September 14, 2021

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Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
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Submitted via e-mail: USCISFRComment@uscis.dhs.gov

Re: DHS Docket No. USCIS-2011-0010, Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status

Dear Ms. Deshommes:

Kids in Need of Defense (KIND) submits the following comments in response to the above-referenced request for comments.[1] KIND is the leading national nonprofit organization working to ensure that no child faces immigration court alone. KIND provides free legal representation and coordinated social services to unaccompanied children in removal proceedings, advocates for laws and policies to improve the well-being of unaccompanied children, and promotes protection of children in countries of origin and transit countries to address the root causes of child migration. Through strategic partnerships, KIND provides pro bono legal representation for refugee and migrant children across the country. Since January 2009, KIND has received referrals for more than 21,000 cases from 77 countries and now serves over 5,000 children annually in partnership with nearly 700 law firm, corporate, law school, and bar association partners. KIND has field and satellite offices in thirteen cities: Los Angeles, San Francisco, Fresno, Atlanta, Baltimore, Boston, Houston, El Paso, Newark, New York City, Seattle, Falls Church, VA and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits. KIND works with trafficked unaccompanied children, and has filed for, obtained, and mentored pro bono attorneys in pursuing T nonimmigrant status (also known as T visas) on behalf of unaccompanied children.

KIND thanks DHS for reopening the comment period for the Interim Final Rule (IFR) and for extending the comment period to a full 60 days. As DHS has noted, after the initial passage of the Trafficking Victims Protection Act (TVPA) in 2002, Congress reauthorized the TVPA as 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), Titles VIII and XII of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), and the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act in 2019. Additionally, the since the IFR's initial issuance in 2016, there have been a myriad of policy and procedural changes. As a service provider, these rapid and

[1] 81 Fed. Reg. 92266 (Dec. 19, 2016).

overlapping changes have highlighted additional weaknesses and concerns in the IFR, leading to confusion and inconsistent outcomes for clients. KIND greatly appreciates the opportunity to provide additional insight and recommendations before the rule is finalized.

KIND believes that our expertise and experience advocating for and providing legal representation, mentoring pro bono attorneys, and giving technical assistance to other services providers serving trafficked unaccompanied children makes us particularly well-qualified to offer views that will benefit the public and the government. Below KIND provides a detailed list of requested changes to the interim regulations. Language in strikethrough reflects KIND's suggested removal of language, while language in red and italicized is KIND's suggested added language.

I. Eligibility Requirements for T Nonimmigrant Classification

a. Victim of a Severe Form of Human Trafficking in Persons

i. Performing Labor, Services, or Commercial Sex is Not Necessary

Recommended Language: 8 C.F.R. § 214.11(f)(1) ". . . 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 *through any credible evidence. The victim's statement (prescribed by paragraph (d)(2) of this section) may provide sufficient evidence to meet the victim's burden of proof and the victim may also submit any other credible evidence which may include but is not limited to:*
(i) An LEA endorsement as described in paragraph (d)(3) of this section;
(ii) Documentation of a grant of Continued Presence under 28 C.F.R. 1100.35; or
(iii) Any other evidence, including but not limited to:

- *(A)* Trial transcripts~~,~~*;*
- *(B)* Court documents~~,~~*;*
- *(C)* Police reports *and other documentation by law enforcement and certifying agencies*~~,~~*;*
- *(D)* News articles~~,~~*;*
- *(E)* Photographs and images;
- *(F)* Copies of reimbursement forms for travel to and from court~~,~~*;*
- *(G) Affidavits from case managers, therapists, medical professionals, witnesses, or other victims of the same trafficking scheme*~~,~~*;*
- *(H) Correspondence or other documents with and from the trafficker, including letters, photos, emails, or text messages*~~,~~*; or*
- *(I) Documents used in furtherance of the trafficking scheme such as recruitment materials, advertisements, pay stubs, log books, or contracts.*

(iv) In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should describe *if and* what the ~~alien~~ *applicant* has done to report the crime to an LEA and indicate whether *the victim has possession of any* criminal records relating to the trafficking crime.

Explanation: KIND applauds DHS for its clarifying language in 8 C.F.R. § 214.11(f)(1) acknowledging that performing labor, services, or commercial sex is not required to be a victim of a severe form of trafficking in persons. KIND believes this clarification is consistent with the legislative intent and statutory language of the TVPA. KIND agrees with DHS that there may be scenarios where a victim may

be removed from the trafficking situation by a law enforcement agency (LEA), or where a victim may escape the trafficking situation on their own, without completion of the criminal act.

Additionally, KIND appreciates that DHS has chosen to provide examples of evidence that may be submitted to demonstrate the trafficker's purpose even if no commercial sex or forced labor actually occurred at new 8 C.F.R. § 214.11(f)(1). KIND also appreciates that USCIS indicates that this list is not "all inclusive." However, KIND requests that the language in the example list be expanded with specific examples and formatting them in such a way as to clarify that all forms of evidence are acceptable, and that an LEA endorsement or Continued Presence grant are not required or preferred forms of evidence. In KIND's experience, most trafficking cases are not prosecuted, do not have law enforcement or court documents as support, have no media articles, have no witnesses, and have no written proof from their traffickers. It is often difficult to procure forms of evidence other than an affidavit from the applicant in situations where the trafficking was not completed or was thwarted by law enforcement. Children are not likely to have documentation of the planned trafficking scheme, which is typically arranged by adults. Information about similar trafficking schemes (e.g. similar recruitment patterns using a certain kind of visa, recruitment from the same village, etc.) may also be illustrative of "what would have happened" to the victim. Given this reality, the regulations should emphasize the types of different affidavits and other forms of evidence that victims could use as evidence of attempted trafficking. KIND also believes that the updated regulations should clarify that a credible statement from the victim is sufficient evidence.

