



**Homeland
Security**

**Improving the Process for Victims of Human Trafficking
and Certain Criminal Activity: The T and U Visa
January 29, 2009**

The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services and proposes changes to mitigate those problems.

I. Executive Summary

The Citizenship and Immigration Services Ombudsman (Ombudsman) has studied the visa process for victims of trafficking (T visa) and victims of certain criminal activity (U visa). These non-immigrant visas were established by Congress to provide temporary legal status to victims of trafficking and enumerated crimes who assist with the investigations or prosecutions of the criminal activity. The Ombudsman has developed recommendations for United States Citizenship and Immigration Services (USCIS) to improve the immigration process for T and U visa applicants.

USCIS recently issued the long-awaited adjustment of status regulations (adjustment regulations),¹ which provide procedures for T and U non-immigrants to become lawful permanent residents (green card holders). However, delays in the issuance of regulations have created a backlog of T and U visa cases, which are pending at the Vermont Service Center (VSC).² The Ombudsman is concerned that USCIS has not allocated the resources needed to timely process T and U non-immigrant, as well as eligible adjustment, cases. Furthermore, the Ombudsman has observed several obstacles that remain for T and U visa applicants in the immigration process.³

¹ USCIS Interim Final Rule, "Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status" 73 Fed. Reg. 75540 (Dec. 12, 2008). Effective January 12, 2009.

² Information provided to the Ombudsman by USCIS (Oct. 28, 2008). Specifically, as of October 22, 2008, there were 212 T-1 cases, 202 T derivatives cases, 12,092 U-1 visa cases, and 8,156 U visa derivative cases pending with USCIS. *Id.* T-1 and U-1 indicates principal petitioners, which is the individual seeking the immigration benefit and derivatives are immediate family members of the principal applicant. To add to the USCIS workload, according to the adjustment regulations, over 300 T-1 applicants and approximately 2,100 U-1 applicants are eligible to adjust status. *See supra* note 1.

³ Some obstacles facing T and U applicants include: difficulty in obtaining work authorization, inconsistent cooperation from law enforcement officials, and long processing times. The Ombudsman is aware of other concerns, such as uncertainty surrounding derivative filings and discretionary items.

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In an effort to eliminate further delays, facilitate criminal investigations, and assist victims in obtaining the legal status intended by Congress in the “Victims of Trafficking and Violence Protection Act” (VTVPA),⁴ the Ombudsman recommends that USCIS:

- 1) Expeditiously provide more detailed public guidance on new filing procedures outlined in the December 2008 adjustment regulations as well as the trafficking reauthorization legislation for T and U visa applicants.**
- 2) Find alternatives for T visa non-immigrant applicants to obtain work authorization while their applications are pending.**
- 3) Expeditiously implement procedures and provide public guidance for U visa non-immigrant applicants to apply for work authorization as outlined in the December 2008 reauthorization legislation.**
- 4) Provide adequate staff at the T and U visa unit to ensure prompt adjudication of the existing and anticipated T and U visa applications.**
- 5) Post processing times for Form I-914 (Application for T Non-Immigrant Status) and Form I-918 (Petition for U Non-Immigrant Status).**

II. Background

There are an estimated 800,000 individuals trafficked across national borders each year.⁵ Trafficking has a profound impact: “[i]t deprives people of their human rights and freedoms, it is a global health risk, and it fuels the growth of organized crime.”⁶

In 2000, the VTVPA⁷ established the T and U non-immigrant visas, which provide temporary legal status to victims of trafficking and enumerated crimes who assist with investigations or prosecutions of criminal activity. The intent of the VTVPA is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”⁸ Many federal agencies have partnered to fight human trafficking, including the U.S. Departments of Homeland Security (DHS), State (DOS), Justice (DOJ), Health and Human Services (HHS),⁹ Defense (DOD), and Labor (DOL).

⁴ “Victims of Trafficking and Violence Protection Act of 2000” Pub. L. No. 106-386 (Oct. 28, 2000). Codified at INA §§ 101(a)(15)(T), 101(a)(15)(U), 214(n), 214(p), 245(l), and 245(m).

⁵ U.S. Department of State, Bureau of Public Affairs Publication, “Facts About Human Trafficking” (Mar. 15, 2007).

⁶ *Id.* (emphasis removed)

⁷ See *supra* note 4.

⁸ *Id.*

⁹ See *supra* note 5. HHS works to assist trafficking victims so that they may receive the same assistance available to refugees and conducts a national outreach campaign to increase awareness. *Id.*

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USCIS plays an important role in the fight against human trafficking by adjudicating immigration cases, conducting outreach to law enforcement agencies and stakeholders, and developing regulations to establish the procedures for T and U visa applicants. In addition, USCIS has established a dedicated and knowledgeable unit at the VSC to adjudicate T and U visa applications. The Ombudsman has heard positive reports from stakeholders regarding the VSC and its role in adjudicating T and U visa cases.¹⁰ Specifically, stakeholders report that the VSC is responsive, knowledgeable, and sensitive to the issues faced by victims. The adjudicators are selected from an experienced pool of adjudicators and undergo specialized training.¹¹

Since its enactment, several delays have thwarted the success of VTVPA, placing victims in a prolonged period of uncertainty. The formation of DHS after September 11, 2001, and re-delegation of agency responsibility has played a role in the delays. The Immigration and Naturalization Service (INS) issued regulations containing procedures for T non-immigrant applicants in 2002¹² (two years after the passage of the VTVPA).

Subsequently, USCIS was tasked with developing regulations and processing immigration cases. USCIS issued regulations for the U visa in September 2007¹³ (seven years after the passage of the VTVPA). Following congressional pressure,¹⁴ USCIS issued the adjustment regulations for T and U visa holders to become lawful permanent residents (green card holders) in December 2008, effective January 12, 2009.¹⁵ Because of the delays, thousands of victims have failed to obtain the benefits afforded to them by the VTVPA. Significantly, on December 23, 2008, President Bush signed a trafficking reauthorization bill,¹⁶ indicating the importance of this issue.

