Session 306: The Changing Face of Human Trafficking

Immigration is a perennial part of the daily evening news. While much of the focus has been on immigration across our southern border, immigrants from Asia continue to come to this country in large numbers. That search for opportunity has also led to much more sinister phenomena, that of human trafficking. Many of us still remember the images in the 1990s of trafficked garment workers held hostage in an apartment complex in El Monte, California. Since then, however, some of our nation’s largest private law firms and civil rights organizations have been collaborating to file civil lawsuits on behalf of trafficked workers. The face of the trafficked worker is also changing as the traffickers have propagated in several industries. Whether it’s 3 Indonesian caregivers in Los Angeles, 500 Indian shipyard workers in Mississippi, or 350 teachers in Louisiana, our concept of the trafficking victim has broadened. This panel will discuss a wide range of issues related to serving survivors of labor and sex trafficking, including immigration relief, remedies through civil litigation, and law enforcement.

Program Chair & Moderator:
Paul J. Estuar, Senior Attorney, Legal Aid Foundation of Los Angeles

Speakers:
Joann H. Lee, Directing Attorney, Legal Aid Foundation of Los Angeles
Greg Nunnally, Homeland Security Investigations
Yanin Senachai, Skadden Fellow, Asian Americans Advancing Justice - Los Angeles
Ivy O. Suriyopas, Director, Anti-Trafficking Initiative, Asian American Legal Defense and Education Fund
Casey Wilson, Group Supervisor, Homeland Security Investigations
Human Trafficking...
We are proud to partner with the National Asian Pacific American Bar Association to promote excellence in the legal profession.
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Dear NAPABA Members and Friends,

As we gather for the 2012 NAPABA Convention in Washington, DC, it’s hard to believe that one year has passed by so quickly. This will be my last President’s message. Together we have continued to build on the strong foundation from previous years to deliver another year of extraordinary growth for NAPABA.

To more effectively serve our members and accomplish our mission, over the course of this year we have focused on three primary areas—enhancing NAPABA’s governance, elevating our advocacy, and deepening our partnerships.

With respect to enhancing NAPABA’s governance, one of the signature accomplishments of the Board this year was drafting and adopting a new strategic plan to chart NAPABA’s growth over the next three years. Through the collective effort of NAPABA leaders and members across the country, we have had tremendous growth over the past few years in virtually every respect. The primary objective of the strategic plan, which can be accessed on the NAPABA website, is to guide and manage our growth as we move forward. The overall theme of the strategic plan is to enhance collaboration throughout NAPABA, from the Board, the NAPABA Law Foundation, our affiliates, and our committees. One example of this effort is that at each of the Regional Conferences this year—Atlantic City, Chicago, and Orange County, President-Elect Wendy Shiba or I led a meeting of NAPABA Board members and affiliate leadership. These have been great opportunities to exchange information and build relationships.

In terms of advocacy, one area that NAPABA has continued to focus is judicial nominations. Since January 2009, our country has more than doubled the number of active APA judges on the federal bench, from eight to now seventeen. One of the highlights for this year was to see Judge Jacqueline Nguyen confirmed to the United States Court of Appeals for the Ninth Circuit, becoming the first APA woman Federal Circuit Court judge in the history of our nation. Pending the outcome of the Presidential election, we hope to see the confirmation of a few other APA judicial nominees. Our advocacy efforts also included Lobby Day where NAPABA members met with elected members of Congress and their staff on select issues from NAPABA’s annual advocacy agenda. One of the highlights of this effort was to work with Congresswoman Judy Chu from California who sponsored a bill to issue an expression of regret for the Chinese Exclusion Act of 1882. Earlier this year, one hundred and thirty years after passage of the Chinese Exclusion Act, the U.S. House of Representatives joined the Senate’s prior action in expressing regret for enacting discriminatory laws targeting Chinese and other Asian immigrants.