Further, victims may not know whether any criminal records relating to the trafficking exist. This is especially true for children, whose cases are often submitted to law enforcement by mandatory reporters. Law enforcement agencies are rarely forthcoming with victims about the extent of their recordkeeping. They may not respond to the victim and/or their attorney, they may withhold documents, may give an incomplete answer about the status of any such records, or may hold such information confidential due to ongoing investigatory matters. The victim cannot be held responsible for knowledge about records that are not in their possession. Additionally, USCIS's proposal in 8 C.F.R. § 214.11(f)(3) suggests that criminal records are preferred over other evidence, which is contrary to the "any credible evidence" standard.

KIND has worked on several cases involving trafficked unaccompanied children who were intercepted by authorities before reaching their final destination to be trafficked for sex and/or labor. Some of these children were intercepted at the port of entry as an ongoing extension of sex trafficking and sexual tourism, with the trafficker attempting to bring the child into the U.S. to further the trafficking. In several of these cases, such as the trafficking scheme of youth for athletic sports, DHS was able to ascertain that some of these children had final destinations in the U.S. that did not match information provided in student visa applications, and linking certain entities and individuals in the student visa to existing state and federal criminal investigations. Other times, unaccompanied children have revealed when in federal custody that they were informed that they had been "sold" or were expected to provided labor or sexual servitude to certain individuals in the U.S. When KIND attempted to obtain information about existing federal investigations for these cases, the FOIA results either did not contain records related to the trafficking or were often heavily redacted, yielding little to no useful information about the investigation.

ii. Evidence of Victimization—Burden of Proof

Recommended Language: 8 C.F.R. § 214.11(d)(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 *in the administrative record* and may investigate any aspect of the application. *If further investigation of the administrative record results in unfavorable evidence, the applicant must be given a copy of the evidence to allow applicant an adequate opportunity to respond.* 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 *in the administrative record. If information contained in the administrative record could result in an unfavorable determination, the applicant shall be given a copy of the evidence in the administrative record that could contribute to an unfavorable decision on the victim's application for T nonimmigrant status, and the victim shall be provided an opportunity to respond to such adverse evidence.*

Explanation: Through KIND's direct representation cases and pro bono mentoring work, KIND has witnessed issuances of Requests for Additional Evidence (RFE) asking applicants to explain inconsistencies that adjudicators have found in the applicant's administrative record that the applicant is not privy to. These inconsistent statements often arise because the minor applicant is in removal proceedings and needs to file for a T visa application quickly, and/or because requests to obtain a copy of the A file and other documents through the Freedom of Information Act (FOIA) to certain federal agencies do not yield timely and/or full records and information. An attorney for a single child applicant may find themselves needing to obtain information through time-consuming and formal processes with the Office of Refugee Resettlement (ORR), Customs and Border Protection (CBP), USCIS, the Department of State, and the Department of Labor, as well as with federal and local law enforcement, but receiving not a single FOIA result before they need to submit a T visa application for the child. As a result, many survivors of trafficking have been placed in a situation which requires them to blindly defend themselves from alleged inconsistent statements that may detrimentally impact their ability to obtain immigration relief.

Specifically, KIND has worked with child trafficking survivors who have been detained by CBP, which is tasked with the identification of potential victims of trafficking . In addition to the uncomfortable physical environments they are kept in, children have reported extremely short screenings that are neither trauma-informed nor victim-centered, and do not take into account the particular needs of children. KIND has seen multiple cases where the screenings by CBP have not led to the accurate identification of child trafficking victims. There are cases where child trafficking victims have been treated as criminals or even interviewed within close proximity to their traffickers. Statements made during these short interviews can later appear to be inconsistent statements in the administrative record. Often the full contents of these CBP interviews are not released in response to a FOIA request. Without access to these records, an applicant would not be given an opportunity to respond or provide further context (e.g., the location of the trafficker during the interview, trauma, or fear) or correct these allegedly inconsistent statements.

The USCIS adjudicator is also disadvantaged if not allowed the opportunity to review information the applicant has given context to or corrected, because they would never obtain this critical information from the applicant before having to make a determination regarding T nonimmigrant status. Accessing

the full administrative record would also allow the applicant to point out favorable evidence under the "any credible evidence" standard that may otherwise be overlooked by the adjudicator.

b. Physical Presence on Account of Trafficking in Persons

Recommended Language: [8 C.F.R. 214.11(g) and in preamble] 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~~ *current* presence in the United States is directly related to the original trafficking in persons; or

(~~v~~*iii*) Is present on account of the alien ~~having been allowed entry into~~ *has entered* the United States for participation *and will participate* 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~~ *applicant* 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~~ *applicant* 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. *An applicant who entered the United States without a valid entry must submit documentation that they are physically present in the United States, and that their entry is intended for participation in a criminal, civil, or administrative investigation, prosecution or judicial process associated with an act or a perpetrator of trafficking to satisfy this section.*

(4) Evidence. The applicant must . . . perpetrator of trafficking. USCIS will consider any credible evidence presented to determine the physical presence requirement, including *but not limited to* the ~~alien's~~ *applicant's* responses to questions on the application for T nonimmigrant status, *documentation submitted by the applicant, and the applicant's personal statement regarding:* ~~about~~ when he or she escaped the trafficker, *when and how the applicant learned that they were a victim of human trafficking*

and may be eligible for services and protection in the United States on account of such victimization, and 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~~.