¹⁰ Ombudsman meeting with U visa stakeholders (Aug. 1, 2008).

¹¹ Information provided to the Ombudsman by USCIS (Oct. 8, 2008).

¹² “New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ‘T’ Nonimmigrant Status” 67 Fed. Reg. 4784 (Jan. 31, 2002).

¹³ “New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status” 72 Fed. Reg. 53014 (Sept. 17, 2007).

¹⁴ Press Release, “Conyers and Lofgren Demand that DHS Issue Rule for Crime Victims: Administration Has Failed to Adopt Regulations to Protect Crime Victims who Cooperate with Law Enforcement” (July 11, 2008).

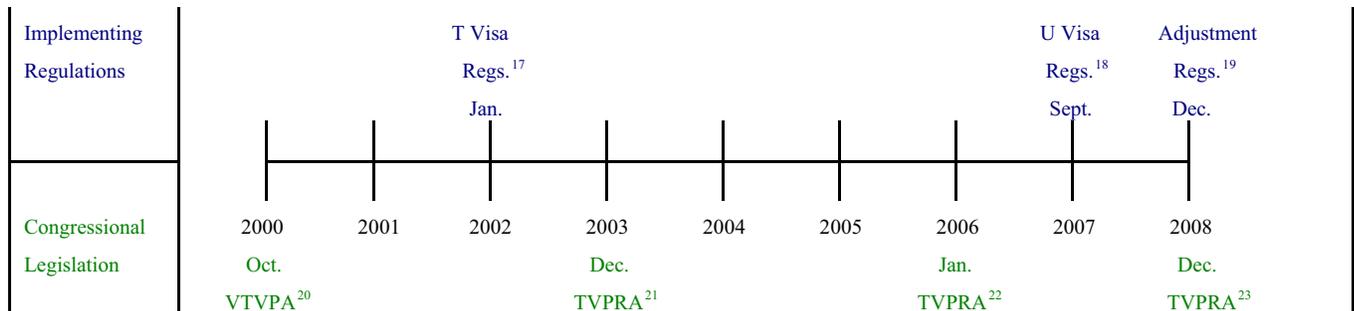
<http://lofgren.house.gov/PRArticle.aspx?NewsID=1926> (accessed Nov. 10, 2008). The press release stated, “[d]espite the enactment of VTVPA eight years ago, and an explicit Congressional mandate to issue the implementing regulations more than two years ago, DHS has yet to issue the T and U adjustment regulations.” It continued, “[t]he failure to timely issue this rule has had concrete, detrimental impact on the lives of crime victims and their families.”

¹⁵ USCIS Press Release, “Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity” (Dec. 8, 2008). USCIS explained the reason for the delay on its website: “The adjustment of status provisions for ‘T’ and ‘U’ visa holders are complex; many difficult legal and policy issues required resolution. Such issues led to intricate and often complicated discussions among the many agencies with which we needed to coordinate. The administration of the adjustment of status provisions for ‘T’ and ‘U’ visa holders is markedly different from other adjustment of status provisions in the INA. We recognize this is a vulnerable population and we want to ensure that our policies and procedures are sound.”

¹⁶ “Trafficking Victims Protection Reauthorization Act” Pub. L. No. 110-457 (Dec. 23, 2008).

USCIS has provided the public with some information on the new adjustment regulations. In addition, the Ombudsman understands that USCIS is working on guidance regarding the procedures outlined in the new legislation.

Figure 1. Timeline Containing Relevant T and U Visa Legislation and Regulations



A. The T Visa

The purpose of the T non-immigrant visa is to allow eligible victims of trafficking to legally remain in the United States and provide assistance with the investigation and prosecution of traffickers.²⁴ According to DOS, of the estimated hundreds of thousands of people trafficked across international borders annually, approximately 14,500-17,500 people are trafficked into the United States.²⁵ According to DOJ, “[the] T visa is a powerful new tool to protect the most vulnerable victims and prevent future trafficking.”²⁶

1. The T Non-Immigrant Visa Process²⁷

By statute, there are 5,000 T non-immigrant visas available for issuance annually, which provide temporary legal status to qualified victims.²⁸ T non-immigrant status cannot exceed four years²⁹

¹⁷ See *supra* note 12.

¹⁸ See *supra* note 13.

¹⁹ See *supra* note 1.

²⁰ See *supra* note 4.

²¹ “Trafficking Victims Protection Reauthorization Act” Pub. L. No. 108-193 (Dec. 19, 2003).

²² “Trafficking Victims Protection Reauthorization Act” Pub. L. No. 109-164 (Jan. 10, 2006).

²³ See *supra* note 16.

²⁴ USCIS Webpage, “Victims of Trafficking and Violence Protection Act of 2000 (VTVPA)” www.uscis.gov (accessed Jan. 8, 2009).

²⁵ U.S. Customs and Border Protection News Release, “CBP, ICE Launch Effort to Raise Awareness of Human Trafficking” (Sept. 9, 2008) citing to information from DOS.

²⁶ DOJ, “Department of Justice Issues T Visa To Protect Women, Children and All Victims of Human Trafficking” (Jan. 24, 2002) quoting former INS Commissioner James Ziglar. http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm (accessed Nov. 12, 2008).

²⁷ See Appendix 1, “T Non-Immigrant Visa Eligibility Requirements” and Appendix 3, “Comparison of T and U Non-Immigrant Eligibility Requirements” for more information.

²⁸ INA § 214(o); 8 U.S.C. § 1184(o) (2008). Derivatives (immediate family members planning to join the principal) are not subject to an annual cap and must file Form I-914, Supplement A. *Id.*

unless due to exceptional circumstances,³⁰ or if the T visa applicant obtains a law enforcement certificate stating that the victim's presence is of law enforcement necessity. There is no filing fee for Form I-914. Upon approval of the T visa by USCIS, victims are granted work authorization.

