHS regulations to reflect the creation of DHS, and to implement current standards of regulatory organization, plain language, and USCIS efforts to transform its customer service practices.

#### 4. Benefits

##### a. Benefits of Statutory Provisions

A qualitative benefit is realized by incorporating all the statutory provisions that are current USCIS practice in DHS regulations. The addition of these provisions to DHS regulations is necessary to ensure: That DHS regulations are consistent with applicable legislation; that no ambiguity exists between current DHS practices and the CFR; and that the general public is able to access DHS practices via the CFR without having to consult multiple policy memoranda.

The VAWA 2013 provision expanding the derivative eligibility to the children (adult or minor) of the principal’s derivative family members provides an additional qualitative benefit for trafficking victims and their eligible family members. Specifically, incorporating this statutory change in DHS regulations upholds the United States Federal Government’s commitment to promoting family unity in its immigration laws. Additionally, this provision may provide a qualitative benefit to law enforcement agencies that are investigating trafficking crimes, as it provides them with another method to incentivize victims to report these crimes who otherwise may not have

because they feared retaliation against their family members.

In the event the adult or minor children of the principal’s derivative family members face a present danger of retaliation as a result of the victim’s escape from a severe form of trafficking or cooperation with law enforcement, they may now qualify for T nonimmigrant derivative status. Prior to this expansion of derivative eligibility these family members may have been exposed to danger as a result of the victims coming forward to report the trafficking incidents. This may have acted as a disincentive for victims to report these crimes and to seek assistance. Expanding derivative eligibility to these family members may induce trafficking victims to seek LEA assistance and to cooperate with investigations of trafficking crimes. As a result, trafficking victims, their eligible family members, and law enforcement agencies investigating trafficking abuses all benefit from this statutory expansion.

The final VAWA 2013 provision provides a benefit by addressing a gap in immigration law as it pertains to the CNMI to clarify that presence as a T nonimmigrant in the CNMI before or after November 28, 2009 qualifies toward the three-year physical presence requirement for adjustment of status to lawful permanent residence. Prior to this technical fix, the CNRA provision stated that time in the CNMI before November 28, 2009 did not count as time in the United States. This may have been a barrier to T nonimmigrants residing in the CNMI who wished to adjust status but whose time in the CNMI prior to this date did not qualify toward the three year physical presence requirement. With the enactment of VAWA 2013, time spent as a T nonimmigrant in the CNMI before November 28, 2009 counts toward the physical presence requirement for adjustment of status to lawful permanent residence.

DHS is unable to determine how many T nonimmigrants may have been unable to adjust to permanent residence status as a result of the prior CNRA provision. Those in the CNMI had to travel to Guam or other parts of the United States to be admitted as a T nonimmigrant prior to the replacement of the immigration laws of the CNMI with those of the United States under the CNRA. DHS data does not track individuals who were admitted as T nonimmigrants in the United States (including Guam) who relocated to the CNMI, and who may have been unable to adjust to lawful permanent resident because their time in the CNMI prior to November 28, 2009 did not qualify



towards the three-year physical presence requirement. DHS believes this to have been a rare occurrence, however, and therefore anticipates that any additional population adjusting status solely as a result of this change will be small, if any.

#### b. Benefits of Discretionary Changes

DHS will eliminate the current requirement that three passport-style photographs be submitted with T nonimmigrant applications. This is a requirement for both principal alien victims and their eligible family members. Enhancements in USCIS operations as it pertains to collecting biometrics make the requirement to submit these photographs redundant. T nonimmigrant applicants have their photographs taken when they visit an application support center (ASC) to submit biometrics. The photographs taken at the ASC replaces the current requirement to submit three passport-style photographs with T nonimmigrant applications. DHS, in our ongoing efforts to review our regulations and reduce unnecessary and/or redundant burdens, is eliminating the requirement to submit these photographs, resulting in quantitative savings for applicants. According to the findings of Department of State (DOS), a passport-style photograph has an average cost of \$10.00.<sup>39</sup> Therefore, each T nonimmigrant status applicant would save an estimated \$30.00, the cost of three photographs.

This \$30.00 savings would benefit all future T nonimmigrant principal and derivative applicants. As noted throughout this analysis, DHS is unable to reasonably project how future filing volumes may be affected by the statutory and discretionary changes implemented by this interim rule. In an effort, however, to calculate total cost savings to applicants by no longer having to submit three photographs DHS averaged total annual receipts for Fiscal Years 2011 through 2015. (Refer to Table 1 in this analysis to view all T nonimmigrant receipts since Fiscal Year 2005.) DHS assumes that average filing volumes for Fiscal Years 11 through 15 offer a reasonable expectation of what future receipts would be under current DHS process. DHS does not have the information to forecast populations that may result from the changes made in this interim rule. Using the average of

Fiscal Years 11 through 15 receipts, DHS estimates expects that annual receipts for T nonimmigrant status applications (both principal and derivative applicants) would be approximately 1,871.<sup>40</sup> Again, the assumed volume of 1,871 is calculated without considering any unforeseeable increases in receipts that may result from new population groups that will be eligible for T nonimmigrant status in this interim rule. Therefore, at a minimum, DHS expects the cost savings from eliminating the photograph requirement to be \$56,130.<sup>41</sup>

In addition to this quantitative benefit, the remaining discretionary changes result in qualitative benefits for victims of trafficking and their eligible family members, and also for law enforcement agencies in their efforts to combat and investigate trafficking crimes. The provision relating to the discretion of USCIS to administer its waiver authority over criminal inadmissibility grounds provides benefits by clarifying USCIS policy as it relates to USCIS waiver authority and the granting of deferred action. Additionally, removing the regulatory restrictions on methods available to protect applicants on the waiting list from removal will allow DHS the discretion to grant deferred action to applicants on the waiting list who currently have no current means to prevent removal.

Additionally, amending DHS regulations to clarify that a trafficked individual may be eligible for T nonimmigrant status even though he or she did not perform labor or services, or a commercial sex act will also provide benefits for the impacted population. This amendatory language is meant to clarify when an individual can satisfy the definition of being a victim of "severe forms of trafficking in persons," even if the victim escaped his or her traffickers prior to performing the labor, services, or commercial sex acts intended. This clarification will be a qualitative benefit to applicants who, prior to the clarification, may have experienced confusion as to whether they are eligible for T nonimmigrant status if they have not performed the services mentioned. Likewise, the clarification will provide clear guidance to DHS adjudicators in their evaluations of applications in which this might occur.

DHS is also eliminating the filing deadline for those who were victimized prior to October 28, 2000. See 8 CFR 214.11(d)(4). According to current DHS

regulations, victims of a severe form of trafficking in persons whose victimization occurred prior to this deadline must have filed a completed application for T nonimmigrant status within one year of March 4, 2002, the effective date of the 2002 interim final rule. The deadline was originally put in place because of uncertainty of how many victims may come forward to apply for T nonimmigrant benefits. The reasoning at the time was that there could be a large influx of applicants for T nonimmigrant benefits, which could have adversely impacted timely administration and adjudication of the program if no deadline were in place. This concern never materialized, however, and annual T nonimmigrant application receipts have remained well under the cap of 5,000 T-1 principal aliens. Therefore, DHS will remove the filing deadline for those victims that were trafficked before October 28, 2000. This will make the T nonimmigrant status accessible to those victimized prior to the enactment of TVPA that were unable to apply for T nonimmigrant status prior to the filing deadline. DHS is unable to estimate how many individuals may apply once the deadline is removed, although it is believed the receipts would be small given the amount of time that has passed.

The discretionary provision eliminating the requirement that victims of trafficking must show they had no clear opportunity to depart from the United States will provide another benefit to potential applicants. Currently, victims of trafficking who escaped their traffickers prior to LEA involvement in the matter must submit evidence showing they had no clear chance to leave the United States once they became free of their traffickers. Such evidence may include, but is not limited to, demonstrating the victim had limited ability to depart due to circumstances attributable to the trafficking, such as trauma, injury, lack of funds, or seizure of travel documents by the traffickers. See 8 CFR 214.11(g)(2). DHS has determined that this requirement places an unnecessary additional burden on victims of trafficking who wish to apply for T nonimmigrant status. Removing this evidentiary requirement will provide time and cost savings to the applicant by not having to procure and provide such evidence to USCIS; additionally, USCIS may realize some time savings by not having to review these documents during case adjudication. DHS did not have the necessary data to estimate the monetary value of such savings.

<sup>39</sup> DOS estimates an average cost of \$10 per passport photo in the PRA Supporting Statement found under OMB control number 1450-0004. A copy of the Supporting Statement is found on [Reginfo.gov](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001) at: [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201102-1405-001](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001) (see question #13 of the Supporting Statement).

<sup>40</sup> Average of FY 11 through 15 total receipts.

<sup>41</sup> Calculation: 1,871 × \$30.00 = \$56,130.

DHS also will discontinue the practice of labeling evidence as primary and secondary, in favor of requiring “any credible evidence” the applicant may possess to show that they were a victim of a severe form of trafficking and have complied with any reasonable request to assist an LEA. Currently, DHS considers only the submission of the Declaration of Law Enforcement Officer, Form I-914 Supplement B, to be primary evidence. All other evidence the applicant may submit is labeled as secondary evidence. This distinction has proven to be confusing for both applicants and law enforcement officials, because the Supplement B is not a required form to be submitted by applicants. Furthermore, LEAs have expressed concern that because the Supplement B is the only evidence considered by DHS to be “primary evidence,” the mere fact that an LEA completes the form may be the primary ground relied on by DHS in granting status to an applicant seeking T nonimmigrant benefits. As a result of this misinterpretation, some LEAs have been reluctant to complete a Supplement B on behalf of applicants. DHS believes removing the “primary evidence” and “secondary evidence” labels currently in place will reduce confusion for applicants and alleviate the concerns of LEAs. LEAs may then be more likely to complete the Supplement B for an applicant, which, although it would no longer have the label of “primary evidence,” would still contribute to the alien’s overall application for T nonimmigrant benefits. In turn, the victim may be more willing to cooperate if he or she feels more confident the LEA will recognize this assistance.