Explanation: KIND appreciates that where a victim escaped a trafficker before a LEA became involved in the matter, DHS is no longer requiring a victim to demonstrate, that the victim did not have a clear chance to leave the U.S. or an "opportunity to depart" in new 8 C.F.R. § 214.11(g)(1).

However, KIND believes that DHS has interpreted "physical presence on account of trafficking" too narrowly. At 8 C.F.R. § 2141.11(g)(1)-(2), DHS creates a presumption that those individuals whose trafficking occurred outside of the U.S. or who traveled outside of the U.S. after their trafficking situation and subsequently returned, are not physically present in the U.S. on account of trafficking in persons. This presumption has no statutory basis, *see* 8 U.S.C. § 1101(a)(15)(T)(i)(II). The statute requires only that the applicant be in the U.S., and that their presence in the U.S. is "on account of" their victimization. Although the statute gives one specific example (allowed entry for participation in investigative or judicial processes), the statute does not suggest that this example is meant to limit physical presence in the way described by DHS. These regulations significantly narrow the interpretation of physical presence in a way to deny many trafficking victims the protection that the TVPA was designed to provide.

<u>KIND recommends that USCIS interpret the regulations so that an applicant's physical presence in the U.S. at the time of filing the T visa application is sufficient to meet the "present on account of trafficking" eligibility requirement under the statute.</u>

Unaccompanied children are particularly vulnerable given the unsafe migration journeys they may be undertaking alone, and are particularly susceptible to the schemes and physical subjection of adult traffickers. For example, KIND has worked with or knows of cases of unaccompanied children who were trafficked to the U.S. border, and then escaped their trafficker, arriving at the U.S. port of entry upon fleeing their trafficker; and cases of unaccompanied children trafficked within the U.S., lured abroad by a trafficker and then trafficked and abused abroad, and then fleeing back to the U.S. for protection.

Congress chose specifically to require that T visa applicants be present in the U.S. or at a port of entry on account of trafficking, but did not specify that the trafficking must have occurred in the U.S. or have violated U.S. law. This is clearly distinguished from the U visa, created in the same legislation, that allows for crime victims to apply from outside of the U.S. only if they are victims of a crime, and only if the criminal activity "violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States." 8 USC 1101(a)(15)(U)(i)(IV). Congress could have similarly limited eligibility for the T visa to those who were victims of a crime of trafficking that occurred in the U.S. when passing the TVPA or any of the four reauthorizations, but has not done so. KIND does not believe in the needless limitation of this protection that Congress designed to ameliorate the crime of human trafficking. This broader reading of the statute is the appropriate statutory interpretation given the legislative intent in protecting vulnerable victims and encouraging more victims to report crimes of trafficking.

KIND also disagrees with DHS' interpretation of "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." 8 U.S.C. § 1101(a)(15)(T)(i)(II). DHS, in the Interim

Final Rule, asserts that this language "require[s] the victim's entry through a lawful means." 81 Fed Reg. 92274. There is no basis for this interpretation in the plain language of the statute, which merely lists one example of a situation in which a survivor departed the U.S. and then returned. Congress did not state that this is the only re-entry that can demonstrate physical presence or that the entry must be legal or arranged by a government agency. In fact, Congress did not specify the manner of entry, include the word "legal" or "lawful," point to any statutory provisions for legal entries, or use any other language to indicate the limitation that DHS has read into the statute.

KIND also recommends removing the reference to the "applicant's ability to leave the United States." USCIS has already deleted the requirement that the applicant prove that they did not have an "opportunity to depart." Retaining this language is confusing, and USCIS should focus on any credible evidence submitted by the applicant to establish that their current presence in the U.S. is on account of trafficking, regardless of whether they may have been physically able to depart.

c. Compliance with Any Reasonable Request in an Investigation or Prosecution

i. Minors Exempt from Compliance with Any Reasonable Request

Recommended Language: 8 C.F.R. § 214.11(h)(4)(ii) *Age.* The applicant *was* under 18 years of age *at the time of victimization of a severe form of trafficking in persons.* An applicant under 18 years of age *at the time of victimization* 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 *the* age *at the time of victimization*. Applicants should include, where available, an official copy of the ~~alien's~~ *applicant's* birth certificate, a passport, or a certified medical opinion. ~~Other~~ *Any credible* evidence regarding the age of the applicant may be submitted in accordance with 8 C.F.R. 103.2(b)(2)(i).