As of October 2008, USCIS had received less than 2,300 T visa principal applications: 1,308 were approved, 709 were denied or withdrawn, and 212 remained pending since the establishment of the T visa in the VTVPA.³¹ Work authorization is available for T visa non-immigrant applicants who obtain continued presence status while their applications are pending, but that status can only be requested by a law enforcement official.³²

2. The T Visa Adjustment of Status Process³³

In December 2008, USCIS issued adjustment regulations, effective January 12, 2009, providing procedures for T visa holders to apply to become lawful permanent residents (green card holders).³⁴ By statute, USCIS is limited to adjusting 5,000 principal T visas a year, not including derivatives.³⁵

B. The U Visa³⁶

Congress established the U non-immigrant classification in the VTVPA in 2000 to provide legal status to victims of specified crimes.³⁷ “[V]ictims may not have legal status and, therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States. In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes.”³⁸

²⁹ *Id.* The duration of status was added to section 214 after passage of the “Violence Against Women and Department of Justice Reauthorization Act” Pub. L. No. 109-162 (Jan. 5, 2006).

³⁰ *See supra* note 16.

³¹ Information provided to the Ombudsman by USCIS (Oct. 28, 2008). In addition, USCIS received 1,440 I-914A applications for derivatives: 1,077 were approved, 183 were denied, and 202 remain pending.

³² 28 C.F.R. § 1100.35 (2008). “Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the [INS] grant the continued presence....” The status may include “parole, voluntary departure, stay of final order, section 107(c)(3)-based deferred action, or any other authorized form of continued presence....” *Id.* This status does not convey immigration status. Victims granted continued presence will be eligible for work authorization. *Id.*

³³ *See* Appendix 4, “T Visa Adjustment of Status Eligibility Requirements” and Appendix 6, “Comparison of T and U Visa Adjustment of Status Eligibility Requirements” for more information.

³⁴ *See supra* note 1.

³⁵ *Id.*

³⁶ *See* Appendix 2, “U Visa Non-Immigrant Eligibility Requirements” and Appendix 3, “Comparison of T and U Non-Immigrant Eligibility Requirements” for more information.

³⁷ *See supra* note 4.

³⁸ *Supra* note 13.

1. The U Non-Immigrant Visa Process

There is an annual cap of 10,000 U visas per year, not including visas for derivative family members.³⁹ Applications are filed with the VSC. U visa status cannot exceed four years unless due to exceptional circumstances,⁴⁰ or if the U visa applicant receives a law enforcement certificate stating that the victim's presence is necessary to assist in the investigation or prosecution.⁴¹ Upon approval by USCIS, U visa holders are granted work authorization.⁴²

2. Interim Relief for U Non-Immigrant Applicants

The seven year period between the passage of the VTVPA (2000) and the issuance of the interim final rule (2007) created a period of uncertainty for individuals seeking U visa immigration benefits. In 2001, INS issued guidance on interim relief that contained procedures to be followed while regulations implementing the T and U visa status were pending.⁴³ The memorandum indicated that because the regulations were not finalized, individuals identified as possible victims should not be removed from the United States. Furthermore, "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal [would] be used to achieve this objective...."⁴⁴

Roles shifted from INS to USCIS after formation of DHS in 2002. In 2003, with regulations still pending, USCIS issued a memorandum about the U non-immigrant process stating that a "more unified, centralized approach is needed in the interim relief process."⁴⁵

Interim relief was granted to those deemed *prima facie* eligible for U non-immigrant status. Approved applicants were placed in deferred action status, which provided victims with the opportunity to apply for work authorization.⁴⁶ Deferred action is not an immigration status, but a discretionary form of relief.⁴⁷

According to stakeholders assisting U visa applicants, some applicants were reluctant to apply for interim relief due to the absence of regulations with clear procedures, and they feared removal from the United States.

³⁹ *Id.*

⁴⁰ *See supra* note 16.

⁴¹ INA § 214(p); 8 U.S.C. § 1184(p) (2008).

⁴² *Id.*

⁴³ INS Memorandum, "Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – 'T' and 'U' Nonimmigrant Visas" (Aug. 30, 2001).

⁴⁴ *Id.*

⁴⁵ USCIS Memorandum for Director, Vermont Service Center, from William R. Yates, "Centralization of Interim Relief for U Nonimmigrant Status Applicants" (Oct. 8, 2003).

⁴⁶ 8 C.F.R. § 274a.12(c)(14) (2008).

⁴⁷ "An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment..." *Id.*

3. Regulations for U Non-Immigrant Visa Applicants

USCIS issued the interim final regulations containing procedures for victims seeking U visa status on September 17, 2007.⁴⁸ The interim final regulations clarified filing procedures for U visa applicants and established Form I-918 (Petition for U Non-Immigrant Status), to be filed with the VSC.

USCIS publicly noted that it would not re-evaluate previous grants of deferred action, parole, and stays of removal.⁴⁹ Significantly, USCIS stated it would extend interim relief until the agency completed the adjudication of the U visa application.⁵⁰ Effectively, those U visa applicants who filed for interim relief could continue to apply for work authorization while those individuals who applied after the interim final rule was implemented could not apply. Significantly, in recent legislation, Congress recognized the importance for U visa applicants to be able to work while their applications are pending,⁵¹ but USCIS has not yet issued guidance.