Over the course of this year NAPABA has also ramped up our understanding of combating human trafficking, one of the most compelling human rights issues of our time. The majority of the victims of human trafficking are of Asian descent and NAPABA is proud to launch a major new initiative to combat this injustice. Our approach will be threefold, advocacy for legislation and partnership with law enforcement entities to combat human trafficking, encouraging NAPABA affiliates to engage in direct community service to raise awareness and aid victims, and encouraging individual members to provide legal services to non-profit organizations engaged in addressing this issue.

The final major area of focus for NAPABA this year has been in cultivating our strategic partnerships. One of the most important is the Coalition of Bar Associations of Color (CBAC) which brings together the National Bar Association, the Hispanic National Bar Association, the National Native American Bar Association, and NAPABA on a range of issues and common concerns. This year through CBAC, these four bar associations issued 19 joint resolutions. One of the more complex issues the NAPABA Board had to decide this year was whether to join an amicus brief in the University of Texas v. Fisher case involving diversity in college admissions. As a non-partisan organization that welcomes all members and perspectives across the political continuum, the Board took a very thoughtful and deliberative approach, ultimately deciding to join the brief submitted on behalf of CBAC. Of the more compelling considerations for the Board was that diversity in colleges and universities ultimately benefits all students by enabling a greater exchange of ideas and perspectives. Moreover, greater access to higher education expands opportunity for all Americans, which ultimately goes to one of the NAPABA’s core values—advancing diversity in the legal profession. This will definitely be one of the biggest cases of this term of the Supreme Court. I encourage you to read the amicus brief filed on behalf of CBAC. There are other outstanding briefs on this issue as well, including the Asian American Center for Advancing Justice brief in support of diversity in college admissions filed on behalf of over 70 APA organizations and led by long-time NAPASA partner the Asian American Justice Center; the brief filed by the Asian American Legal Foundation in opposition; as well as powerful briefs filed by the U.S. Department of Justice and on behalf of over 50 Fortune 100 and other leading companies.

In closing, I would like to thank you for the opportunity to serve as your President; it’s an honor and a privilege. Also, thank you for all that you do each day to contribute to making this the leading bar association for APA lawyers whether that is at the affiliate level, in our committees, or through the NAPASA Law Foundation. Finally, I would like to thank our outstanding staff, who do so much behind the scenes, and the NAPABA Board. All of our Board members did an outstanding job and it was an honor to serve with them. I look forward to supporting President-Elect Wendy Shiba and the incoming Board as we continue to build this great organization.

Warm regards,

Nimesh M. Patel
LEADERSHIP CORNER

Do you want to get involved with NAPABA? Are you interested in how current board members and committee chairs got involved? You can learn about NAPABA’s leadership in this feature of Leadership Corner. This quarter, we get to know Margaret Wong.

In more than 35 years of practice, Margaret Wong has built Margaret W. Wong & Associates Co., L.P.A. into a firm nationally and internationally renowned for its knowledge in immigration and nationality law. As the demand for her services increases across the country, Margaret W. Wong & Associates now has offices in Cleveland, Columbus, Detroit, New York, Atlanta and Nashville. Margaret is admitted for practice in Ohio, New York, Illinois, Georgia, the District of Columbia, and Michigan.

In recognition of her abilities as a practitioner, Margaret has received the highest rating, AV, from Martindale-Hubbell, based on both legal ability and general-ethics standards. Her peers have named her a “Leading Lawyer,” an exclusive list that has been published in Inside Business Magazine since the 1990s. She is listed as a 2004 “Super Lawyer” in Cincinnati Magazine, a distinction reserved for the top 5% of lawyers. She has also been listed as one of the “Best Lawyers in America.” Her firm is ranked by US News as one the best law firms in the country.