Explanation: KIND strongly urges DHS to clarify that this exemption from reporting to law enforcement is based on the age of victimization of an applicant, and not the time of filing of an application. Trafficking victims, especially child victims of trafficking, suffer long-term trauma as a result of their trafficking experience which may inhibit their ability to cooperate with law enforcement at any period. Title 8, U.S. Code § 1101(a)(15)(T)(i)(III) clearly outlines the standard for cooperating with law enforcement and includes a clear exception that a victim of trafficking who has not attained 18 years is not required to cooperate with law enforcement. *See id.* § 1101(a)(15)(T)(i)(III)(aa-cc). This exception also exists because minors experience psychological traumatization at a deeper level and therefore may find it even harder than adults to confide in individuals regarding painful and intimate events.[2] Survivors of trafficking suffer extensive, long-term trauma, persistent fear of punishment from traffickers, and distrust of law enforcement.[3] The developing adolescent brain is particularly vulnerable to adverse effects of repeated trauma and stress.[4] Trafficking results in serious impacts on children's psychological

[2] Heather Clawson, Nicole Dutch & Megan Cummings, *Law Enforcement Response to Human Trafficking and the Implications for Victims: Current Practices and Lessons Learned*, at 37 (National Institute of Justice No. 216547, 2006).
[3] Kathryn Marburger and Sheri Pickover, *A Comprehensive Perspective on Treating Victims of Human Trafficking*, The Professional Counselor 10:1, at 13-24 (Mar. 2020).
[4] *Id.* (noting the impact of trafficking of children on their "psychological, spiritual, and emotional development").

and emotional development.[5] When victims have to discuss the events of the trafficking, this often causes retraumatization, especially for children.[6]

There is past historical practice and precedence of DHS interpretation of this requirement as the age of victimization. USCIS itself, in clarifying the T nonimmigrant status, instructed on its website as recently as October 2019, "*If under the age of 18 at the time of the victimization*, or if you are unable to cooperate with a law enforcement request due to physical or psychological trauma, you may qualify for the T nonimmigrant status without having to assist in investigation or prosecution" (emphasis added).[7] Additionally, Vermont Service Center (VSC) adjudicators have reiterated at several Freedom Network Conferences over years, most recently in April 2016, that this eligibility requirement is broadly interpreted to apply to applicants who were victimized prior to turning 18 years old, not solely for victims who are under 18 years of age when filing. However, in recent times, KIND has received several RFEs for unaccompanied children who were trafficked under the age of 18, but filed T visa applications after they turned 18 years of age, demanding that the applicant report their case to law enforcement.

If DHS requires the applicant to be under 18 years of age at the time of filing rather than at the time of victimization, DHS is unnecessarily narrowing the interpretation of this eligibility requirement, contravening the intent behind the law, and contravening current understanding and practice. This narrow interpretation would also harm the mental health of children. Statutes of limitations on child abuse have been extended across the U.S., to better account for time needed for a child victim to come forward to report their victimization. One of the most significant issues that arises from childhood and adolescent exposure to abuse, trauma, and stress is the negative impact of such exposure on the executive functioning, both cognitively and physiologically leading to distancing, numbing and avoidance that lasts well into adulthood and impedes child trafficking victims' ability to come forward.[8] Scientific research shows that exposure to violence and trauma during childhood and adolescence has significant and negative psychological and neurobiological impacts on the child's development.

A narrow interpretation that depends on the time rather than the age of victimization would require a victim who was trafficked for a year beginning at age 17 to report to law enforcement if the T visa application was filed after she turned 18, but not if she was quick enough to file before, putting undue pressure on young survivors to relate their trafficking experience to USCIS as quickly as possible regardless of their need for healing and immediate services. Many unaccompanied children released to sponsors remain limited English proficient and unrepresented by legal counsel, and are often unable to afford attorneys, meaning that an analysis of their eligibility for a T visa can be delayed after they turn 18 years of age. The COVID-19 pandemic has only exacerbated issues related to access to counsel for trafficked children, including transportation and financial ability to find and access legal representation,

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[5] *Id.*

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

[7] *See* USCIS, *Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status*. (Archived Oct. 30, 2019) https://web.archive.org/web/20191030025126/https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status.

[8] Faiza Chappell, Meaghan Fitzpatrick, Alina Husain, Giselle Hass and Leslye E. Orloff, *Understanding the Significance of a Minor's Trauma History in Family Court Rulings* (May 17, 2021) https://niwaplibrary.wcl.american.edu/pubs/understanding-effects-of-trauma-on-minors

dealing with trauma from severe illness and death of sponsors, diminishing of services due to school closures and community resources, and lack of mental health services.

This narrower interpretation requiring the victim to be under 18 years of age at the time of filing would be especially devastating to child applicants who are currently in federal custody and do not have the time or opportunity to report or fully engage with legal providers or LEAs, but turn 18 years of age before they can file their T visa application. Recent statistics demonstrate that the average length of days in care for unaccompanied children has ranged from 27 to 40 days between March 2021 through May 2021.[9] As demonstrated by HHS statistics, for FY21 to date (Oct. 20-May 21), 37% of all children in care were aged 17 and older. It can be difficult to gain the trust of a trafficked and traumatized unaccompanied child, and have a legal services provider file a T visa in a short amount of time. In comparing refugee children to child trafficking victims in the URM program, a report indicates that trafficked children "are more difficult to engage than the average refugee child….and trafficked children can often take up to a year or more to 'settle in' and trust the program."[10]

Additionally, as mentioned above, trafficking, particularly labor trafficking of children and youth, is still not a well understood crime. This misidentification is common with scenarios where law enforcement does not understand the way children are trafficked and coerced performing illegal labor and services, such as coerced drug smuggling, human smuggling, drug cultivation, and sex work. When identification finally does occur, there may be pressure to file a T visa quickly due to the applicant's age, creating possible inconsistencies and inaccuracies to no fault of the child. For an unaccompanied child who is turning 18 and may be transferred to ICE custody this means that they would likely be unable to access legal counsel and assistance in filing a T visa once transferred to ICE custody.