Lastly, DHS will amend the regulations to provide guidance on how victims may still qualify for T nonimmigrant status in instances when the trafficking occurred abroad. Though DHS anticipates there will be limited circumstances when trafficking occurred abroad that could still lead to T nonimmigrant eligibility, it has identified some instances when this might occur and discusses them in this interim rule. This expanded interpretation of the physical presence

requirement will be a benefit to any additional aliens and their eligible family members who may now become eligible for T nonimmigrant status. In addition, LEAs will benefit from having access to additional eligible populations that can provide key information and assistance to those investigating trafficking crimes. DHS is unable to project how many victims may become eligible for T nonimmigrant status as a result of this change.

## 5. Costs

### a. Costs of Statutory Provisions

The majority of the changes to DHS regulations made to incorporate statutory provisions result in no additional costs to victims of severe forms of trafficking or their eligible family members. Since the application volume for the T nonimmigrant program has never reached capacity, we expect that any additional costs to DHS in its administration of the T nonimmigrant program will be minimal. The provisions created as a result of congressional action in the years following the 2002 interim final rule and prior to the VAWA 2013 are current DHS policy and therefore no changes or amendments to current practice are necessary as a result of codifying them in DHS regulations. Likewise, the provision in VAWA 2013 clarifying that presence in the CNMI qualifies toward the requisite physical presence requirement for adjustment of status will result in no additional costs.

The VAWA 2013 provision expanding T nonimmigrant derivative status eligibility to the children (adult or minor) of the principal’s derivative family members is currently reflected in DHS policy and includes certain associated costs. In order for family members to be eligible for the new T-6 derivative categories, the T-1 principal must file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, on behalf of each of these family members, in accordance with form instructions. There is no fee to file the Form I-914 Supplement A; therefore, the associated cost to the T-1 principal is the opportunity cost of time to file the form. DHS uses the time

burden of one hour for Form I-914 Supplement A to calculate the opportunity cost associated with this provision.<sup>42</sup>

Consistent with other DHS rulemakings, we use wage rates as the mechanism to calculate opportunity or time valuation costs associated with submitting required information to USCIS in order to apply for immigration benefits. Since T-1 principals must file one Application for Immediate Family Member of T-1 Recipient, Form 914 Supplement A, on behalf of each of their eligible family members and are authorized to work when they are granted T nonimmigrant status, DHS employs the mean hourly wage rate of all occupations in the United States, \$23.23.<sup>43</sup> The mean hourly wage rate is multiplied by 1.46 to account for the full cost of employee benefits such as paid leave, insurance, and retirement, bringing the total burdened wage rate to \$33.92.<sup>44</sup> Therefore, the T-1 principal is subject to a per application opportunity cost of \$33.92 to complete and file an Application for Immediate Family Member of T-1 Recipient, Form I-914 Supplement A with USCIS.<sup>45</sup>

The opportunity cost of time for T-1 principals to file the Application for Family Member of a T-1 Recipient, Form I-914 Supplement A, as presented here are individual per application costs only; applying these costs to an entire population is not possible at this time. DHS has no way to estimate the additional population of eligible family members who may qualify for status under the new T-6 nonimmigrant derivative classification. Current statutory authority offers no comparable immigration benefits to family members of nonimmigrant aliens outside of those considered immediate relatives, such as spouses, children, parents, and in some cases siblings. Making benefits eligible to the children (adult or minor) of derivatives will be a new practice for DHS; therefore, an informed estimation of this population is not possible.

Table 3 provides a summary of the costs and benefits to the regulated population that are associated with the statutory changes as put forth by VAWA 2013.

<sup>42</sup> Currently, the PRA time burden for Application for T-1 Nonimmigrant Status, Form I-914 and Application for Immediate Family Member of T-1 Recipient, Form I-914 Supplement A are not reported separately. The current time burden is reported in aggregate as 3 hours 15 min. The information collection instrument is being revised slightly, and as part of those revisions, the time burden for each form, Form I-914 (2.25 hours) and Form I-914A (1 hour), will be reported separately.

The information collection request will be reviewed by OMB concurrent with the interim final rule.

<sup>43</sup> U.S. Department of Labor, Bureau of Labor Statistics. *May 2015 National Occupational Employment and Wage Estimates*, Mean Hourly Wage (all occupations), available at: [http://www.bls.gov/oes/current/oes\\_nat.htm#00-0000](http://www.bls.gov/oes/current/oes_nat.htm#00-0000).

<sup>44</sup> Calculation:  $\$23.23 \times 1.46 = \$33.92$ . Bureau of Labor Statistics, *Economic News Release*, Table 1.

Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, March 2016, available at: <http://www.bls.gov/news.release/ecec.t01.htm>.

<sup>45</sup>  $(\$33.92 \text{ hourly burdened wage rate}) \times (1 \text{ hour estimated time burden}) = \$33.92$ .

TABLE 3—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF VAWA 2013 STATUTORY CHANGES CODIFIED BY THIS INTERIM RULE

| Provision   | Current policy  | Expected cost of the interim rule   | Expected benefit of the interim rule  |
|---|---|---|---|
| Allowing principals to apply for derivative T nonimmigrant status for children of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the victim's escape from a severe form of trafficking or cooperation with law enforcement. | Adult or minor children of the principal's derivative family members may now be eligible for T nonimmigrant status under the new T-6 derivative category.   | T-1 principals will face an opportunity cost of \$33.92 to file Form I-914 Supplement A on behalf of the derivative's adult or minor child. | If eligible, the children of the principal's derivative relatives may qualify for T-6 nonimmigrant status, and obtain the immigration benefits that accompany that status. In addition, LEAs may benefit if more victims come forward to report trafficking crimes. |
| Implementing a clarification that presence in the Commonwealth of the Northern Mariana Islands (CNMI) after being granted T nonimmigrant status prior to November 28, 2009 qualifies toward the requisite physical presence requirement for adjustment of status.                                     | Time in the CNMI as a T nonimmigrant, whether before, on or after November 28, 2009, now counts as physical presence for purposes of establishing eligibility for adjustment of status as a T nonimmigrant to lawful permanent residence. | None .....  | Provides a benefit in that it addresses a gap in immigration law as it pertains to the CNMI and removes a provision that may have been a bar to adjustment of status to lawful permanent resident.  |

b. Costs of Discretionary Changes

Most of the discretionary changes included in the interim rule will require no additional costs to either victims of severe forms of trafficking or to DHS in its administration of T nonimmigrant status benefits. The two provisions related to USCIS's waiver authority over criminal inadmissibility grounds and its discretion to grant deferred action to those victims placed on the waiting list simply clarify current USCIS practice and do not result in changes to the process of handling and adjudicating T nonimmigrant applications. Likewise, the guidance provided in the interim rule for meeting the definition of "severe forms of trafficking in persons" where an individual has not performed labor or service, or a commercial sex act is simply a clarification of current DHS interpretation of the definition and will not result in additional costs or changes to the process of handling and the adjudication of T nonimmigrant applications. The remaining discretionary changes that result in no additional costs include:

- No longer weighing evidence as either primary or secondary in favor of an "any credible evidence" standard;
- Eliminating the requirement that applicants provide three passport-style photographs as part of his or her application;
- Discontinuing the current practice of requiring victims who escaped from traffickers prior to LEA involvement to submit evidence to show that he or she had no clear opportunity to depart from the United States; and
- Providing guidance on physical presence as it relates to eligibility for T

nonimmigrant status when the trafficking has occurred abroad.

Though these provisions do amend current DHS practice, they place no further burden or cost on victims of trafficking who wish to apply for T nonimmigrant status. Furthermore, DHS does not expect these changes to have an impact on staffing plans or adjudication timeframes in processing T nonimmigrant applications. The change to remove the filing deadline for individuals victimized prior to October 28, 2000 will result in costs for any additional victims that may now be eligible to apply for principal T-1 nonimmigrant status. In addition, if the victim wishes to provide evidence in their application that they are cooperating with law enforcement, there will be an opportunity cost for the law enforcement officer completing the Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B.

Since there are no fees associated with either the T nonimmigrant application or providing required biometrics, the newly eligible population would be responsible only for the opportunity cost of time to file the Form I-914 and to submit the required biometrics.

DHS estimates the time burden to file the Form I-914 to be 2.25 hours. Generally, trafficked individuals applying for T-1 nonimmigrant status are not eligible to work in the United States until after USCIS has made a decision on their application (either a grant of bona fide determination or an approval). There could, however, be instances where a victim may have received other forms of immigration

relief which allowed them to legally work, although DHS does not collect the data necessary to estimate the number of victims that may fall into this category.<sup>46</sup> Consistent with other DHS rulemakings, we use wage rates as a mechanism to estimate the opportunity or time valuation costs for these aliens to file the Application for T Nonimmigrant Status, Form I-914 and to submit the required biometrics.

Assuming that most individuals applying for T-1 nonimmigrant status on the basis of removing the October 28, 2000 filing deadline are not yet authorized to work in the United States, DHS will use the Federal minimum wage as a proxy to estimate the opportunity cost understanding these individuals are not currently eligible to participate in the workforce. The Federal minimum wage is currently \$7.25 per hour.<sup>47</sup> To anticipate the full opportunity costs faced by the applicants, the minimum hourly wage rate is multiplied by 1.46 to account for the full cost of employee benefits such as paid leave, insurance, and retirement, which equals \$10.59 per hour.<sup>48</sup> DHS

<sup>46</sup> For example, some in this population could have received a grant of continued presence from DHS, U.S. Immigration and Customs Enforcement, which would permit them work authorization. See 22 U.S.C. 7105(c)(3)(A)(i).