Margaret received the highly coveted Ellis Island Medal of Honor in May 1998 for her outstanding achievements and contributions to the multicultural fabric of the United States. In 2010, she published her first book, The Immigrant’s Way: For All Immigrants, By an Immigrant. A second book is currently in the works. In the legal profession her status has been recognized with the honor of lifetime membership of both the Eighth Judicial District Court and the Federal Sixth Circuit Court.

What role do you currently hold in NAPABA? What have you held in the past?
I am the co-chair of the NAPABA Immigration Law Committee, alongside Jared Leung and Vishal Chander. I was a Trailblazer award winner and have been a contributor to the organization for many years. Jared and I also organized one of the organization’s annual conventions.

How did you first get involved with NAPABA?
In 1977 when I first moved to Cleveland, James Chin, a fellow Cleveland Asian lawyer, helped me out tremendously. I had held a number of positions before moving to Cleveland, but never found a home or a niche. In spite of my academic successes, being born and raised in Hong Kong meant that I was essentially still a “fish out of water” in the United States. It was James who introduced me to NAPABA and there I began the process of really understanding how Asian Americans really think and work.

What do you most enjoy about your job and the legal profession?
I love being an immigration lawyer. I know how immigrants feel – I am one. I am an outlier who is neither east or west, and often don’t belong.

What advice would you give to young or aspiring attorneys?
Work hard. There is no such thing as finding a perfect balance between your life and career – you can be good at both. Sadly, however, to be great you do have to pick one to prioritize. It takes about ten years to develop your core competence. During this time there may be a lot of grunt work – just do it, even if you hate it, it will pay off. There is no such thing as hard work without reward. Don’t worry or fixate too much on money. It will come if you are great in what you do. Watch and learn from those around you. Read as much as you can, including staying on top of world news. I read as much as I can – at least two books a week.

Benchmark yourself against two or three lawyers you admire. Take the time to engage with them – even see if you can shadow them in their work. Every New Year put together a new list of three figures you want to emulate. At the end of the year re-check your list and see where you stand. Always remember to take the time to repay the help that others have given you. It may be a cliché but I am experienced enough to know that it’s true – what goes around comes around. Help people you see in trouble; you never know when you may be in a similar situation. Be kind to your clients. This does not mean not charging enough. To be successful requires a certain amount of selfishness first, followed by selfishness.

Is there anything interesting about yourself that you would like to share?
Contrary to popular belief I am not a “smart” person – I am a hard worker. Because of my Catholic girl education I am confident enough within myself to do my cases. In the other aspects of my life I am not as confident. Before meeting my wonderful husband Kam, I went through hell and back in my personal life. I was an abused woman and had to go through a horrible divorce. Overcoming setbacks in life has made me the person I am today. Moreover, it has given me the belief I have in persevering in the face of adversity and the faith that hard work will bring rewards.

Why did you choose to become an attorney?
Growing up, my parents were small business in the education system in Hong Kong you are forced to choose between the arts and the sciences. I was very good at math and therefore chose the sciences. In 1969, when I first came to the United States I attended an all-girls, catholic, junior college and then went on to receive my Bachelor’s degree at Western Illinois University. There my majors were biology and chemistry as my earlier choices in life had pushed me towards a career in medicine. Around this time, one of my role models from Hong Kong, who was six years older than me, became a lawyer. Inspired, in my last year I changed my major and was subsequently accepted to study law at the State University of New York at Buffalo with a full scholarship. This was simply too good to turn down. In many ways my becoming an attorney was a bit of a fluke and involved a lot of luck. This year my daughter also graduated from the same law school and I sit on the school’s Foundation Board.
Every person should have a fair opportunity to thrive. Human trafficking occurs when a person loses the pursuit of that chance because she operates in a climate of fear in the workplace, making her feel isolated or invisible. Legally, she has to demonstrate that she experiences some type of force, fraud, or coercion that keeps her working against her will. An extremely exploitative employer who abuses her power and severely limits the worker’s movements and access to help has crossed the line from merely violating employment law into infringing laws against involuntary servitude, forced labor, peonage, or debt bondage—also known as “modern-day slavery.”