The narrow interpretation is also at odds with the clear distinction Congress provided at 8 U.S.C. §1255(l)(1)(C)(iii), the T visa adjustment statute, which specifically identifies survivors who were "younger than 18 years of age ***at the time of the victimization***" (emphasis added) as exempt from complying with reasonable requests from law enforcement for the purposes of adjusting their status. It is inconsistent to require such child survivors to report their victimization to law enforcement and respond to their requests at the T visa filing stage, but to be exempt from any contact with law enforcement to when applying for adjustment of status. Thus, the most reasonable interpretation of the vague requirement at § 1101(15)(T)(III)(cc) is that the exemption refers to the age at the time of the victimization.

Finally, KIND requests clarification that any credible evidence related to a child's age be included. KIND has worked with many children who do not have access to birth certificates, passports, or certified medical opinions. KIND has worked with child clients whose documents have been withheld by their legal guardians, or do not know their own birthdates or exactly where they were born.

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[9] U.S. Department of Health and Human Services, *Latest UC Data*. (Jun. 24, 2021) https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2021/index.html.

[10] United States Conference of Catholic Bishops, *Care for Trafficked Children*, at 4 (Apr. 2006). Specifically, 22 USC § 7105(b)(1) enables a child from another country who *may have been* subjected to a severe form of trafficking in persons to be eligible for benefits and services in the United States (emphasis added). Section 212(a)(2) of the TVPRA provides for interim assistance for minors who "*may have been* subjected to a severe form of trafficking in persons" (emphasis added).

[10] As explained in the TVPRA 2008, the purpose of the statute is to allow "a potential victim" of a severe form of trafficking to request federally funded benefits and services to the same extent as a refugee. This highlights the need for exceptions for minors who have been trafficked, to account for their vulnerabilities.

ii. Evidence of Compliance with Any Reasonable Request--Law Enforcement Agency

Recommended Language: 8 C.F.R. 214.11(a) *Law Enforcement Agency (LEA)* means … ~~and~~ Department of Labor~~.~~; *Equal Employment Opportunity Commission (EEOC); Offices of Inspector General (OIG); and National Labor Relations Board (NLRB).*

Explanation: KIND recommends that this list explicitly include the Equal Employment Opportunity Commission (EEOC), Offices of Inspector General (OIG); and the National Labor Relations Board (NLRB). While KIND acknowledges that the list provided in the regulations is not exhaustive, explicitly including the EEOC, OIGs, and NLRB allows victims to consider which agencies to report their trafficking victimization to, and expands the list to include agencies that have explicit T visa policies and have taken seminal roles in investigating and pursuing remedies for trafficking victims. The explicit recognition of these agencies can also assist in identifying similar counterpart local and state agencies (as the preamble notes) that are also detecting and investigating trafficking crimes, such as human rights commissions, departments of labor, and child protective services. Specifically, in accordance with the Inspector General Act of 1978, as amended, OIG investigations can include criminal, civil and administrative matters and violations of federal law. Including OIGs, especially for the DHS OIG and Department of Health and Human Services (HHS) OIG, would also highlight for unaccompanied child applicants an additional option for who they can report their trafficking victimization, especially if it involves trafficking-related conduct facilitated by a federal employee.

iii. Evidence of Compliance with Any Reasonable Request--Trauma Exception

Recommended Language: 8 C.F.R. § 214.11(h)(4)(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*, or the circumstances of the victim during which the trauma was experienced, and the applicant's current ability to cooperate with law enforcement*. An applicant must submit evidence of the trauma. *Evidence may include information about the traumatic impact based on all surrounding circumstances and background of the applicant, including their age, maturity, health, disability, and history of abuse or exploitation.* 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 *or medical condition;* ~~,~~ ~~and~~ medical~~,~~ *or* psychological *records documenting the trauma or its impact;* ~~,~~ *or disability determinations* or other records which are relevant to the trauma. *When an applicant is found to have satisfied this exemption, the applicant is not required to have had any contact with law enforcement, including reporting the trafficking.* USCIS reserves the authority and discretion to contact the LEA involved in *cases where the applicant has contacted LEA but was unable to comply with reasonable requests due to trauma*, if appropriate.

Explanation: KIND commends DHS on providing clarification on supporting evidence that may be included to evaluate whether an applicant meets the trauma exception to the law enforcement cooperation requirement. KIND agrees that a victim's own statement may be sufficient to establish qualification for the exception. KIND recommends a few additional examples of documents that might assist DHS in making these determinations.