As of October 2008, USCIS had received 12,151 principal U visa applications since the establishment of the U visa in the VTVPA.⁵² However, only 50 were approved and nine were denied or withdrawn. USCIS placed the vast majority of U visa applications (12,092 applications) on hold while finalizing adjustment regulations to address outstanding issues such as the availability of a fee waiver for the inadmissibility waiver and potential loss of status.⁵³

4. Adjustment of Status Regulations⁵⁴

USCIS issued the adjustment regulations for T and U non-immigrants on December 12, 2008. Unlike the T visa adjustment regulations, there is no limit to the number of U non-immigrants who can adjust status in a fiscal year.⁵⁵ There are three eligibility requirements for U non-immigrants to adjust status to lawful permanent residence.⁵⁶

⁴⁸ See *supra* note 13.

⁴⁹ USCIS Update, "USCIS Announces Update for Processing Petitions for Nonimmigrant Victims of Criminal Activity" (April 10, 2008). http://www.uscis.gov/files/article/U-Visa_10Apr08.pdf (accessed Dec. 6, 2008).

⁵⁰ *Id.*

⁵¹ See *supra* note 16. Section 201 states, "[t]he Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U)."

⁵² Information provided to Ombudsman by USCIS (Oct. 28, 2008).

⁵³ *Id.* In addition, USCIS received 8,220 U visa derivative applications: 11 were approved, 6 denied, 8,156 remain pending. *Id.*

⁵⁴ See Appendix 5, "U Visa Adjustment of Status Eligibility Requirements" and Appendix 6, "Comparison of T and U Visa Adjustment of Status Eligibility Requirements" for more information.

⁵⁵ See *supra* note 1; see also, USCIS Press Release, "Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity" USCIS answers the question, "Is there a cap on the number of 'T' and 'U' nonimmigrants that can apply to adjust status?" (Dec. 8, 2008).

⁵⁶ See *supra* note 1.

C. Some Key Issues Addressed in the Adjustment Regulations

1. Fee Waivers for the Inadmissibility Waiver⁵⁷

One of the primary obstacles for T and U visa applicants was the unavailability of the fee waiver for the inadmissibility waiver.⁵⁸ The fee for the inadmissibility waiver is \$545.⁵⁹ Many victims, already depending on public benefits for food and shelter, were unable to afford this fee for themselves and members of their family. Without the option of applying for a fee waiver, the immigration benefit was essentially inaccessible to them.

Significantly, USCIS addressed this issue in the adjustment regulations. A fee waiver may be filed for Form I-192 (Application for Advance Permission to Enter as a Non-Immigrant), in cases of individuals filing for T or U non-immigrant status.⁶⁰ The decision to grant a fee waiver is discretionary.⁶¹ The ability to request a fee waiver may allow USCIS to process more T and U applications, reduce its backlog of pending cases, and provide more immigration benefits to qualifying victims.

2. Transition Rule

Certain T and U visa applicants are at risk of being ineligible to adjust status because they may be out-of-status when their application is approved. By statute, T and U visa status cannot exceed four years, unless due to exceptional circumstances. Several T non-immigrants were approved more than four years ago and certain U non-immigrants, who obtained interim relief, accrued more than four years of status.⁶²

⁵⁷ See Appendix 7, “Availability of a Fee Waiver for T and U Visa Applicants” for further explanation of the availability of the fee waiver and its effect on T and U visa applications.

⁵⁸ Many T and U visa victims have immigration issues to address that require an inadmissibility waiver. For example, some common issues include: entry without inspection, entering on a tourist visa and engaging in unauthorized employment, overstaying a visa, entering on a fraudulent passport, or criminal issues. Many of the issues relate to the trafficking or criminal activity for which the applicants are seeking assistance.

⁵⁹ USCIS Immigration Forms, “Application for Advance Permission to Enter as a Non-Immigrant” www.uscis.gov. (accessed Jan. 9, 2009).

⁶⁰ See *supra* note 1. Please note that fees associated with adjustment (Form I-485 (Application to Register Permanent Residence or Adjust Status), I-765 (Employment Authorization Application), I-601 (Application for Waiver of Grounds of Excludability), and biometrics) are waivable for T and U visa applicants. *Id.*

⁶¹ USCIS Forms and Fees, “Fee Waiver Guidance” (March 29, 2004). <http://www.uscis.gov/feewaiver>.

⁶² USCIS acknowledged this conundrum in response to teleconference questions posed in the Ombudsman’s monthly teleconference series. Ombudsman teleconference, “U Visa: One Year After the Interim Final Rule” (Aug. 26, 2008) <http://www.dhs.gov/ombudsman>. USCIS stated, “Petitioners for the U visa must be in valid nonimmigrant status in order to apply for adjustment of status. Currently, many of the petitioners have had interim relief for at least four years. This means that when we approve these U visa petitions, these petitioners will immediately fall out of U nonimmigrant status. Unfortunately, these petitioners cannot currently apply for adjustment of status since the adjustment regulation hasn’t yet been published (it is currently pending with the Office of Management and Budget). Therefore, we are helping these petitioners remain in a valid status by withholding the adjudication of their petitions until the regulation is published and they will be able to apply for adjustment.” *Id.*

This issue was addressed in the adjustment regulations, which provide a transition period for applicants who have accrued more than four years in status waiting for the issuance of the adjustment regulations. T visa applicants must file a complete adjustment application within 90 days of the effective date of the rule and U visa applicants have 120 days from the date of the approval of their non-immigrant application (Form I-918).⁶³

D. Barriers in the Immigration Process

The delay in the issuance of adjustment regulations has been a principal obstacle in the immigration process for T and U visa applicants. For several years, victims who applied for immigration benefits faced prolonged uncertainty; other victims decided not to file and remained in the shadows, not willing to risk possible deportation. The issuance of adjustment regulations clarifies procedures, presents the path for T and U visa holders to obtain lawful permanent residency, and facilitates the processing of cases that have been pending. However, several issues remain.