<sup>47</sup> U.S. Department of Labor, Wage and Hour Division. *Minimum Wage* effective July 24, 2009, available at: <http://www.dol.gov/dol/topic/wages/minimumwage.htm>.

<sup>48</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Economic News Release*, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, May 2016, available at <http://www.bls.gov/news.release/ecec.t01>.

multiplied the fully burdened wage rate of \$10.59 per hour by the 2.25 hours estimated to file the Form I-914 to get an opportunity cost of \$23.83 to file the Application for T Nonimmigrant Status.<sup>49</sup>

Applicants seeking T-1 nonimmigrant status will be required to travel to an ASC to submit biometrics. In past rulemaking, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.<sup>50</sup> DHS also estimates that applicants will wait an average of 1.17 hours for service, bringing the total time to submit biometrics to 3.67 hours.<sup>51 52</sup> In addition, the cost of travel includes a mileage charge based on the estimated 50 mile round trip at the 2016 General Services Administration rate of \$0.54 per mile, which equals \$27.00 for each applicant.<sup>53</sup> Using an opportunity cost of time of \$10.59 per hour and the 3.67 hours estimated time for travel and service and the mileage charge of \$27.00, DHS estimates the cost per T-1 principal applicant to be \$65.87 for travel to and service at the ASC.<sup>54</sup> Therefore, the full cost for a T nonimmigrant applicant victimized

prior to October 28, 2000, including the total costs of filing the Form I-914 and submitting biometrics, is \$89.70.<sup>55</sup>

Lastly, there is an opportunity cost for law enforcement to complete Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B if the applicant decides to include that evidence in their application. DHS estimates the time burden to complete Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B is 3.75 hours. In 2015, the mean hourly wage rate for law enforcement workers was \$27.34, which when accounting for non-salaried benefits equals \$39.92.<sup>56</sup> Using this total hourly wage rate, DHS estimates the opportunity costs for law enforcement to complete the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B is \$149.70.<sup>57</sup> DHS is unable to estimate how many individuals victimized prior to October 28, 2000 may apply once the filing deadline is removed. Due to the passage of time, we anticipate filing volumes for those that were victimized prior to October 28, 2000 to be minimal.

Additionally, individuals who may now become eligible for T nonimmigrant status as a result of the expanded interpretation of the physical presence requirement will face the same opportunity cost of \$89.70 to file the Form I-914 and submit the required biometrics. Likewise, if the applicant decides to include evidence of law enforcement cooperation, the law enforcement official completing Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B will face an opportunity cost of \$149.70. DHS is unable to estimate how many individuals may become eligible as a result of this provision but anticipates there will be a limited number of cases where the trafficking occurred outside of the United States and the alien will now meet the physical presence requirement.

Table 4 provides a summary of the costs and benefits associated with each discretionary change made in this interim rule. The discretionary change that updates terminology and organizational structure in DHS regulations is not included in the table as it results in no additional impacts.

TABLE 4—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF THE DISCRETIONARY CHANGES IMPLEMENTED IN THIS INTERIM RULE

| Provision  | Changes to current policy resulting from the interim rule   | Expected cost of the interim rule | Expected benefit of the interim rule   |
|--|---|-----------------------------------|--|
| Specifies how USCIS exercises its waiver authority over criminal inadmissibility grounds.  | None. This will simply be a clarification of current DHS practice and align T nonimmigrant regulations with those currently governing the U nonimmigrant status.  | None .....                        | Providing clarity and consistency in DHS practice with DHS regulations will lead to a qualitative benefit to both the victims of trafficking and USCIS staff adjudicating these cases. |
| Discontinues weighing evidence as primary and secondary in favor of a standard that reviews any credible evidence in making the determination to approve or disapprove an application for T nonimmigrant status. | Evidence will no longer be labeled primary or secondary. DHS will accept any credible evidence of compliance with any reasonable request to assist LEAs.  | None .....                        | Removes confusion associated with labeling evidence as primary and secondary, and will result in qualitative benefits for both the victims of trafficking and LEAs.                    |
| Eliminates the requirement that an applicant provide three passport-style photographs.   | The applicant will no longer be responsible for submitting three passport-style photographs with his/her application. DHS will continue to take photographs at Application Support Centers at the time of fingerprint collection. | None .....                        | Results in total quantitative savings of \$56,130 for principal applicants and their derivatives.  |

<sup>49</sup> (\$10.59 per hour) × (2.25 hours) = \$23.83.

<sup>50</sup> See, e.g., *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 FR 535 (Jan. 3, 2013) (DHS final rule).

<sup>51</sup> See "Paperwork Reduction Act (PRA) Supporting Statement for Application for Employment Authorization, Form I-765 (OMB control number 1615-0040), Question 13. The Supporting Statement can be found on [Reginfo.gov](http://www.Reginfo.gov)

at [http://www.reginfo.gov/public/do/PRAViewGR?ref\\_nbr=201502-1615-004](http://www.reginfo.gov/public/do/PRAViewGR?ref_nbr=201502-1615-004)."

<sup>52</sup> Calculation: 2.5 hours + 1.17 average of service wait time = 3.67 total time to submit biometrics.

<sup>53</sup> The General Services Administration mileage rate of \$0.54, effective January 1, 2016, available at: <http://www.gsa.gov/portal/content/100715>.

<sup>54</sup> (\$10.46 per hour × 3.67 hours) + (\$0.54 per mile × 50 miles) = \$65.87.

<sup>55</sup> \$23.83 + \$65.87 = \$89.70.

<sup>56</sup> U.S. Department of Labor, Bureau of Labor Statistics. *May 2015 National Occupational Employment and Wage Estimates*, Law Enforcement Workers (occupational group code 33-3000), [http://www.bls.gov/oes/current/oes\\_nat.htm#33-0000](http://www.bls.gov/oes/current/oes_nat.htm#33-0000). The calculation to load the wage is: \$27.34 × 1.46 = \$39.92 (rounded).

<sup>57</sup> (\$39.92 hourly burdened wage rate) × (3.75 hours in estimated time burden) = \$149.70.

TABLE 4—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF THE DISCRETIONARY CHANGES IMPLEMENTED IN THIS INTERIM RULE—Continued

| Provision   | Changes to current policy resulting from the interim rule   | Expected cost of the interim rule  | Expected benefit of the interim rule   |
|---|---|--|--|
| Removes the filing deadline for applicants victimized prior to October 28, 2000.  | Those victimized prior to October 28, 2000 will be able to apply for T nonimmigrant status.   | Any new eligible applicants will be responsible for the full cost of \$89.70 for applying and submitting fingerprints. If included in the application, the cost for law enforcement to complete Form I-914 Supplement B is \$149.70. | Those victimized prior to October 28, 2000, and their eligible derivative family members, will be able to apply for T nonimmigrant status and receive the immigration benefits associated with that status.      |
| Permits USCIS to take a discretionary action to protect applicants from removal who are placed on the waiting list if the statutory cap is met in a given fiscal year.    | None. This will simply be a clarification of current DHS practice and align T nonimmigrant regulations with those currently governing the U nonimmigrant status.            | None   | Providing clarity and consistency in DHS practice will lead to a qualitative benefit to both the victims of trafficking and DHS staff adjudicating these cases.  |
| Removes the current regulatory “opportunity to depart” requirement for those victims who escaped traffickers before law enforcement became involved.                      | DHS will no longer require additional evidence to show the victim had no opportunity to depart the United States after he/she escaped traffickers prior to LEA involvement. | None   | Provides a qualitative benefit by removing an additional evidentiary burden for those victims of trafficking who escaped prior to LEA involvement.   |
| Provides guidance on meeting the definition of “severe forms of trafficking in persons” where an individual has not performed labor or services, or a commercial sex act. | None. This will clarify current DHS practice as regards the definition of “severe forms of trafficking in persons”.   | None   | Providing clarity and consistency in DHS practice will lead to a qualitative benefit to both the victims of trafficking and DHS staff adjudicating these cases.  |
| Addresses situations where trafficking has occurred abroad and whether the applicant can potentially meet the physical presence requirement.                              | DHS may consider victims as having met the physical presence requirement for certain instances when the trafficking occurred outside the United States.                     | Any new eligible applicants will be responsible for the full cost of \$89.70 for applying and submitting fingerprints. If included in the application, the cost for law enforcement to complete Form I-914 Supplement B is \$149.70. | Individuals victimized abroad, and their eligible derivative family members, can apply for T nonimmigrant status. These victims will also help in investigations of trafficking crimes, which will benefit LEAs. |

c. Costs to the Federal Government

If the changes implemented in this interim rule increase the volume of applications for T nonimmigrant status, USCIS could face increased costs to administer the T nonimmigrant status program. The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other immigrant applicants. INA section 286(m), 8 U.S.C. 1356(m). Recognizing the economic needs and hardships of this vulnerable population, as a matter of policy USCIS exempted the fee for applying for T nonimmigrant status and for submitting biometrics. Likewise, the fees for any additional applications needed for T nonimmigrants, from the time the alien victim applies for initial T nonimmigrant status (e.g. for submitting waivers of inadmissibility requests) through applications to adjust status, are eligible for fee waiver requests. Accordingly, the costs incurred by USCIS to process T nonimmigrant applications and biometrics are an insignificant portion

of the total USCIS adjudication costs compared to other fee paying immigrant benefit requests. These costs are insignificant due to the small number of receipts of Form I-914. In FY 2015, USCIS received 2,224 Form I-914 applications (see Table 1) out of a total of 7,650,475 applications received agency wide, making Form I-914 receipts less than 0.03% of total agency-wide receipts.<sup>58</sup> Therefore, to the extent that the changes implemented in this interim rule may result in additional applications, or even reach the statutory cap of 5,000 applications, in the short term we expect those costs to be insignificant and absorbed by the current fee structure for immigration benefits. In the long term, USCIS will continue to monitor the costs of administering the T nonimmigrant program as a normal part of its biennial fee review. The biennial fee review determines if fees for immigration

<sup>58</sup> Source: USCIS, Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2015 available at [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all\\_forms\\_performedata\\_fy2015\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performedata_fy2015_qtr4.pdf).

benefits are sufficient in light resource needs and filing trends. As previously mentioned, beneficiaries of T nonimmigrant status are also eligible for federal public benefits from the Department of Health and Human Services, so the changes implemented in this interim rule could result in increased transfer payments if there are increases in the number of persons granted T nonimmigrant status.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. DHS has determined that this rule is exempt from notice and comment rulemaking. Therefore, a regulatory flexibility analysis is not required for this rule. Nonetheless, USCIS examined the

impact of this rule on small entities under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(6). The individual victims of trafficking and their derivative family members to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6).