The trauma exception was created with the consideration that some applicants who fall under this exception have serious concern for their own safety as well as for their families, and that this concern may be psychologically debilitating for a victim to move forward with filing an application. However, KIND is concerned that the current language might discourage applicants who fear that DHS's discretion to contact law enforcement would jeopardize their or their family's safety. This would undermine the purpose of this exception. The recommended language reflects the language in the preamble and clarifies that DHS will only reach out to law enforcement if the victim has had initial contact with law enforcement. The recommended language further clarifies that DHS will not contact a law enforcement agency where there is no law enforcement contact because there will not be a law enforcement involved with the applicant's case. By including this clarifying language, DHS would be encouraging applicants to move forward with filing a T visa application without fear that USCIS will reach out to law enforcement and potentially endanger their safety when they meet this exception.

II. Bona Fide Determinations

Recommended Language: 8 C.F.R. § 214.11(e)(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 presence prima facie evidence that 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 be treated as bona fide ~~until USCIS provides notice to the applicant~~ *if after reviewing the complete application, USCIS determines that the facts, if proven true, would lead to approval . . . .*
(ii) *Notice.* Once USCIS determines an application is bona fide, USCIS will notify the Applicant *within 90 days of receipt of the initial application.*

Explanation: The intent of Congress in creating a bona fide determination (BFD) standard was to ensure that victims can have access to a streamlined process for securing access to benefits and employment.[11] While KIND acknowledges that USCIS cannot guarantee a BFD within 90 days because of case-specific circumstances, KIND is concerned over the continual minimization of the importance of having BFD issued within 90 days of filing.[12] In KIND's experience, decisions on T visa are typically not issued within

[11] *See* 22 USC §7105(b)(1)(E)(II)(aa) (indicating that certification for federal benefits can be granted if an applicant has made a bona fide application for a visa under INA §101(a)(15)(T)).
[12] In the May 22, 2009, USCIS memo Michael Aytes, Acting Deputy Director wrote, "USCIS does not currently have a backlog of I-914 cases; therefore, focusing on issuing interim EADs is not necessary. USCIS believes it is more efficient to adjudicate the entire I-914 and grant the T status, which produces work authorization for the applicant,

90 days of initial filing. When processing times ranged from 4-9 months, these BFDs may have seemed less urgent.[13] But as of the time of these comments, processing times have increased to 20-43.5 months, and BFDs are still not being issued regularly. During these waiting periods, T visa applicants are unable to receive federal benefits or work legally in the U.S. For children, this lag time on benefits and work authorization can leave them vulnerable to further abuse and exploitation. BFDs are especially important to automatically stay outstanding orders.

The recommended language mirrors the practical application of prima facie evidence in the VAWA context by underlining the fact that USCIS will, in fact, issue these determinations in a timely manner if the applicant has met the criteria for BFD. As in the VAWA context, the determination will allow trafficking victims, particularly children, to become more stable through the prompt access to federal benefits and work authorization rather than having to wait through the current lengthy adjudication of the T visa application.

DHS should eliminate the provision at 8 C.F.R. § 214.11(e)(1)(ii), which requires a T visa applicant to demonstrate that "the application does not appear to be fraudulent" and 8 C.F.R. § 214.11(e)(1)(v) requiring verification of admissibility or the filing or granting of a waiver of inadmissibility. This is consistent and would be on par with the BFD process for U Visa (I-918) applications.[14] DHS should focus the determination of prima facie eligibility for a bona fide determination on whether the applicant has properly filed a complete application including completed fingerprint and background checks.[15] Because USCIS similarly considers an applicant's compliance with initial evidence requirements and background checks in the T visa bona fide process, it is unnecessary for the agency to separately analyze whether the application "appears to be fraudulent." Additionally, a T visa applicant's admissibility is extraneous to the questions of whether or not the T visa application is bona fide. The BFD is meant to be a quick process that is completed before a decision is made on the merits of the application.

III. Adjudication and Post-Adjudication

a. Waivers of Grounds of Inadmissibility

Recommended Language: 8 C.F.R. § 212.16(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…

~~(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~~

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rather than to touch the application twice in order to make a bona fide determination. However, in the event that processing times should exceed 90 days, USCIS will conduct bona fide determinations for the purpose of issuing employment authorization." USCIS, Memorandum, *Response to Recommendation 39: 'Improving the Process for Victims of Trafficking and Certain Criminal Activity: The T and U Visas*. (May 22, 2009).

[13] In FY2015 T visa applications took 6.4 months to adjudicate. See USCIS, *Historic National Average Processing Times for All USCIS Offices*. (Archived Mar. 12, 2019) https://web.archive.org/web/20190312202427/https://egov.uscis.gov/processing-times/historic-pt

[14] *See* USCIS Policy Manual, Vol. 3, *Part C- Victims of Crimes, Ch. 5, Bona Fide Determination Process*; *see also* ICE Directive 11005.3: *Using a Victim-Centered Approach with Noncitizen Crime Victims*, at 3.1 (Aug. 10, 2021).

[15] *Id*. (noting that "[t]he term "prima facie" refers to a petition appearing sufficient on its face").