1. Difficulties Obtaining Work Authorization While Application is Pending

Stakeholders reported to the Ombudsman that the inability of T and U non-immigrant visa applicants to work while their applications are pending is a major roadblock for victims seeking relief.⁶⁴ Upon approval of the T or U visa application by USCIS, victims receive work authorization. However, until a decision is made, victims remain dependent on other means for financial support.⁶⁵ The hardship of not being able to work is heightened by USCIS' prolonged processing times for these applications.

Case Problem: A stakeholder made the following assertions to the Ombudsman: a victim suffered sexual and emotional abuse from her long time boyfriend. Her boyfriend made death threats. In fear of her safety and the safety of her children, the victim reported the crime to the police and her boyfriend was convicted of assault. She applied for U visa status for herself and her three children, but she does not have work authorization to support her family while the non-immigrant case is pending.⁶⁶

The Ombudsman understands that determining *prima facie* eligibility to enable T and U non-immigrant applicants to apply for work authorization in advance of a final adjudication presents an operational challenge to USCIS because it involves reviewing the case twice. However, stakeholders have indicated that the opportunity to work may allow victims to escape threatening situations, facilitate more effective cooperation in criminal investigations and prosecutions, and reduce reliance on public assistance.

⁶³ See *supra* note 1.

⁶⁴ Ombudsman meeting with U visa stakeholders (Aug. 1, 2008).

⁶⁵ T non-immigrant applicants who obtain continued presence status, which must be requested by a law enforcement official, and U non-immigrant applicants who received interim relief continue to be eligible for work authorization.

⁶⁶ Email provided to the Ombudsman by stakeholder (Dec. 4, 2008).

2. Inconsistent Cooperation from Law Enforcement Officials

Stakeholders advise the Ombudsman that cooperation from law enforcement officials is inconsistent and some officials are not fully aware of the T and U visa process. Eligibility for both T and U non-immigrant status require applicants to be willing to assist with criminal investigations to be eligible for the immigration benefit. Unlike T visa applicants, U visa applicants are required to include Form I-918, Supplement B (U Visa Non-Immigrant Status Certification), which is a certification of helpfulness from a “certifying agency.”⁶⁷ The certificate must be signed by a “certifying official,” which is explicitly defined in the regulations as “[t]he head of the certifying agency or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U non-immigrant status certifications on behalf of that agency; or a Federal, State, or local judge.”⁶⁸

Stakeholders have reported to the Ombudsman that the requirement that the certification be signed by a supervisor or agency head is a significant administrative obstacle for applicants because the supervisor or agency head is often unavailable or not as familiar with the case as another officer who worked on the case.⁶⁹ Also, stakeholders have indicated that some officials are not always cooperative and are unaware of the protections afforded to victims in the VTVPA. Others claim that officers are more responsive to certain types of crimes, such as sexual assault, but not other crimes, such as domestic violence.⁷⁰

Stakeholders have also expressed concerns with the requirement in the adjustment regulations that U visa adjustment applicants must show they have not refused assistance to law enforcement agencies with the investigation or prosecution of the relevant crime.⁷¹ Adjustment regulations indicate that one option for applicants to satisfy this requirement is by submitting a new Form I-918, Supplement B.⁷² Stakeholders have indicated that proving this requirement with a new Form I-918 places a heavy burden on the applicant, especially if the applicant faced difficulties obtaining the certificate in the U non-immigrant visa application.⁷³

⁶⁷ 8 C.F.R. § 214.14 (2008). Certifying agency includes federal, state, or local law enforcement agencies, a prosecutor, judge, or other agencies that have responsibilities in the investigation. *Id.*

⁶⁸ 8 C.F.R. § 214.14(a)(3)(i) (2008). This expressed requirement is to ensure the reliability of the certification.

⁶⁹ Ombudsman meeting with U visa stakeholders (Aug. 1, 2008).

⁷⁰ *Id.*

⁷¹ Information provided to the Ombudsman by stakeholders (Dec. 10 and 29, 2008).

⁷² *See supra* note 1. An applicant may also submit “an affidavit describing the applicant’s efforts, if any, to obtain a newly executed Form I-918, Supplement B, or other evidence describing whether the [applicant] received any request” to assist in the investigation or prosecution. *Id.* Please note that the 2008 VTVPR Act also addresses the requirement for U visa applicants seeking lawful permanent residents to not refuse assistance with the investigation and prosecution. “Trafficking Victims Protection Reauthorization Act” Pub. L. No. 110-457 (Dec. 23, 2008).

⁷³ Information provided to the Ombudsman by email from stakeholder (Dec. 9, 2008). That stakeholder explained that it “is a heavy burden on applicants and law enforcement agencies to pull up files years later. So many law enforcement agencies are still not really on board with the U visa process, so it’s an uphill battle just to get the I-918B signed the first time around. I can’t imagine trying it three years later.” *Id.* Similar comments were expressed on a USCIS teleconference call, “T and U Visa Stakeholder Conference Call” conducted by the USCIS Community Relations Office (Dec. 11, 2008).

Best Practice: In the summer of 2008, USCIS initiated a national outreach program to local law enforcement to educate them about the certification process for the U visa.⁷⁴

3. Long Processing Times

USCIS does not post processing times for the T and U non-immigrant visa applications on its website. Stakeholders have noted that many cases have been pending for well over a year, several years in many cases. As noted above, USCIS has thousands of T and U visa applications waiting to be processed.⁷⁵ Since the recent issuance of the adjustment regulations, USCIS can begin processing many of the applications. However, it remains unclear if USCIS has the resources to timely process cases considering the existing and increasing workload, the time necessary to train adjudicators added to the VSC T and U visa unit, and time required to respond to customer inquiries.

III. Analysis

A. Expeditiously Issue Public Guidance

USCIS has issued “Fact Sheets” and provided answers to “Frequently Asked Questions” on its website to assist T and U applicants and their representatives.⁷⁶ Due to the complexity of the eligibility requirements, amendments to previous regulations, and the discretionary nature of many elements, confusion and questions remain. For example, USCIS has previously issued guidance regarding fee waivers for all application types.⁷⁷ However, as indicated in the regulations, victims of crimes have distinct circumstances that separate them from other applicants.⁷⁸ Specific guidance should be provided to T and U visa applicants.