#### F. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### G. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

#### H. Family Assessment

This regulation may affect family well-being as that term is defined in section 654 of the Treasury General Appropriations Act, 1999, Public Law 105-277, Div. A. This action has been assessed in accordance with the criteria specified by section 654(c)(1). This regulation will enhance family well-being by encouraging vulnerable individuals who have been victims of severe forms of trafficking in persons to report the criminal activity and by providing critical assistance and benefits. Additionally, this regulation allows certain family members to obtain T nonimmigrant status once the principal applicant has received status.

#### I. Paperwork Reduction Act

Under the PRA of 1995, 44 U.S.C. 3501 *et seq.*, all Departments are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. DHS is amending application requirements and procedures for aliens to receive T nonimmigrant status, defined in section 101(a)(15)(T) of the INA, 8 U.S.C. 1101(a)(15)(T). DHS has revised the Application for T Nonimmigrant Status, Form I-914; the Application for Family Member of T-1 Recipient, Form I-914 Supplement A; and the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B, and the associated form instructions to conform with the new regulations (OMB Control Number 1615-0099). These forms are considered

information collections and are covered under the PRA. USCIS previously requested public comments on the revised forms and form instructions for 60 days. 60-day notice, *Agency Information Collection Activities: Application for T Nonimmigrant Status, Form I-914, Application for Immediate Family Member of T-1 Recipient, Supplement A, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Supplement B; Revision of a Currently Approved Collection*, 79 FR 6209-10 (Feb. 3, 2014). One comment was received that expressed general opposition to the T nonimmigrant program but provided no input on the information collection instruments. No changes were made in response to the comment.

The revised information collection has been submitted for approval to the Office of Management and Budget (OMB) for review and approval under procedures covered under the PRA. USCIS is requesting comments on this information collection for 30 days until January 18, 2017. When submitting comments on the information collection, your comments should address one or more of the following four points.

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of information collection:  
(a) *Type of information collection:* Revised information collection.

(b) *Abstract:* This information collection will be used by individuals (aliens who are victims of severe forms of trafficking in persons and certain family members, as appropriate) to file a request for USCIS approval for T nonimmigrant status.

(c) *Title of Form/Collection:* Application for T Nonimmigrant Status, Application for Family Member of T-1 Recipient, and Declaration of Law

Enforcement Officer for Victim of Trafficking in Persons.

(d) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-914, Form I-914 Supplement A, and Form I-914 Supplement B; USCIS.

(e) *Affected public who will be asked or required to respond:* Individuals and households.

(f) *An estimate of the total number of annual respondents:* 1,871 respondents.

(g) *Hours per response:* Application for T Nonimmigrant Status, Form I-914 at 2.25 hours per response; Application for Family Member of T-1 Recipient, Form I-914 Supplement A at 1 hour per response; Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B at 3.75 hours per response; and biometric services processing at 1.17 hours per response.

(h) *Total annual reporting burden:* 9,921 annual burden hours.

Comments should refer to the proposal by name and/or the OMB Control Number and should be sent to DHS using *one* of the methods provided under the **ADDRESSES** and I. Public Participation sections of this interim rule. Comments should also be submitted to USCIS Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202-395-5806. Email: [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov).

#### List of Subjects

##### 8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

##### 8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

##### 8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

##### 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

**PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

■ 1. The authority citation for part 212 is revised to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); 8 CFR part 2. Section 212.1(q) also issued under section 702, Pub. L. 110–229, 122 Stat. 754, 854.

■ 2. Section 212.1 is amended by revising paragraph (o) to read as follows:

**§ 212.1 Documentary requirements for nonimmigrants.**

\* \* \* \* \*

(o) *Alien in T–2 through T–6 classification.* USCIS may apply paragraph (g) of this section to individuals seeking T–2, T–3, T–4, T–5, or T–6 nonimmigrant status upon request by the applicant.

\* \* \* \* \*

■ 3. Section 212.16 is revised to read as follows:

**§ 212.16 Applications for exercise of discretion relating to T nonimmigrant status.**

(a) *Requesting the waiver.* An alien requesting a waiver of inadmissibility under section 212(d)(3)(B) or (d)(13) of the Act must submit a waiver form as designated by USCIS in accordance with 8 CFR 103.2.

(b) *Treatment of waiver request.* USCIS, in its discretion, may grant a waiver request based on section 212(d)(13) of the Act of the applicable ground(s) of inadmissibility, except USCIS may not waive a ground of inadmissibility based on sections 212(a)(3), (a)(10)(C), or (a)(10)(E) of the Act. An applicant for T nonimmigrant status is not subject to the ground of inadmissibility based on section 212(a)(4) of the Act (public charge) and is not required to file a waiver form for the public charge ground. Waiver requests are subject to a determination of national interest and connection to victimization as follows.

(1) *National interest.* USCIS, in its discretion, may grant a waiver of inadmissibility request if it determines that it is in the national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.

(2) *Connection to victimization.* An applicant requesting a waiver under section 212(d)(13) of the Act on grounds other than the health-related grounds described in section 212(a)(1) of the Act must establish that the activities rendering him or her inadmissible were caused by, or were incident to, the

victimization described in section 101(a)(15)(T)(i)(I) of the Act.

(3) *Criminal grounds.* In exercising its discretion, USCIS will consider the number and seriousness of the criminal offenses and convictions that render an applicant inadmissible under the criminal and related grounds in section 212(a)(2) of the Act. In cases involving violent or dangerous crimes, USCIS will only exercise favorable discretion in extraordinary circumstances, unless the criminal activities were caused by, or were incident to, the victimization described under section 101(a)(15)(T)(i)(I) of the Act.

(c) *No appeal.* There is no appeal of a decision to deny a waiver request. Nothing in this section is intended to prevent an applicant from re-filing a request for a waiver of a ground of inadmissibility in appropriate cases.

(d) *Revocation.* USCIS, at any time, may revoke a waiver previously authorized under section 212(d) of the Act. There is no appeal of a decision to revoke a waiver.

**PART 214—NONIMMIGRANT CLASSES**

■ 4. The authority citation for part 214 continues to read as follows:

**Authority:** 6 U.S.C. 111 and 202; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372 and 1762; Sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; Pub. L. 107–173, 116 Stat. 543; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 5. Section 214.1 is amended by:  
 ■ a. Revising paragraph (a)(1)(viii); and  
 ■ b. Adding entries for “101(a)(15)(T)(v)” and “101(a)(15)(T)(vi)” in alpha/numeric sequence in the table in paragraph (a)(2).

The revision and additions read as follows:

**§ 214.1 Nonimmigrant classifications.**

(a) \* \* \*  
 (1) \* \* \*

(viii) Section 101(a)(15)(T)(ii) is divided into (T)(ii), (T)(iii), (T)(iv), and (T)(v) for the spouse, child, parent, and unmarried sibling under 18 years of age, respectively, of a principal nonimmigrant classified under section 101(a)(15)(T)(i); and T(vi) for the adult or minor child of a derivative nonimmigrant classified under section 101(a)(15)(T)(ii); and

\* \* \* \* \*  
 (2) \* \* \*

|   |   |   |   |   | Section                 | Designation |
|---|---|---|---|---|-------------------------|-------------|
| * | * | * | * | * |                         |             |
|   |   |   |   |   | 101(a)(15)(T)(v) .....  | T–5.        |
|   |   |   |   |   | 101(a)(15)(T)(vi) ..... | T–6.        |
| * | * | * | * | * |                         |             |
|   |   |   |   |   | -----                   |             |
| * | * | * | * | * |                         |             |

■ 6. Section 214.11 is revised to read as follows:

**§ 214.11 Alien victims of severe forms of trafficking in persons.**

(a) *Definitions.* Where applicable, USCIS will apply the definitions provided in section 103 and 107(e) of the Trafficking Victims Protection Act (TVPA) with due regard for the definitions and application of these terms in 28 CFR part 1100 and the provisions of 18 U.S.C. 77. As used in this section the term:

*Application for derivative T nonimmigrant status* means a request by a principal alien on behalf of an eligible family member for derivative T–2, T–3, T–4, T–5, or T–6 nonimmigrant status on the form designated by USCIS for that purpose.

*Application for T nonimmigrant status* means a request by a principal alien for T–1 nonimmigrant status on the form designated by USCIS for that purpose.

*Bona fide determination* means a USCIS determination that an application for T–1 nonimmigrant status has been initially reviewed and determined that the application does not appear to be fraudulent, is complete and properly filed, includes completed fingerprint and background checks, and presents prima facie evidence of eligibility for T–1 nonimmigrant status including admissibility.

*Child* means a person described in section 101(b)(1) of the Act.

*Coercion* means threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.

*Commercial sex act* means any sex act on account of which anything of value is given to or received by any person.

*Debt bondage* means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied



toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

*Derivative T nonimmigrant* means an eligible family member who has been granted T-2, T-3, T-4, T-5, or T-6 derivative status. A family member outside of the United States is not a derivative T nonimmigrant until he or she is granted a T-2, T-3, T-4, T-5, or T-6 visa by the Department of State and is admitted to the United States in derivative T nonimmigrant status.