~~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.~~

Explanation: KIND agrees that DHS has discretionary authority to waive the criminal grounds of inadmissibility for T visa applicants if the criminal activities were caused by or incident to the trafficking under INA § 212(d)(13). Nonetheless, KIND believes that the language in 8 C.F.R. § 212.16(b)(3) is not statutorily required, and that this language is unnecessarily stringent given that INA § 212(d)(3)(B) already gives the Attorney General broad discretion to approve a waiver of inadmissibility. Trafficking survivors, including those trafficked as children, often have criminal histories that may not be incident to the trafficking, but are often part of the scheme that makes them vulnerable to exploitation.

b. USCIS Referral of Minors to Department of Health and Human Services

Recommended Language: 8 C.F.R. § 214.11(d)(1)(iii) *Minor applicants.* When USCIS receives an application from a minor principal alien under the age of 18 *at the time of filing*, USCIS will notify the Department of Health and Human Services to facilitate the provision of interim assistance. *If the applicant does not want this notification to HHS occur, including but not limited to the need to complete access to state-funded benefits, the applicant should notify USCIS of this on their initial application*.

Comments: KIND appreciates DHS's continuing prioritization of encouraging child applicants to access federal public benefits. However, in some states, both children and adults are eligible to receive state benefits while the T visa application is pending. For example, in California, foreign national survivors (adults and children) are entitled to eight months of state-funded public benefits prior to the T visa approval upon identification as a victim of trafficking. Notifying HHS and obtaining an HHS certification for federal benefits for a child victim of trafficking while a victim is accessing state-funded benefits could prematurely terminate access to these state-funded benefits and automatically transfer the individual to receiving the federal benefits. In these cases, the victim is not able to receive the full spectrum public benefits (eight months of cash-aid assistance through state-funded benefits in addition to eight months of federal refugee cash aid assistance) that they are entitled to. Because this precertification benefit is dependent on the individual state, the recommended language would provide notice to applicants that state-funded benefits may exist and place the burden on the applicant to notify USCIS should they not want to immediately access the federal interim assistance.

I. Recommendations for T Visa Applicants and Recipients in Removal Proceedings, in Detention, and with Outstanding Orders of Removal

a. Motions for T Visa And Derivative Applicants and Approvals in Pending Immigration Proceedings

Recommended Language: 8 C.F.R. § 214.11(d)(1)(i) *Applicants in pending immigration proceedings*. . . . ~~In its discretion,~~ DHS *shall* ~~may~~ agree to the ~~alien's~~ *applicant's* request to file with the immigration judge or the Board a joint motion to administratively close*, continue,* or dismiss proceedings without prejudice, whichever is appropriate, while an application for T nonimmigrant status is adjudicated by USCIS *or, at the respondent's request, shall move to dismiss proceedings pursuant to 8 C.F.R. §§ 239.2(c), 1239.2(c).*

8 C.F.R. § 214.11(k)(2)(i) Eligible family members in pending immigration proceedings. … DHS *shall* ~~may~~ agree to file a joint motion to administratively close*, continue,* or dismiss proceedings without prejudice with the immigration judge or the Board, whichever is appropriate, while USCIS adjudicates an application for derivative T nonimmigrant status *or, at the respondent's request, shall move to dismiss proceedings pursuant to 8 C.F.R. §§ 239.2(c), 1239.2(c).*

[new section] Approved T nonimmigrants in Removal Proceedings: *DHS shall agree to a non-citizen's motion to reopen, dismiss, or, at the respondent's request, move to dismiss proceedings without prejudice upon proof that USCIS has approved the non-citizen's application for T-1 or T- derivative non-immigrant status.*

Explanation: In KIND's experience representing unaccompanied children in removal proceedings, attorneys have struggled to have DHS join in motions to close, continue, or dismiss proceedings for T visa applicants in removal proceedings. The ongoing immigration case compounds the trauma of the trafficking victim, who lives with the ongoing threat of removal from the protection of the U.S. Additionally, the active case is a substantial waste of government resources and burdens the substantially limited resources of the victim and their representatives. Children in ongoing removal proceedings are often forced to file additional, alternative applications for relief, further wasting limited government resources. The failure to close, continue, or dismiss proceedings is also contrary to Congressional intent. DHS's objections are particularly distressing for unaccompanied children because even if they have filed for a T visa application, they are rendered ineligible for T-1 nonimmigrant status if they are removed from the U.S. Removal from the U.S. may also render unaccompanied children vulnerable to re-trafficking or retaliation from the trafficker, and return them to the dangerous conditions to which they fled.

DHS should require OPLA to agree to a motion to administratively close, dismiss, or continue proceedings for respondents with pending I-914 applications. The current regulations state only that DHS "*may* agree" to a respondent's "request to file a joint motion to administratively close or terminate proceedings without prejudice" while USCIS adjudicates an application for T-1 or T derivative nonimmigrant status. 8.C.F.R. § 214(d)(1)(ii); (k)(2)(i) (emphasis added). The proposed regulation should state that DHS "*shall* agree" to a respondent's "request to file a joint motion to administratively close or terminate proceedings without prejudice or a request to continue the proceedings until USCIS can adjudicate the non-citizen's application for T- nonimmigrant's status or, at the respondent's request, shall move to dismiss proceedings pursuant to 8 C.F.R. §§ 239.2 (c), 1239.2 (c)."[16] To the extent that DHS disagrees this language should be mandatory, it should at least add permissive language to this effect, making clear that the language set forth at 8 C.F.R. § 214(d)(1)(ii) and (k)(2)(i) applies both to T-1 nonimmigrants as well as T-derivatives in pending removal proceedings.