Human trafficking is a complex phenomenon. Women, men, and children can be trafficked. Undocumented immigrants, visa and green card holders, and U.S. citizens can be trafficked. The educated, unskilled laborers, seasonal workers, or persons who operate in the informal economy can be trafficked. A person can be trafficked to work on a farm, a restaurant, a hotel, a brothel, or a household as a domestic worker. Traffickers can be women, men, corporations, small business owners, smugglers, complex crime syndicates, government contractors, diplomats, or pimps. Traffickers exploit and abuse persons who are in vulnerable situations and who may be unaware of or unable to assert their rights and seek assistance.

Domestic workers, for instance, are already extremely vulnerable to economic exploitation because of their isolation in private households. The federal government’s failure to provide them with the same kind of employment law protections as other workers under the Fair Labor Standards Act, such as the lack of overtime pay for live-in workers, increases the likelihood of mistreatment. Domestic workers in diplomat households face even greater challenges because they have limited options to find alternative employment; for many of these workers, if they are experiencing poor working conditions, their essential choice is either to endure or complain and risk being returned to their home countries. In Baoanan v. Baja, a former nursing school student alleged that a Philippine permanent representative to the United Nations and his family defrauded her and subjected her to involuntary servitude and debt bondage by making her their domestic worker to satisfy a supposed debt. There have been a host of similar cases in which domestic workers of diplomats and consuls have filed criminal and civil complaints against their employers, such as Swarna v. Al-Awadi and Sabbithi v. Al Salem. The Government Accountability Office issued a report, “Human Rights: U.S. Government’s Efforts to Address Alleged Abuse of Household Workers by Foreign Diplomats with Immunity Could Be Strengthened,” on the prevalence of this issue.

Another example of a human trafficking case is U.S. v. Carreto. There, the defendants were convicted of smuggling Mexican women into the United States and forcing them into
prostitution. The defendants operated out of Tenancingo, Tlaxcala, Mexico, a town built on sex trafficking where there is little alternative employment. The Carreto brothers were just one operation out of an estimated 1,000 traffickers in the region. Wealthy men defraud Mexican, Central American, and South American women and girls from poor backgrounds into believing that they are in loving relationships, offering them marriage or work. The State Department issued a memorandum, “Tenancingo Bulletin #1 – The Anatomy of a Trafficking Ring: Origins and Recruitment,” that described the typical patterns that these syndicates follow.

A final illustration of human trafficking involves workers who enter the U.S. on temporary guestworker visas. An overseas recruiter generally advertises job opportunities in the United States; certain promises are made about the working and housing conditions in the U.S.; an attorney connected with the employer arranges for the H-2A or H-2B visas, sometimes for a fee; the employer may test the prospective worker or provide some kind of training, sometimes for a fee; the worker often owes money in order to pay for the numerous fees and travel expenses; the recruiter, attorney, or employer may advise the worker on how to prepare for the interview at the U.S. embassy or consulate; and the worker arrives in the U.S. and starts working for the employer. However, in a trafficking situation, the worker often faces dramatically different working conditions than initially promised. The pay may be drastically lower or nonexistent; the worker may face deductions in pay for housing, transportation, or other hidden expenses; the number of hours per week may be substantially higher, or the worker may be even expected to be on-call 24 hours a day, seven days a week; the housing conditions may be dangerous or unsanitary, or in violation of federal regulations; and the employer may make threats to call the authorities or repatriate the worker for complaining about the conditions.

David v. Signal and the Equal Employment Opportunity Commission’s companion case, EEOC v. Signal, are civil actions involving guestworkers from India with claims against a corporation and various other entities for their alleged mistreatment. The suit claims that a class of nearly 500 Indian guestworkers were trafficked into the U.S. through the H-2B guestworker program to work in shipyards in the aftermath of Hurricane Katrina and were subjected to labor camps, fraudulent pay, and threats of physical harm, among other violations. In U.S. v. Terechina, the defendant, who admitted to withholding guestworkers’ passports and immigration documents, was sentenced to prison and ordered to pay almost $250,000 in restitution to her guestworker victims who worked in hotels as housekeepers and laundry workers in Columbus, Ohio.