*Eligible family member* means a family member who may be eligible for derivative T nonimmigrant status based on his or her relationship to an alien victim and, if required, upon a showing of a present danger or retaliation; and:

(1) In the case of an alien victim who is 21 years of age or older, means the spouse and children of such alien;

(2) In the case of an alien victim under 21 years of age, means the spouse, children, unmarried siblings under 18 years of age, and parents of such alien; and

(3) Regardless of the age of an alien victim, means any parent or unmarried sibling under 18 years of age, or adult or minor child of a derivative of such alien where the family member faces a present danger of retaliation as a result of the alien victim's escape from a severe form of trafficking or cooperation with law enforcement.

*Involuntary servitude* means a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or a condition of servitude induced by the abuse or threatened abuse of legal process. Involuntary servitude includes a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.

*Law Enforcement Agency (LEA)* means a Federal, State, or local law enforcement agency, prosecutor, judge, labor agency, children's protective services agency, or other authority that has the responsibility and authority for the detection, investigation, and/or prosecution of severe forms of trafficking in persons. Federal LEAs include but are not limited to the following: U.S. Attorneys' Offices, Civil

Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Diplomatic Security Service (Department of State); and Department of Labor.

*Law Enforcement Agency (LEA) endorsement* means an official LEA endorsement on the form designated by USCIS for such purpose.

*Peonage* means a status or condition of involuntary servitude based upon real or alleged indebtedness.

*Principal T nonimmigrant* means the victim of a severe form of trafficking in persons who has been granted T-1 nonimmigrant status.

*Reasonable request for assistance* means a request made by an LEA to a victim to assist in the investigation or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime. The "reasonableness" of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to: General law enforcement and prosecutorial practices; the nature of the victimization; the specific circumstances of the victim; severe trauma (both mental and physical); access to support services; whether the request would cause further trauma: The safety of the victim or the victim's family; compliance with other requests and the extent of such compliance; whether the request would yield essential information; whether the information could be obtained without the victim's compliance; whether an interpreter or attorney was present to help the victim understand the request; cultural, religious, or moral objections to the request; the time the victim had to comply with the request; and the age and maturity of the victim.

*Severe form of trafficking in persons* means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or 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 subjection to involuntary servitude, peonage, debt bondage, or slavery.

*Sex trafficking* means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

*United States* means the fifty States of the United States, the District of

Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

*Victim of a severe form of trafficking in persons (victim)* means an alien who is or has been subject to a severe form of trafficking in persons.

(b) *Eligibility for T-1 status.* An alien is eligible for T-1 nonimmigrant status under section 101(a)(15)(T)(i) of the Act if he or she demonstrates all of the following, subject to section 214(o) of the Act:

(1) *Victim.* The alien is or has been a victim of a severe form of trafficking in persons.

(2) *Physical presence.* The alien is physically present in the United States or at a port-of-entry thereto, according to paragraph (g) of this section.

(3) *Compliance with any reasonable request for assistance.* The alien has complied with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, or meets one of the conditions described below.

(i) *Exemption for minor victims.* An alien under 18 years of age is not required to comply with any reasonable request.

(ii) *Exception for trauma.* An alien who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, is not required to comply with such reasonable request.

(4) *Hardship.* The alien would suffer extreme hardship involving unusual and severe harm upon removal.

(5) *Prohibition against traffickers in persons.* No alien will be eligible to receive T nonimmigrant status under section 101(a)(15)(T) of the Act if there is substantial reason to believe that the alien has committed an act of a severe form of trafficking in persons.

(c) *Period of admission.* (1) *T-1 Principal.* T-1 nonimmigrant status may be approved for a period not to exceed 4 years, except as provided in section 214(o)(7) of the Act.

(2) *Derivative family members.* A derivative family member who is otherwise eligible for admission may be granted T-2, T-3, T-4, T-5, or T-6 nonimmigrant status for an initial period that does not exceed the

expiration date of the initial period approved for the T-1 principal alien, except as provided in section 214(o)(7) of the Act.

(3) *Notice.* At the time an alien is approved for T nonimmigrant status or receives an extension of T nonimmigrant status, USCIS will notify the alien when his or her T nonimmigrant status will expire. USCIS also will notify the alien that the failure to apply for adjustment of status to lawful permanent resident, as set forth in 8 CFR 245.23, will result in termination of the alien's T nonimmigrant status in the United States at the end of the 4-year period or any extension.

(d) *Application.* USCIS has sole jurisdiction over all applications for T nonimmigrant status.

(1) *Filing an application.* An alien seeking T-1 nonimmigrant status must submit an application for T nonimmigrant status on the form designated by USCIS in accordance with 8 CFR 103.2 and with the evidence described in paragraph (d) of this section.

(i) *Applicants in pending immigration proceedings.* An alien in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997), and who wishes to apply for T-1 nonimmigrant status must file an application for T nonimmigrant status directly with USCIS. In its discretion, DHS may agree to the alien's request to file with the immigration judge or the Board a joint motion to administratively close or terminate proceedings without prejudice, whichever is appropriate, while an application for T nonimmigrant status is adjudicated by USCIS.

(ii) *Applicants with final orders of removal, deportation, or exclusion.* An alien subject to a final order of removal, deportation, or exclusion may file an application for T-1 nonimmigrant status directly with USCIS. The filing of an application for T nonimmigrant status has no effect on DHS authority or discretion to execute a final order of removal, although the alien may request an administrative stay of removal pursuant to 8 CFR 241.6(a). If the alien is in detention pending execution of the final order, the period of detention (under the standards of 8 CFR 241.4) reasonably necessary to bring about the applicant's removal will be extended during the period the stay is in effect. If USCIS subsequently determines under the procedures in paragraph (e) of this section that the application is bona fide, DHS will automatically grant an

administrative stay of the final order of removal, deportation, or exclusion, and the stay will remain in effect until a final decision is made on the application for T nonimmigrant status.

(iii) *Minor applicants.* When USCIS receives an application from a minor principal alien under the age of 18, USCIS will notify the Department of Health and Human Services to facilitate the provision of interim assistance.

(2) *Initial evidence.* An application for T nonimmigrant status must include:

(i) The applicant's signed statement describing the facts of the victimization and compliance with any reasonable law enforcement request (or a basis for why he or she has not complied) and any other eligibility requirements in his or her own words;

(ii) Any credible evidence that the applicant would like USCIS to consider supporting any of the eligibility requirements set out in paragraphs (f), (g), (h) and (i) of this section; and

(iii) *Inadmissible applicants.* If an applicant is inadmissible based on a ground that may be waived, he or she must also submit a request for a waiver of inadmissibility on the form designated by USCIS with the fee prescribed by 8 CFR 103.7(b)(1), in accordance with form instructions and 8 CFR 212.16, and accompanied by supporting evidence.

(3) *Evidence from law enforcement.*

An applicant may wish to submit evidence from an LEA to help establish certain eligibility requirements for T nonimmigrant status. Evidence from an LEA is optional and is not given any special evidentiary weight.

(i) *Law Enforcement Agency (LEA) endorsement.* An LEA endorsement is optional evidence that can be submitted to help demonstrate victimization and/or compliance with reasonable requests. An LEA endorsement is not mandatory and is not given any special evidentiary weight. An LEA endorsement itself does not grant a benefit and is one form of possible evidence but it does not lead to automatic approval of the application for T nonimmigrant status by USCIS. If provided, the LEA endorsement must be submitted on the form designated by USCIS in accordance with the form instructions and must be signed by a supervising official responsible for the detection, investigation or prosecution of severe forms of trafficking in persons. The LEA endorsement must attach the results of any name or database inquiries performed and describe the victimization (including dates where known) and the cooperation of the victim. USCIS, not the LEA, will determine if the applicant was or is a victim of a severe form of trafficking in

persons, and otherwise meets the eligibility requirements for T nonimmigrant status. The decision whether to complete an LEA endorsement is at the discretion of the LEA. A formal investigation or prosecution is not required to complete an LEA endorsement.

(ii) *Disavowed or revoked LEA endorsement.* An LEA may revoke or disavow the contents of a previously submitted endorsement in writing. After revocation or disavowal, the LEA endorsement will no longer be considered as evidence.

(iii) *Continued Presence.* An applicant granted Continued Presence under 28 CFR 110.35 should submit documentation of the grant of Continued Presence. If Continued Presence has been revoked, it will no longer be considered as evidence.

(iv) *Other evidence.* An applicant may also submit any evidence regarding entry or admission into the United States or permission to remain in the United States or note that such evidence is contained in an applicant's immigration file.

(4) *Biometric services.* All applicants for T-1 nonimmigrant status must submit biometrics in accordance with 8 CFR 103.16.

(5) *Evidentiary standards and burden of proof.* The burden is on the applicant to demonstrate eligibility for T-1 nonimmigrant status. The applicant may submit any credible evidence relating to a T nonimmigrant application for consideration by USCIS. USCIS will conduct a de novo review of all evidence and may investigate any aspect of the application. Evidence previously submitted by the applicant for any immigration benefit or relief may be used by USCIS in evaluating the eligibility of an applicant for T-1 nonimmigrant status. USCIS will not be bound by previous factual determinations made in connection with a prior application or petition for any immigration benefit or relief. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence.

(6) *Interview.* USCIS may require an applicant for T nonimmigrant status to participate in a personal interview. The necessity and location of the interview is determined solely by USCIS in accordance with 8 CFR part 103. Every effort will be made to schedule the interview in a location convenient to the applicant.

(7) *Bona fide determination.* Once an alien submits an application for T-1 nonimmigrant status, USCIS will conduct an initial review to determine if the application is a bona fide

application for T-1 nonimmigrant status under the provisions of paragraph (e) of this section.

(8) *Decision.* After completing its de novo review of the application and evidence, USCIS will issue a decision approving or denying the application in accordance with 8 CFR 103.3.