Furthermore, while advocates, DHS and courts alike have relied on the provisions set forth at proposed rule 8 C.F.R. § 214(d)(1)(ii) and (k)(2)(i) in cases involving survivors in proceedings upon approval of T-

[16] If the agency disagrees with this broad mandatory language, it could retain the permissive "may", but modify and implement the bona fide determination (BFD) process, as set forth above, clarifying that, if a BFD is issued, the agency *shall* agree to the respondent's request to administratively close, terminate, continue the proceedings or, at the respondent's request, shall move to dismiss proceedings. That a BFD automatically stays the *execution* of a removal order does not resolve the myriad issues outlined above that arise for clients who are in proceedings. An attorney generally cannot responsibly advise a client not to pursue other relief in proceedings and accept a removal order simply because the agency has or might issue a BFD.

nonimmigrant status, a close read of these provisions reflects that they technically apply to non-citizens with *pending* I-914 or I-914A applications, not only to those whose applications for T- nonimmigrant status have been *approved*.[17] The only language in the proposed regulation regarding clients with *approved* I-914 applications references T-1 nonimmigrants with "outstanding" orders of removal, not those who are still in proceedings.[18] This lack of clarity and the permissive nature of these provisions can have devastating consequences for trafficking survivors and their families, again, depleting the limited resources of USCIS, the courts and legal and social service providers.

b. T Visa Recipients with an Outstanding Order of Removal, Deportation or Exclusion Issued by the Department of Justice

Recommendation: 8 C.F.R. § 214.11(d)(9)(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. DHS *shall* ~~may agree, as a matter of discretion, to~~ join such motion to overcome any time and numerical limitations of 8 C.F.R. §§ 1003.2 and 1003.23.

Explanation: The IFR states that ICE "may agree, as a matter of discretion" to join a motion to reopen and terminate removal proceedings on behalf of individuals whose application for T nonimmigrant status has been approved. Such opposition by a branch of the very same agency that granted the victim relief also places unnecessary strain on scarce immigration court resources. Where DHS has approved an application for T nonimmigrant status, the regulation should specify that "DHS *shall* join such motion to overcome any applicable time and numerical limitations of 8 C.F.R. §§ 1003.2 and 1003.23."

c. T Visa Applicants in Immigration Detention

Recommended Language: DHS should require that ICE seek expedited processing for T visa applicants in immigration detention. In a new section, DHS should add a provision to the regulation requiring ICE to request expedited processing of T visa applications for any detained applicants. The regulation should also specify that an applicant is detained will factor heavily in any direct request by an applicant to USCIS to expedite processing of the T visa application. Furthermore, the regulation should specify how quickly ICE should make this request upon learning of the non-citizen's pending T visa applications as well as how long USCIS should generally take to respond to the expedite request.

Explanation*:* Applicants in detention have a much more difficult time reporting to and collaborating with law enforcement and are deprived of access to much-needed services that can help them stabilize and allow them to effectively cooperate with legal proceedings to hold their traffickers accountable. KIND has represented and worked with trafficked unaccompanied children who were never referred to child protection agencies or offered services to help with the impacts of victimization and instead were sent to secure detention facilities for children and then transferred to ICE detention. Most of these children

[17] *See* 8 C.F.R. § 214(d)(1)(ii); (k)(2)(i) (stating that DHS may agree to administrative closure or termination "while an application for T nonimmigrant status is adjudicated by USCIS" and "while USCIS adjudicates an application for derivative T nonimmigrant status", respectively).

[18] *See* 8 C.F.R. § 214.11 (d)(9)(i), (ii). And the proposed regulation makes no mention whatsoever of non-citizens granted T- derivative status who are still in proceedings *or* who have outstanding orders of removal. *See* 8 C.F.R. § 214.11(k).

have been labor trafficked and coerced into servitude into criminalized industries; as such, these cases are often underidentified or identified on the eve of or after transfer to detention. These detained trafficked unaccompanied children face an even higher risk of being removed before their application is adjudicated, thus rendering them not only ineligible for a T visa, but vulnerable to being re-trafficked and retaliated against by traffickers after removal.

II. Adjustment of Status

Recommended Language: 8 C.F.R. 245.23(a)(6): "(i) has, since first being lawfully admitted as a T-1 nonimmigrant and until the conclusion of adjudication of the application, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, as defined in 8 C.F.R. 214.11(a), (ii) would suffer extreme hardship involving unusual and severe harm upon removal from the United States, as provide in 8 C.F.R. 214.11(i); *or (iii) was younger than 18 years of age at the time of the victimization qualifying the applicant for relief under section 1101(a)(15)(T) of the INA."*

Explanation: Currently, DHS regulations related to adjustment of status are inconsistent with the statute. 8 USC 1255(l)(C)(iii) specifically exempts trafficking victims who were under the age of 18 at the time of their qualifying victimization from engaging with law enforcement. An exemption that is notably missing from the regulations is necessary for trafficked unaccompanied children to adjust their status and allow them to fully heal from their trauma.

KIND appreciates the opportunity comment on these interim regulations, and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

/s/

Jennifer Podkul
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