Human trafficking has impacted every facet of the economy – from the workers that take care of our children to the food we eat. Consider the root causes: poverty, vast unemployment, limited educational or professional opportunities, and demand for cheap products and services, familial conflict or lack of services and support for youth, mentally-challenged persons, and other vulnerable domestic populations; and discrimination against women, rigid immigration policies for migrant workers, and natural disasters or conflicts in origin countries. The federal government has attempted to address some of these factors as part of its efforts to prevent human trafficking. The State Department, for instance, has supported the website www.slaveryfootprint.org in its attempts to educate the public about the supply chains of products they consume. This website will estimate the number of “slaves” or forced labor victims that were used in the production of various goods, such as chocolate, jewelry, or clothing. States such as California, meanwhile, passed the California Transparency Supply Chains Act, which requires retailers and manufacturers to their efforts to eradicate human trafficking from their supply chains for goods offered for sale. Representative Carolyn Maloney (D-NY14) has introduced a similar bill, the Business Transparency on Trafficking and Slavery Act (HR.2759), that would require similar efforts on a federal level.

Another way the federal government has tried to combat trafficking has been to track and rate governments’ efforts to end this human rights violation worldwide. The State Department issues an annual Trafficking in Persons (TIP) Report, which was released on June tenth this year. Less than three weeks after the International Labour Organization issued its report on forced labor estimating trafficking to be 20.9 million worldwide, the State Department’s TIP Report estimated 27 million women, men, and children to be trafficked around the world. It ranked countries on six continents on three tiers plus a “watch list,” including the United States. Although the U.S. is ranked on Tier 1, the federal government could be doing more to improve the political tray and focus on what matters most – in this case, the victims of human trafficking and other crimes. As we approach the 150th anniversary of the signing of the Emancipation Proclamation, demand that your senators and representatives cosponsor the Senate’s bill to reauthorize the TVPA and continue the fight to end the scourge of human trafficking.

ABOUT THE AUTHOR
Ivy O. Suriyopas is a Staff Attorney with the Anti-Trafficking Initiative at the Asian American Legal Defense and Education Fund (AALDEF). She provides legal representation, conducts community education and outreach, and engages in policy advocacy on sex and labor trafficking issues. Ms. Suriyopas serves as a Freedom Network Policy Co-Chair and a steering committee member of the NY Anti-Trafficking Network. She co-authored the third edition of “Identification and Legal Advocacy for Trafficking Survivors” and the first edition of “Immigration Relief for Crime Victims: The U Visa Manual.” She received her J.D. from the University of California Hastings College of the Law and her B.S. in Policy Analysis and Management from Cornell University.
Moonlighting

Why You Should Be a Big Softie at Work

By Susan Moon

Everyone talks about how soft skills are important for success. Soft skills, also referred to as people skills or EQ, are key to influence, persuasion, karaoke smack-talk, and many other aspects of being a savvy lawyer and advocate. They’re essential for both in-house and law firm attorneys. But what are soft skills exactly?

We often know when soft skills are at play, such as when an employee is confronted by a group of hostile workers and is able to calm them down before they go too far and, God forbid, blog their grievances. Figuring out a definition, though, is kind of difficult. I decided to try asking my social media circles: “What’s your definition of soft skills?” I received many informative responses such as: “the ones I don’t have,” “skills our parents never taught us,” “hmm, that’s a hard one,” and “are we keeping this discussion R-rated and under?” Thanks people, very helpful.