(9) *Approval.* If USCIS determines that the applicant is eligible for T-1 nonimmigrant status, USCIS will approve the application and grant T-1 nonimmigrant status, subject to the annual limitation as provided in paragraph (j) of this section. USCIS will provide the applicant with evidence of T-1 nonimmigrant status. USCIS may also notify other parties and entities of the approval as it determines appropriate, including any LEA providing an LEA endorsement and the Department of Health and Human Service's Office of Refugee Resettlement, consistent with 8 U.S.C. 1367.

(i) *Applicants with an outstanding order of removal, deportation or exclusion issued by DHS.* For an applicant who is the subject of an order of removal, deportation or exclusion issued by DHS, the order will be deemed cancelled by operation of law as of the date of the USCIS approval of the application.

(ii) *Applicants with an outstanding order of removal, deportation or exclusion issued by the Department of Justice.* An applicant who is the subject of an order of removal, deportation or exclusion issued by an immigration judge or the Board may seek cancellation of such order by filing a motion to reopen and terminate removal proceedings with the immigration judge or the Board. ICE may agree, as a matter of discretion, to join such motion to overcome any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23.

(10) *Denial.* Upon denial of an application, USCIS will notify the applicant in accordance with 8 CFR 103.3. USCIS may also notify any LEA providing an LEA endorsement and the Department of Health and Human Service's Office of Refugee Resettlement. If an applicant appeals a denial in accordance with 8 CFR 103.3, the denial will not become final until the administrative appeal is decided.

(i) *Effect on bona fide determination.* Upon denial of an application, any benefits derived from a bona fide determination will automatically be revoked when the denial becomes final.

(ii) *Applicants previously in removal proceedings.* In the case of an applicant who was previously in removal proceedings that were terminated on the

basis of a pending application for T nonimmigrant status, once a denial becomes final, DHS may file a new Notice to Appear to place the individual in removal proceedings again.

(iii) *Applicants subject to an order of removal, deportation or exclusion.* In the case of an applicant who is subject to an order of removal, deportation or exclusion that had been stayed due to the pending application for T nonimmigrant status, the stay will be automatically lifted as of the date the denial becomes final.

(11) *Employment authorization.* An alien granted T-1 nonimmigrant status is authorized to work incident to status. There is no need for an alien to file a separate form to be granted employment authorization. USCIS will issue an initial Employment Authorization Document (EAD) to such aliens, which will be valid for the duration of the alien's T-1 nonimmigrant status. An alien granted T-1 nonimmigrant status seeking to replace an EAD that was lost, stolen, or destroyed must file an application on the form designated by USCIS in accordance with form instructions.

(e) *Bona fide determination.* Once an alien submits an application for T-1 nonimmigrant status, USCIS will conduct an initial review to determine if the application is a bona fide application for T-1 nonimmigrant status.

(1) *Criteria.* After initial review, an application will be determined to be bona fide if:

- (i) The application is properly filed and is complete;
- (ii) The application does not appear to be fraudulent;
- (iii) The application presents prima facie evidence of each eligibility requirement for T-1 nonimmigrant status;
- (iv) Biometrics and background checks are complete; and
- (v) The applicant is:
  - (A) Admissible to the United States; or

(B) Inadmissible to the United States based on a ground that may be waived (other than section 212(a)(4) of the Act); and either the applicant has filed a waiver of a ground of inadmissibility described in section 212(d)(13) of the Act concurrently with the application for T nonimmigrant status, or USCIS has already granted a waiver with respect to any ground of inadmissibility that applies to the applicant. USCIS may request further evidence from the applicant. All waivers are discretionary and require a request for waiver, on the form designated by USCIS.

(2) *USCIS determination.* An application will not be treated as bona fide until USCIS provides notice to the applicant.

(i) *Incomplete or insufficient application.* If an application is incomplete or if an application is complete but does not present sufficient evidence to establish prima facie eligibility for each eligibility requirement for T-1 nonimmigrant status, USCIS may request additional information, issue a notice of intent to deny as provided in 8 CFR 103.2(b)(8), or may adjudicate the application on the basis of the evidence presented under the procedures of this section.

(ii) *Notice.* Once USCIS determines an application is bona fide, USCIS will notify the applicant. An application will be treated as a bona fide application as of the date of the notice.

(3) *Stay of final order of removal, deportation, or exclusion.* If USCIS determines that an application is bona fide it automatically stays the execution of any final order of removal, deportation, or exclusion. This administrative stay will remain in effect until any adverse decision becomes final. The filing of an application for T nonimmigrant status does not automatically stay the execution of a final order unless USCIS has determined that the application is bona fide. Neither an immigration judge nor the Board has jurisdiction to adjudicate an application for a stay of removal, deportation, or exclusion on the basis of the filing of an application for T nonimmigrant status.

(f) *Victim of a severe form of trafficking in persons.* To be eligible for T-1 nonimmigrant status an applicant must meet the definition of a victim of a severe form of trafficking in persons described in paragraph (a) of this section.

(1) *Evidence.* The applicant must submit evidence that demonstrates that he or she is or has been a victim of a severe form of trafficking in persons. Except in instances of sex trafficking involving victims under 18 years of age, severe forms of trafficking in persons must involve both a particular means (force, fraud, or coercion) and a particular end or a particular intended end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery). If a victim has not performed labor or services, or a commercial sex act, the victim must establish that he or she was recruited, transported, harbored, provided, or obtained for the purposes of subjection to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, or patronized or solicited for the purposes of subjection

to sex trafficking. The applicant may satisfy this requirement by submitting:

- (i) An LEA endorsement as described in paragraph (d)(3) of this section;
- (ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35; or

(iii) Any other evidence, including but not limited to, trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and/or affidavits. In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should describe what the alien has done to report the crime to an LEA and indicate whether criminal records relating to the trafficking crime are available.

(2) If the Continued Presence has been revoked or the contents of the LEA endorsement have been disavowed based on a determination that the applicant is not or was not a victim of a severe form of trafficking in persons, it will no longer be considered as evidence.

(g) *Physical presence.* To be eligible for T-1 nonimmigrant status an applicant must be physically present in the United States, American Samoa, or at a port-of-entry thereto on account of such trafficking.

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

- (i) Is present because he or she is currently being subjected to a severe form of trafficking in persons;
- (ii) Was liberated from a severe form of trafficking in persons by an LEA;
- (iii) Escaped a severe form of trafficking in persons before an LEA was involved, subject to paragraph (g)(2) of this section;

(iv) Was subject to a severe form of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons; or

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

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

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

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

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

(3) *Presence for participation in investigative or judicial processes.* An alien who was allowed initial entry or reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking will be deemed to be physically present in the United States on account of trafficking in persons, regardless of where such trafficking occurred. To satisfy this section, an alien must submit documentation to show valid entry into the United States and evidence that this valid entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.

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

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

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

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

(iv) Any other credible evidence, including a personal statement from the applicant, stating the date and place (if known) and the manner and purpose (if known) for which the applicant entered

the United States and demonstrating that the applicant is now present on account of the trafficking.

(h) *Compliance with any reasonable request for assistance in an investigation or prosecution.* To be eligible for T-1 nonimmigrant status, an applicant must have complied with any reasonable request for assistance from an LEA in an investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime, unless the applicant meets an exemption described in paragraph (h)(4) of this section.

(1) *Applicability.* An applicant must have had, at a minimum, contact with an LEA regarding the acts of a severe form of trafficking in persons. An applicant who has never had contact with an LEA regarding the acts of a severe form of trafficking in persons will not be eligible for T-1 nonimmigrant status, unless he or she meets an exemption described in paragraph (h)(4) of this section.

(2) *Unreasonable requests.* An applicant need only show compliance with reasonable requests made by an LEA for assistance in the investigation or prosecution of the acts of trafficking in persons. The reasonableness of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to:

- (i) General law enforcement and prosecutorial practices;
- (ii) The nature of the victimization;
- (iii) The specific circumstances of the victim;
- (iv) Severity of trauma suffered (both mental and physical) or whether the request would cause further trauma;
- (v) Access to support services;
- (vi) The safety of the victim or the victim's family;

(vii) Compliance with previous requests and the extent of such compliance;

(viii) Whether the request would yield essential information;

(ix) Whether the information could be obtained without the victim's compliance;

(x) Whether an interpreter or attorney was present to help the victim understand the request;

(xi) Cultural, religious, or moral objections to the request;

(xii) The time the victim had to comply with the request; and

(xiii) The age and maturity of the victim.

(3) *Evidence.* An applicant must submit evidence that demonstrates that he or she has complied with any reasonable request for assistance in a

Federal, State, or local investigation or prosecution of trafficking in persons, or a crime where trafficking in persons is at least one central reason for the commission of that crime. In the alternative, an applicant can submit evidence to demonstrate that he or she should be exempt under paragraph (h)(4) of this section. If USCIS has any question about whether the applicant has complied with a reasonable request for assistance, USCIS may contact the LEA. The applicant may satisfy this requirement by submitting any of the following:

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

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

(iii) Any other evidence, including affidavits of witnesses. In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should show that an LEA that has responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons has information about such trafficking in persons, that the victim has complied with any reasonable request for assistance in the investigation or prosecution of such acts of trafficking, and, if the victim did not report the crime, why the crime was not previously reported.

(4) An applicant who has not had contact with an LEA or who has not complied with any reasonable request may be exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution if either of the following two circumstances applies:

(i) *Trauma*. The applicant is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons due to physical or psychological trauma. An applicant must submit evidence of the trauma. An applicant may satisfy this by submitting an affirmative statement describing the trauma and any other credible evidence. "Any other credible evidence" includes, for instance, a signed statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim's mental state, and medical, psychological, or other records which are relevant to the trauma. USCIS reserves the authority and discretion to contact the LEA involved in the case, if appropriate; or

(ii) *Age*. The applicant is under 18 years of age. An applicant under 18 years of age is exempt from the requirement to comply with any

reasonable request for assistance in an investigation or prosecution, but he or she must submit evidence of age. Applicants should include, where available, an official copy of the alien's birth certificate, a passport, or a certified medical opinion. Other evidence regarding the age of the applicant may be submitted in accordance with 8 CFR 103.2(b)(2)(i).