USCIS also indicated that it will be issuing “Requests for Evidences” (RFEs) to T and U visa applicants for many of the applications that require the fee or fee waiver for the inadmissibility

⁷⁴ CIS Ombudsman teleconference, “U Visa: One Year After the Interim Final Rule” (Aug. 26, 2008) http://www.dhs.gov/xabout/structure/gc_1192724755499.shtm#4. USCIS stated, “[t]here has been outreach to and liaison with individual police officers, victim-witness coordinators at police departments, and management authorities at police departments and other law enforcement agencies in order to educate and help police plan coordinated strategy for victims, and to facilitate the certification process. These efforts so far have spanned the greater California area, the state of Texas, the Pacific Northwest, the south, the Metropolitan New York City area, and the metropolitan Washington, DC area.”

⁷⁵ See *supra* note 2.

⁷⁶ USCIS Press Room, “USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity” (Dec. 8, 2008) and “Questions and Answers: Qualifying Family Members of U Visa Beneficiaries May Obtain Lawful Permanent Residence” (Dec. 10, 2008). www.uscis.gov.

⁷⁷ USCIS Forms and Fees, “Fee Waiver Guidance” (March 29, 2004). <http://www.uscis.gov/feewaiver>.

⁷⁸ “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule” 72 Fed. Reg. 29851 (May 30, 2007). “[P]rograms regarding victims and asylee adjustment of status applications] involve the personal well being of a few applicants and petitioners, and the decision to waive these fees reflects the humanitarian purposes of the authorizing statutes. The final [fee] rule maintains this blanket fee exemption because it is consistent with the legislative intent to assist persons in these circumstances. Anecdotal evidence indicates that applicants under these programs are generally deserving of a fee waiver.” *Id.*

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waiver.⁷⁹ USCIS should take proactive measures to clarify new procedures associated with recently issued regulations and legislation to assist applicants, avoid issuing unnecessary RFEs, and minimize delays.

Certain T and U applicants were eligible to adjust as soon as the adjustment regulations were effective on January 12, 2009. However, some applicants risk losing status because they have been waiting more than four years and the validity period will have expired. Stakeholders have indicated that the transition period (90 days for T visa applicants from the effective date of the adjustment regulations and 120 days for U visa applicants from the approval of the non-immigrant application, Form I-918) may not be sufficient considering the documentation requirements.⁸⁰ USCIS should provide insight on the availability of secondary evidence and information on how applicants can request extensions of time.

As noted, there have been reports of inconsistent cooperation from law enforcement agencies. Difficulties in obtaining a new certificate may prevent applicants from filing their adjustment applications timely. In addition, the Ombudsman has heard that it may be hard to find the original official who worked on the investigation in cases that have been pending for years.⁸¹ For applicants who seek to satisfy the requirement to show continued assistance in the investigation or prosecution with an affidavit or other evidence, it is not clear what evidence is sufficient. USCIS should provide more information on the availability of secondary evidence that would be sufficient to satisfy this requirement. Clearer public guidance would assist T and U visa applicants with procedural changes, decrease the number of inquiries to USCIS, and improve customer service.

For these reasons, the Ombudsman recommends that USCIS expeditiously provide more detailed public guidance on new filing procedures outlined in the December 2008 adjustment regulations as well as the trafficking reauthorization legislation for T and U visa applicants. USCIS should provide specific guidance to applicants on several issues addressed in the adjustment regulations, including: (1) fee waivers, particularly for T and U applicants, (2) transition rule; and (3) law enforcement certificates.⁸²

B. Work Authorization for T Visa Non-Immigrant Applicants

Currently, only certain T visa non-immigrant applicants who obtained continued presence status can work while their applications are pending, and that status can only be requested by a law enforcement official.⁸³ Stakeholders have indicated that it is sometimes difficult to obtain

⁷⁹ USCIS teleconference, “T and U Visa Stakeholder Conference Call” conducted by the USCIS Community Relations Office (Dec. 11, 2008).

⁸⁰ Information provided to the Ombudsman by stakeholders (Dec. 4 and 29, 2008).

⁸¹ Information provided to the Ombudsman by stakeholder (Dec. 29, 2008).

⁸² USCIS may also wish to consider providing guidance on other issues, such as derivative filings.

⁸³ 28 C.F.R. § 1100.35 (2008). “Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the [INS] grant the continued presence....” The status may include “parole, voluntary departure, stay of final order, section 107(c)(3)-based

cooperation from law enforcement officials to request continued presence.⁸⁴ Many victims have not been able to work for extended periods of time and are vulnerable throughout the process.

Policy guidance and regulations provide legal avenues that allow certain applicants to apply for work authorization. For example, a policy memorandum noted that mechanisms such as granted deferred action, parole, and stays of removal should be used to avoid possible deportation of T and U visa applicants.⁸⁵ Furthermore, according to regulations, USCIS has the discretion to grant deferred action, which allows the individual to apply for employment authorization, if the individual established an economic necessity for employment.⁸⁶

USCIS may wish to consider a process similar to the interim relief process that was afforded to U visa applicants prior to the issuance of the interim final regulations in September 2007. Applicants can make a request for interim relief and gain deferred action status without depending on the assistance of law enforcement officials. This process would enable T non-immigrant applicants to work while their application is pending.

The Ombudsman understands that USCIS may face operational challenges to determine *prima facie* eligibility for interim relief. However, the ability to work legally in the United States is a strong incentive for victims to gain independence and become less reliant on public assistance. The Ombudsman supports an efficient process; however, the hardship suffered by victims unable to work for an extended period requires a solution.