Soft skills are difficult to define, in part because it’s easier to talk about them in relation to what they aren’t — hard skills. Hard skills are the technical information and expertise we need to do our job. Soft skills are basically everything else. Hard skills are quantifiable and more readily measurable. State bars test hard skills. Soft skills are behavioral and more difficult to quantify. Dive bars test soft skills. They involve a spectrum of behaviors, including verbal and written communication, effective management, overall leadership, and how to get the IT guy to fix your computer first. In sum, they’re behaviors we engage in that impact our overall effectiveness on the job.

Business people are trained in soft skills early on. For example, at Harvard Business School, leadership and soft skills courses are required every year. And in addition to the standard required soft skills courses, HBS requires a separate field course, the first portion of which emphasizes the development of leadership attributes.

In contrast, Harvard Law School’s (HLS) required coursework (which is similar to most law schools’ — not just knocking Harvard here, although who doesn’t like to knock Harvard?) emphasizes technical skills only — analyzing case law, civil procedure, legislation, research and writing. While HLS offers some soft skills electives, they’re few and far between, and they certainly don’t seem to be viewed as mandatory training for those entering the legal profession. Nope, not even for the gunners. Considering that lawyers haven’t received much formal training in soft skills, is it any wonder that we’re often left out of the loop and sought as a last resort, viewed as one of the more socially-awkward groups in the workplace? It’s because it’s true!

Why this discrepancy between business and law school curricula? Maybe it’s because soft skills don’t seem very important until you become a more senior attorney who’s trying to get clients (if at a law firm) or managing large groups of people (if in-house). But this is where we’re wrong. We are judged on our ability to communicate, inspire confidence, and exhibit leadership, and it begins from the very first interview, even from the reading of our résumés. Heck, I’ll judge you from the first wimpy handshake, if that’s all I’ve got to go on. Sure, we’ll be critiqued more for our soft skills as we become more senior. But this just means that if we don’t focus on these abilities early on in our career, we’ll lag behind others who have spent years honing them.

Interestingly, law firms and companies differ in the type of training they provide to their employees. Law firms offer virtually no formal training for soft skills — the closest thing is usually some type of diversity workshop, and it’s not because the firms care about soft skills per se. They do usually offer plenty of technical legal training in the form of CLEs, however. At companies, on the other hand, there are often many soft skills training sessions available for employees in general — I’m talking multi-day marathons for some of these things.

But forget CLEs — generally, in-house lawyers get their CLE credits through outside vendors such as PLI, bar associations, and sometimes outside counsel. Maybe it makes sense for law firms, since they’re viewed as technical experts, to focus more on technical legal ability. And maybe companies often assume that new in-house lawyers arrive with a good base of legal knowledge and will mainly learn about the business going forward. What may be better is if the developmental offerings for lawyers at both firms and companies become more of a hybrid of CLE and soft skills training.

Next week,* I’ll examine some soft skills specifics and strategies, like how to get to the general counsel first when everybody else is already knocking down his door about that project you totally messed up — hint: getting on his admin’s good side is key.


ABOUT THE AUTHOR

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The Business Case for Diversity  

Reality or Wishful Thinking?

By The Institute for Legal Inclusion in the Legal Profession & The Association of Legal Administrators

Editor’s note: This article is an abbreviated version focusing on Asian Pacific Americans of the Institute for Inclusion in the Legal Profession’s report The Business Case for Diversity: Reality or Wishful Thinking? The full report can be accessed on the Institute of Inclusion in the Legal Profession’s website at: http://www.theilip.com/CaseForDiversity/.