(i) *Extreme hardship involving unusual and severe harm*. To be eligible for T-1 nonimmigrant status, an applicant must demonstrate that removal from the United States would subject the applicant to extreme hardship involving unusual and severe harm.

(1) *Standard*. Extreme hardship involving unusual and severe harm is a higher standard than extreme hardship as described in 8 CFR 240.58. A finding of extreme hardship involving unusual and severe harm may not be based solely upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities. The determination of extreme hardship is made solely by USCIS.

(2) *Factors*. Factors that may be considered in evaluating whether removal would result in extreme hardship involving unusual and severe harm should include both traditional extreme hardship factors and factors associated with having been a victim of a severe form of trafficking in persons. These factors include, but are not limited to:

(i) The age, maturity, and personal circumstances of the applicant;

(ii) Any physical or psychological issues the applicant has which necessitates medical or psychological care not reasonably available in the foreign country;

(iii) The nature and extent of the physical and psychological consequences of having been a victim of a severe form of trafficking in persons;

(iv) The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of a severe form of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;

(v) The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;

(vi) The likelihood of re-victimization and the need, ability, and willingness of

foreign authorities to protect the applicant;

(vii) The likelihood of harm that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would cause the applicant; or

(viii) The likelihood that the applicant's individual safety would be threatened by the existence of civil unrest or armed conflict.

(3) *Evidence*. An applicant must submit evidence that demonstrates he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States. An applicant is encouraged to describe and document all factors that may be relevant to the case, as there is no guarantee that a particular reason(s) will satisfy the requirement. Hardship to persons other than the alien victim cannot be considered in determining whether an applicant would suffer the requisite hardship. The applicant may satisfy this requirement by submitting any credible evidence regarding the nature and scope of the hardship if the applicant was removed from the United States, including evidence of hardship arising from circumstances surrounding the victimization and any other circumstances. An applicant may submit a personal statement or other evidence, including evidence from relevant country condition reports and any other public or private sources of information.

(j) *Annual cap*. In accordance with section 214(o)(2) of the Act, DHS may not grant T-1 nonimmigrant status to more than 5,000 aliens in any fiscal year.

(1) *Waiting list*. All eligible applicants who, due solely to the cap, are not granted T-1 nonimmigrant status will be placed on a waiting list and will receive written notice of such placement. Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications receiving the highest priority. In the next fiscal year, USCIS will issue a number to each application on the waiting list, in the order of the highest priority, providing the applicant remains admissible and eligible for T nonimmigrant status. After T-1 nonimmigrant status has been issued to qualifying applicants on the waiting list, any remaining T-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

(2) *Unlawful presence*. While an applicant for T nonimmigrant status who was granted deferred action or parole is on the waiting list, the applicant will not accrue unlawful

presence under section 212(a)(9)(B) of the Act while maintaining parole or deferred action.

(3) *Removal from the waiting list.* An applicant may be removed from the waiting list and the deferred action or parole may be terminated consistent with law and policy. Applicants on the waiting list must remain admissible to the United States and otherwise eligible for T nonimmigrant status. If at any time prior to final adjudication USCIS receives information that an applicant is no longer eligible for nonimmigrant status, the applicant may be removed from the waiting list and the deferred action or parole may be terminated. USCIS will provide notice to the applicant of that decision.

(k) *Application for eligible family members.* (1) *Eligibility.* Subject to section 214(o) of the Act, an alien who has applied for or has been granted T-1 nonimmigrant status (principal alien) may apply for the admission of an eligible family member, who is otherwise admissible to the United States, in derivative T nonimmigrant status if accompanying or following to join the principal alien.

(i) *Principal alien 21 years of age or older.* For a principal alien who is 21 years of age or over, eligible family member means a T-2 (spouse) or T-3 (child).

(ii) *Principal alien under 21 years of age.* For a principal alien who is under 21 years of age, eligible family member means a T-2 (spouse), T-3 (child), T-4 (parent), or T-5 (unmarried sibling under the age of 18).

(iii) *Family member facing danger of retaliation.* Regardless of the age of the principal alien, if the eligible family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of trafficking or cooperation with law enforcement, in consultation with the law enforcement officer investigating a severe form of trafficking, eligible family member means a T-4 (parent), T-5 (unmarried sibling under the age of 18), or T-6 (adult or minor child of a derivative of the principal alien).

(iv) *Admission requirements.* The principal applicant must demonstrate that the alien for whom derivative T nonimmigrant status is being sought is an eligible family member of the T-1 principal alien, as defined in paragraph (a) of this section, and is otherwise eligible for that status.

(2) *Application.* A T-1 principal alien may submit an application for derivative T nonimmigrant status on the form designated by USCIS in accordance with the form instructions. The application for derivative T

nonimmigrant status for an eligible family member may be filed with the T-1 application, or separately. Derivative T nonimmigrant status is dependent on the principal alien having been granted T-1 nonimmigrant status and the principal alien maintaining T-1 nonimmigrant status. If a principal alien granted T-1 nonimmigrant status cannot maintain status due to his or her death, the provisions of section 204(l) of the Act may apply.

(i) *Eligible family members in pending immigration proceedings.* If an eligible family member is in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997), the principal alien must file an application for derivative T nonimmigrant status directly with USCIS. In its discretion and at the request of the eligible family member, ICE may agree to file a joint motion to administratively close or terminate proceedings without prejudice with the immigration judge or the Board, whichever is appropriate, while USCIS adjudicates an application for derivative T nonimmigrant status.

(ii) *Eligible family members with final orders of removal, deportation, or exclusion.* If an eligible family member is the subject of a final order of removal, deportation, or exclusion, the principal alien may file an application for derivative T nonimmigrant status directly with USCIS. The filing of an application for derivative T nonimmigrant status has no effect on ICE's authority or discretion to execute a final order, although the alien may file a request for an administrative stay of removal pursuant to 8 CFR 241.6(a). If the eligible family member is in detention pending execution of the final order, the period of detention (under the standards of 8 CFR 241.4) will be extended while a stay is in effect for the period reasonably necessary to bring about the applicant's removal.

(3) *Required supporting evidence.* In addition to the form, an application for derivative T nonimmigrant status must include the following:

(i) Biometrics submitted in accordance with 8 CFR 103.16;

(ii) Evidence demonstrating the relationship of an eligible family member, as provided in paragraph (k)(4) of this section;

(iii) In the case of an alien seeking derivative T nonimmigrant status on the basis of danger of retaliation, evidence demonstrating this danger as provided in paragraph (k)(6) of this section.

(iv) *Inadmissible applicants.* If an eligible family member is inadmissible

based on a ground that may be waived, a request for a waiver of inadmissibility under section 212(d)(13) or section 212(d)(3) of the Act must be filed in accordance with 8 CFR 212.16 and submitted with the completed application package.

(4) *Relationship.* Except as described in paragraphs (k)(5) of this section, the family relationship must exist at the time:

(i) The application for the T-1 nonimmigrant status is filed;

(ii) The application for the T-1 nonimmigrant status is adjudicated;

(iii) The application for derivative T nonimmigrant status is filed;

(iv) The application for derivative T nonimmigrant status is adjudicated; and

(v) The eligible family member is admitted to the United States if residing abroad.

(5) *Relationship and age-out protections.* (i) *Protection for new child of a principal alien.* If the T-1 principal alien proves that he or she had a child after filing the application for T-1 nonimmigrant status, the child will be deemed to be an eligible family member eligible to accompany or follow to join the T-1 principal alien.

(ii) *Age-out protection for eligible family members of a principal alien under 21 years of age.* If the T-1 principal alien was under 21 years of age when he or she filed for T-1 nonimmigrant status, USCIS will continue to consider a parent or unmarried sibling as an eligible family member. A parent or unmarried sibling will remain eligible even if the principal alien turns 21 years of age before adjudication of the T-1 application. An unmarried sibling will remain eligible even if the unmarried sibling is over 18 years of age at the time of adjudication of the T-1 application, so long as the unmarried sibling was under 18 years of age at the time of the T-1 application. The age of an unmarried sibling when USCIS adjudicates the T-1 application, when the unmarried sibling files the derivative application, when USCIS adjudicates the derivative application, or when the unmarried sibling is admitted to the United States does not affect eligibility.

(iii) *Age-out protection for child of a principal alien 21 years of age or older.* If a T-1 principal alien was 21 years of age or older when he or she filed for T-1 nonimmigrant status, USCIS will continue to consider a child as an eligible family member if the child was under 21 years of age at the time the principal filed for T-1 nonimmigrant status. The child will remain eligible even if the child is over 21 years of age at the time of adjudication of the T-1

application. The age of the child when USCIS adjudicates the T-1 application, when the child files the derivative application, when USCIS adjudicates the derivative application, or when the child is admitted to the United States does not affect eligibility.

(iv) *Marriage of an eligible family member.* An eligible family member seeking T-3 or T-5 status must be unmarried when the principal files an application for T-1 status, when USCIS adjudicates the T-1 application, when the eligible family member files for T-3 or T-5 status, when USCIS adjudicates the T-3 or T-5 application, and when the family member is admitted to the United States. If a T-1 marries subsequent to filing the application for T-1 status, USCIS will not consider the spouse eligible as a T-2 eligible family member.