For these reasons, the Ombudsman recommends that USCIS consider alternatives for T non-immigrant visa applicants to apply for work authorization while their applications are pending.

C. Implement Work Authorization Procedures for U Non-Immigrants

In recent legislation, Congress recognized the importance for U visa applicants to be able to work while their applications are pending.⁸⁷ Quick implementation of this legislation and guidance to U visa applicants can minimize hardships and further delays for U visa victims. Congress has indicated the importance of applicants' ability to work. Work authorization can assist in their ability to receive adequate protection, feed their families, pay their rent, and gain independence without relying on public aid.

deferred action, or any other authorized form of continued presence...." *Id.* This status does not convey immigration status. Victims granted continued presence will be eligible for work authorization. *Id.*

⁸⁴ Information provided to the Ombudsman by stakeholder (Dec. 29, 2008).

⁸⁵ INS Memo, "Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – "T" and "U" Nonimmigrant Visas" (Aug. 30, 2001). *See also* USCIS Memorandum, "Centralization of Interim Relief for U Nonimmigrant Status Applicants" (Oct. 8, 2003).

⁸⁶ 8 C.F.R. § 274a.12(c)(14) (2008).

⁸⁷ *See supra* note 16. Section 201 states, "[t]he Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U)."

For these reasons, the Ombudsman recommends that USCIS expeditiously implement procedures and provide public guidance for U non-immigrant visa applicants to apply for work authorization as outlined in the December 2008 reauthorization legislation.

D. Resource the T and U Visa Unit

As of October 2008, USCIS only had five adjudicators tasked with adjudicating T visa cases and two adjudicators working on U visa cases.⁸⁸ In October 2008, USCIS indicated that it planned to add more adjudicators to the T and U unit when the adjustment regulations are issued.⁸⁹ The Ombudsman is aware that the adjustment regulations have only recently been issued. Now, the agency has to process over 12,000 T and U cases, eligible T and U visa adjustment of status cases (approximately 2,500), as well as derivative T and U visa cases.⁹⁰ Considering its small staff, time required for training, and the responsibility to adjudicate the existing and increasing T and U workload, the Ombudsman believes USCIS should rapidly allocate resources and increase its staff to ensure timely adjudication of T and U visa cases.

For these reasons, the Ombudsman recommends that USCIS provide adequate staff at the T and U visa unit to ensure prompt adjudication of the existing and anticipated T and U visa applications.

E. Post Processing Times for T and U Visa Applicants

Posting T and U visa processing times will inform the public about USCIS' efforts to timely process these important cases and give applicants some insight into how soon their case may be processed, which will assist them in planning.

For these reasons, the Ombudsman recommends that USCIS post processing times for Form I-914 (Application for T Non-Immigrant Status) and Form I-918 (Petition for U Non-Immigrant Status).

IV. Conclusion

The effort to combat trafficking in persons and protect victims is a high priority for Congress and DHS. The Ombudsman supports USCIS' efforts to make the path to obtain temporary legal status to qualified victims efficient and timely in accordance with the VTVPA.

⁸⁸ Information provided to the Ombudsman by USCIS (Oct. 8 and Oct. 28, 2008).

⁸⁹ *Id.*

⁹⁰ *See supra* note 2.

Appendices

Appendix 1. T Non-Immigrant Visa Eligibility Requirements

T visa applicants seeking non-immigrant benefits must file Form I-914 (Application for T Non-Immigrant Status) with the VSC.⁹¹ To be eligible for the T visa, applicants must:⁹²

- 1) Be a victim of a severe form of trafficking;⁹³
- 2) Be physically present in the United States or at a port of entry due to trafficking;
- 3) Comply with any reasonable requests for assistance in investigating or prosecuting trafficking; and
- 4) Suffer extreme hardship involving unusual and severe harm if removed from the United States.

Appendix 2. U Visa Non-Immigrant Eligibility Requirements

U visa applicants seeking non-immigrant benefits must file Form I-918 (Petition for U Non-Immigrant Status) with the VSC. To be eligible for the U non-immigrant visa, applicants must:⁹⁴

- 1) Show substantial suffering as a result of physical or mental abuse as a result of being the victim of certain criminal activity;⁹⁵
- 2) Possess information about that criminal activity;
- 3) Have been, or is being, or will be helpful or is likely to be helpful to federal, state, or local authorities in the investigation or prosecution of the qualifying criminal activity; and
- 4) Show that the criminal activity described violated the laws of the United States or occurred in the United States or in the territories of the United States.

⁹¹ See *supra* note 12.

⁹² INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T) (2008).

⁹³ Severe form of trafficking is defined in section 103 of the VTPVA as: “(A) 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 has not attained 18 years of age; or (B) 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.” *Supra* note 4.

⁹⁴ INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U) (2008).

⁹⁵ The enumerated crimes are: “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt; conspiracy; or solicitation to commit any of the above mentioned crimes.” *Id.*

Appendix 3. Comparison of T and U Non-Immigrant Eligibility Requirements

Eligibility	T Non-Immigrant Visa⁹⁶	U Non-Immigrant Visa⁹⁷
Type of Abuse	Victim of severe trafficking	Suffered substantial physical or mental abuse from certain criminal activity.
Where	Applicant must have been physically present in the United States or at a U.S. port of entry on account of such trafficking	Crime occurred in the United States or otherwise violated U.S. law
Helpfulness with Investigation or Prosecution	Comply with reasonable request for assistance with the investigation of trafficking act	Provide law enforcement certificate that victim has been, is likely to be or is being helpful to an investigation or prosecution of criminal activity.
Other	Applicant would suffer extreme hardship involving unusual and severe harm if removed	Victim possesses information about the criminal activity.