(6) *Evidence demonstrating a present danger of retaliation.* An alien seeking derivative T nonimmigrant status on the basis of facing a present danger of retaliation as a result of the T-1 victim's escape from a severe form of trafficking or cooperation with law enforcement, must demonstrate the basis of this danger. USCIS may contact the LEA involved, if appropriate. An applicant may satisfy this requirement by submitting:

(i) Documentation of a previous grant of advance parole to an eligible family member;

(ii) A signed statement from a law enforcement official describing the danger of retaliation;

(iii) An affirmative statement from the applicant describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement (ordinarily an applicant's statement alone is not sufficient to prove present danger); and/or

(iv) Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses.

(7) *Biometric collection; evidentiary standards.* The provisions for biometric capture and evidentiary standards described in paragraph (d)(2) and (d)(4) of this section apply to an eligible family member's application for derivative T nonimmigrant status.

(8) *Review and decision.* USCIS will review the application and issue a decision in accordance with paragraph (d) of this section.

(9) *Derivative approvals.* Aliens whose applications for derivative T nonimmigrant status are approved are not subject to the annual cap described

in paragraph (j) of this section. USCIS will not approve applications for derivative T nonimmigrant status until USCIS has approved T-1 nonimmigrant status to the related principal alien.

(i) *Approvals for eligible family members in the United States.* When USCIS approves an application for derivative T nonimmigrant status for an eligible family member in the United States, USCIS will concurrently approve derivative T nonimmigrant status. USCIS will notify the T-1 principal alien of such approval and provide evidence of derivative T nonimmigrant status to the derivative.

(ii) *Approvals for eligible family members outside the United States.* When USCIS approves an application for an eligible family member outside the United States, USCIS will notify the T-1 principal alien of such approval and provide the necessary documentation to the Department of State for consideration of visa issuance.

(10) *Employment authorization.* An alien granted derivative T nonimmigrant status may apply for employment authorization by filing an application on the form designated by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) in accordance with form instructions. For derivatives in the United States, the application may be filed concurrently with the application for derivative T nonimmigrant status or at any later time. For derivatives outside the United States, an application for employment authorization may only be filed after admission to the United States in T nonimmigrant status. If the application for employment authorization is approved, the derivative alien will be granted employment authorization pursuant to 8 CFR 274a.12(c)(25) for the period remaining in derivative T nonimmigrant status.

(1) *Extension of T nonimmigrant status.* (1) *Eligibility.* USCIS may grant extensions of T-1 nonimmigrant status beyond 4 years from the date of approval in 1-year periods from the date the T-1 nonimmigrant status ends if:

(i) An LEA investigating or prosecuting activity related to human trafficking certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity;

(ii) The Secretary of Homeland Security determines that an extension is warranted due to exceptional circumstances; or

(iii) The alien has a pending application for adjustment of status to that of a lawful permanent resident.

(2) *Application for a discretionary extension of status.* Upon application, USCIS may extend T-1 nonimmigrant

status based on law enforcement need or exceptional circumstances. A T-1 nonimmigrant may apply for an extension by submitting the form designated by USCIS with the prescribed fee and in accordance with form instructions. A T-1 nonimmigrant should indicate on the application whether USCIS should apply the extension to any family member holding derivative T nonimmigrant status.

(3) *Timely filing.* An alien should file the application to extend nonimmigrant status before the expiration of T-1 nonimmigrant status. If T-1 nonimmigrant status has expired, the applicant must explain in writing the reason for the untimely filing. USCIS may exercise its discretion to approve an untimely filed application for extension of T nonimmigrant status.

(4) *Evidence.* In addition to the application, a T-1 nonimmigrant must include evidence to support why USCIS should grant an extension of T nonimmigrant status. The nonimmigrant bears the burden of establishing eligibility for an extension of status.

(5) *Evidence of law enforcement need.* An applicant may demonstrate law enforcement need by submitting evidence that comes directly from an LEA, including:

(i) A new LEA endorsement;

(ii) Evidence from a law enforcement official, prosecutor, judge, or other authority who can investigate or prosecute human trafficking activity, such as a letter on the agency's letterhead, email, or fax; or

(iii) Any other credible evidence.

(6) *Evidence of exceptional circumstances.* An applicant may demonstrate exceptional circumstances by submitting:

(i) The applicant's affirmative statement; or

(ii) Any other credible evidence, including medical records, police or court records, news articles, correspondence with an embassy or consulate, and affidavits of witnesses.

(7) *Mandatory extensions of status for adjustment of status applicants.* USCIS will automatically extend T-1 nonimmigrant status when a T nonimmigrant properly files an application for adjustment of status in accordance with 8 CFR 245.23. No separate application for extension of T nonimmigrant status, or supporting evidence, is required.

(m) *Revocation of approved T nonimmigrant status.* (1) *Automatic revocation of derivative status.* An approved application for derivative T nonimmigrant status will be revoked automatically if the beneficiary of the approved derivative application notifies



USCIS that he or she will not apply for admission to the United States.

(2) *Revocation on notice/grounds for revocation.* USCIS may revoke an approved application for T nonimmigrant status following issuance of a notice of intent to revoke. USCIS may revoke an approved application for T nonimmigrant status based on one or more of the following reasons:

(i) The approval of the application violated the requirements of section 101(a)(15)(T) of the Act or 8 CFR 214.11 or involved error in preparation, procedure, or adjudication that affects the outcome;

(ii) In the case of a T-2 spouse, the alien's divorce from the T-1 principal alien has become final;

(iii) In the case of a T-1 principal alien, an LEA with jurisdiction to detect or investigate the acts of severe forms of trafficking in persons notifies USCIS that the alien has refused to comply with reasonable requests to assist with the investigation or prosecution of the trafficking in persons and provides USCIS with a detailed explanation in writing; or

(iv) The LEA that signed the LEA endorsement withdraws it or disavows its contents and notifies USCIS and provides a detailed explanation of its reasoning in writing.

(3) *Procedures.* Procedures for revocation and appeal follow 8 CFR 103.3. If USCIS revokes approval of the previously granted T nonimmigrant status application, USCIS may notify the LEA who signed the LEA endorsement, any consular officer having jurisdiction over the applicant, or the Office of Refugee Resettlement of the Department of Health and Human Services.

(4) *Effect of revocation.* Revocation of a principal alien's application for T-1 nonimmigrant status will result in termination of T-1 status for the principal alien and, consequently, the automatic termination of the derivative T nonimmigrant status for all derivatives. If a derivative application is pending at the time of revocation, it will be denied. Revocation of an approved application for T-1 nonimmigrant status or an application for derivative T nonimmigrant status also revokes any waiver of inadmissibility granted in conjunction with such application. The revocation of an alien's T-1 status will have no effect on the annual cap described in paragraph (j) of this section.

(n) *Removal proceedings.* Nothing in this section prohibits DHS from instituting removal proceedings for conduct committed after admission, or for conduct or a condition that was not disclosed prior to the granting of T

nonimmigrant status, including misrepresentations of material facts in the application for T-1 nonimmigrant status or in an application for derivative T nonimmigrant status, or after revocation of T nonimmigrant status.

(o) *USCIS employee referral.* Any USCIS employee who, while carrying out his or her official duties, comes into contact with an alien believed to be a victim of a severe form of trafficking in persons and is not already working with an LEA should consult, as necessary, with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence. The ICE office may, in turn, refer the victim to another LEA with responsibility for investigating or prosecuting severe forms of trafficking in persons. If the alien has a credible claim to victimization, USCIS may advise the alien that he or she can submit an application for T nonimmigrant status and seek any other benefit or protection for which he or she may be eligible, provided doing so would not compromise the alien's safety.

(p) *Restrictions on use and disclosure of information relating to applicants for T nonimmigrant classification.* (1) The use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of any of those departments, for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved application for T nonimmigrant status is prohibited unless the disclosure is made in accordance with an exception described in 8 U.S.C. 1367(b).

(2) Information protected under 8 U.S.C. 1367(a)(2) may be disclosed to federal prosecutors to comply with constitutional obligations to provide statements by witnesses and certain other documents to defendants in pending federal criminal proceedings.

(3) Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.

(4) DHS officials are prohibited from making adverse determinations of admissibility or deportability based on information obtained solely from the trafficker, unless the alien has been convicted of a crime or crimes listed in section 237(a)(2) of the Act.

## PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 7. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 8. Section 245.23(a)(3) and (b)(2) are revised to read as follows:

### § 245.23 Adjustment of aliens in T nonimmigrant classification.

(a) \* \* \*

(3) Has been physically present in the United States for a continuous period of at least 3 years since the first date of lawful admission as a T-1 nonimmigrant, or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and the Attorney General has determined that the investigation or prosecution is complete, whichever period is less; except

(i) If the applicant has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant shall be considered to have failed to maintain continuous physical presence in the United States for purposes of section 245(l)(1)(A) of the Act; and

(ii) If the alien was granted T nonimmigrant status under 8 CFR 214.11, such alien's physical presence in the CNMI before, on, or after November 28, 2009, and subsequent to the grant of T nonimmigrant status, is considered as equivalent to presence in the United States pursuant to an admission in T nonimmigrant status.

\* \* \* \* \*

(b) \* \* \*

(2) The derivative family member was lawfully admitted to the United States in derivative T nonimmigrant status under section 101(a)(15)(T)(ii) of the Act, and continues to hold such status at the time of application;

\* \* \* \* \*

## PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 9. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 10. Section 274a.12 is amended by revising paragraphs (a)(16) and (c)(25) to read as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

(a) \* \* \*

(16) Any alien in T-1 nonimmigrant status, pursuant to 8 CFR 214.11, for the period in that status, as evidenced by an

employment authorization document issued by USCIS to the alien.

\* \* \* \* \*

(c) \* \* \*

(25) Any alien in T-2, T-3, T-4, T-5, or T-6 nonimmigrant status, pursuant to 8 CFR 214.11, for the period in that status, as evidenced by an employment

authorization document issued by USCIS to the alien.

\* \* \* \* \*

**Jeh Charles Johnson,**  
*Secretary.*

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