Appendix 4. T Visa Adjustment of Status Eligibility Requirements

To be eligible to adjust, the T visa applicant must show:

- 1) Lawful admission to the United States as a T non-immigrant and continuation of T visa status at the time of filing the application for adjustment;
- 2) Continuous presence of a least three years since admission as a T non-immigrant or continuous presence during the investigation or prosecution;
- 3) Admissible at the time of adjustment of status or otherwise received a waiver by USCIS for any applicable ground of inadmissibility;
- 4) Good moral character; and
- 5) Continued compliance with any reasonable request for assistance in an ongoing investigation or prosecution, or extreme hardship upon removal from the United States.⁹⁸

⁹⁶ INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T) (2008).

⁹⁷ INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U) (2008).

⁹⁸ See *supra* note 1.

Appendix 5. U Visa Adjustment of Status Eligibility Requirements

To be eligible to adjust, the U visa applicant must show:

- 1) Lawful admission to the United States as a U non-immigrant and continuation of U visa status;
- 2) Continuous physical presence in the United States for at least three years since obtaining U non-immigrant visa status; and
- 3) No unreasonable refusals to provide assistance in federal, state, or local investigation or prosecution.⁹⁹

Appendix 6. Comparison of T and U Visa Adjustment of Status Eligibility Requirements

Eligibility	T Visa Adjustment of Status ¹⁰⁰	U Visa Adjustment of Status ¹⁰¹
Lawful Admission	As T non-immigrant	As U non-immigrant
Physical Presence	Continuous period of 3 years since T non-immigrant status was granted OR a continuous period during the investigation, provided that it has been certified that the investigation is complete	Continuous period of 3 years since U non-immigrant status was granted
Character	Good moral character since being admitted as T non-immigrant	N/A
Helpfulness with Investigation or Prosecution	Continued compliance with reasonable requests for assistance in the investigation or prosecution OR extreme hardship involving unusual and severe harm upon removal	No unreasonable refusal to provide assistance in the criminal investigation or prosecution
Admissible	Admissible at the time of adjustment or otherwise have been granted a waiver for any ground of	The only inadmissibility issue that is not waivable includes: Nazi persecution, genocide, or act of torture or extrajudicial killing.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

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	inadmissibility	Not required to establish that they are admissible USCIS uses discretion
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Appendix 7. Availability of a Fee Waiver for T and U Visa Applicants

As noted above, many victims were unable to afford the fee for the waiver of inadmissibility for themselves and members of their family. The fee for the inadmissibility waiver is \$545.¹⁰² According to USCIS, approximately 95 percent of T and U visa non-immigrant applicants are inadmissible and require Form I-192.¹⁰³ Former DHS Secretary Chertoff stated, and USCIS has publicly noted, that the fee should not be an obstacle for a victim seeking an immigration benefit.¹⁰⁴

Before issuing the new adjustment regulations, USCIS stated that the May 2007 fee rule¹⁰⁵ did not permit a fee waiver for the waiver of inadmissibility,¹⁰⁶ but indicated that a case would not be denied for the inability to pay.¹⁰⁷ USCIS placed the majority of T and U visa applications on hold until the regulations were issued with guidance on the fee waiver. This delay may explain the low number of U visa approvals and the high number of applications that still remain pending: 50 U visa approvals compared to 12,092 pending cases.

Case Problem: A stakeholder made the following assertions to the Ombudsman: a victim of rape and assault applied for U visa status for herself and derivative status for her two children. The children are still living in El Salvador. She did not have the money to pay the fee for the waiver of inadmissibility. The applicant learned that the man, whom she testified against, was convicted and deported back to El Salvador. The rapist continues to send the victim threatening letters saying that he is going to harm her children in El Salvador. The victim has requested an expedite of the U visa applications to get her children out of El Salvador. However, the case

¹⁰² USCIS Immigration Forms, "Application for Advance Permission to Enter as a Non-Immigrant" www.uscis.gov. (accessed Jan. 9, 2009).

¹⁰³ Information provided to the Ombudsman by USCIS (Oct. 8, 2008).

¹⁰⁴ Department of Homeland Security News Release, "Remarks by [former] Homeland Security Secretary Michael Chertoff at the Stop Human Trafficking Symposium" (Sept. 9, 2008). http://www.dhs.gov/xnews/speeches/sp_1221053062406.shtm. (accessed Jan. 9, 2009).

The former Secretary stated at the symposium, "generally, we do have an ability to waive fees for people who are indigent, so let me find out about that. Because I agree with you that if there are people who are victimized, we don't want to have -- you know, my definition, they're destitute. We don't want to have that be an obstacle to getting a visa that will enable them to make -- help us make cases against, you know, very serious criminals." USCIS publicly expressed a similar view in a question and answer session at the symposium.

¹⁰⁵ "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule" 72 Fed. Reg. 29851 (May 30, 2007).

¹⁰⁶ USCIS Update, "USCIS Announces Update for Processing Petitions for Nonimmigrant Victims of Criminal Activity" (April 10, 2008). http://www.uscis.gov/files/article/U-Visa_10Apr08.pdf. (accessed Jan 7, 2009).

¹⁰⁷ Information provided to the Ombudsman by USCIS (Oct. 8, 2008).

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remains pending because she previously could not request a fee waiver for the inadmissibility waiver.¹⁰⁸

Significantly, USCIS addressed this issue in the adjustment regulations. A fee waiver may be filed for Form I-192 (Application for Advance Permission to Enter as a Non-Immigrant), in cases of individuals filing for T or U non-immigrant status.¹⁰⁹ The decision to grant a fee waiver is discretionary.¹¹⁰ With the availability of the fee waiver, USCIS should be able to process T and U cases that have remained pending and the immigration benefit should be more accessible to victims.

¹⁰⁸ Email provided to the Ombudsman by stakeholder (Dec. 4, 2008).

¹⁰⁹ *See supra* note 1.

¹¹⁰ USCIS Forms and Fees, "Fee Waiver Guidance" (March 29, 2004). <http://www.uscis.gov/feewaiver>.