The legal profession has been hearing and talking about a business case for diversity for decades. Nevertheless, corporate clients continue to express concern about the lack of diversity among their outside counsel. Law firm leaders continue to be disappointed when their diversity efforts do not achieve desired levels of success or translate into a noticeable increase in business from their corporate clients. And diverse partners – including Asian Pacific American (APA) partners – continue to be frustrated by the amount of business they receive from corporate clients who express a commitment to diversity. This leads anyone familiar with diversity and inclusion efforts within the legal profession to question whether a business case for diversity truly exists, and, if it does, how it might be improved to the greater satisfaction of all stakeholders. Last year, the Institute for Inclusion in the Legal Profession (ILP), along with the Association of Legal Administrators (ALA), launched a study to examine this. This study provided the legal profession with its first hard data about the impact and effectiveness of the business case for diversity. Through projects such as this, ILP asks the hard questions, gets the facts and data necessary to answer those questions, and collaborates with other organizations that desire to see Real Change. Now.

The business case for diversity — where corporate clients apply the “carrot” of continued or increased business and the “stick” of an implied decrease, withdrawal or even loss of business to encourage law firms to become more diverse, or use their economic power to support the economic success and financial independence of diverse lawyers through the growth of minority- and women-owned law firms — is not a new concept.

Nevertheless, despite almost three decades of concerted efforts to use the business case for diversity to diversify the legal profession by increasing diversity among lawyers in large law firms and the level of economic success achieved by minority- and women-owned law firms, what progress has been seen has been disappointing. This has led ILP to ask: Is there a business case for diversity, and, if so, does it really work? What we found is “a qualified yes,” but “not as effective as it ought to be.”

The business case for diversity is important. In many instances it has been the driving force behind the decisions by some individuals and organizations to more actively support and engage in diversity and inclusion efforts. While we can all understand and appreciate that, and indeed it is one of the reasons we chose to undertake this project, it is equally important to remind ourselves that the importance and value of a more diverse and inclusive legal profession goes well beyond dollars and cents. A diverse and inclusive legal profession is fundamental to social justice.

Part I: Corporations  

Fifty-two Fortune 500 corporations participated in the study, representing a 10.4% participation rate. This is particularly significant as this is the first time there has been any effort to collectively report on corporate participation in a business case for diversity or to measure the levels or degrees of that participation.

Among corporate respondents, 69.4% (34 of 49) indicated they use diversity as a criterion in selecting outside counsel. Only 36.7% (18 of 49) stated their corporation is, or has ever been, a signatory to one or more of the diversity pledges or other promissory efforts to promote greater diversity in the legal profession. Corporations are using other means to communicate their desire for greater diversity to their outside counsel. Speaking engagements at diversity conferences, events, and Continuing Legal Education (CLE) programs by general counsel, 75.5% (37 of 49), or in-house counsel, 61.2% (30 of 49), were identified as a more common means of expressing a desire to outside counsel to see greater diversity among the lawyers working on their matters.

At numerous diversity conferences, minority bar association meetings and conventions, and other programs, corporate general counsel and in-house counsel have indicated their readiness to change their relationships with law firms based upon poor performance against their company’s...
Corporate Clients Relationship Changes Attributed to Poor Diversity Performance

- Corporations that have not changed relationships w/ law firms due to poor diversity performance: 83.3%
- Corporations that changed relationships w/ law firms due to poor diversity performance: 16.6%

Firm Management Experience of Diverse Partners

- Executive Committee: 8.1%
- Diversity Committee: 84.1%

Diversity metrics or objectives. Among our corporate respondents, however, only 12.5% (6 of 48) indicated that they had done so, while 89.6% (43 of 48) reported that they had not. Of those companies who did, 83.3% (5 of 6) said they reduced the use of the firms as outside counsel, none pulled any matters from firms, and 16.6% (1 of 6) terminated relationships with firms. All respondents who claimed to have changed the relationship by reducing assignments or termination reported that the law firms in question were told that the reason for the change was poor performance against the company’s diversity metrics or objectives.

Corporations were also asked about their own internal diversity and inclusion efforts, specifically, whether they encouraged their in-house lawyers to value diversity internally. 75.5% (37 of 49) said they did, while 24.5% (12 of 49) said they did not. When asked if they encouraged their in-house counsel to value diversity among their outside counsel, 70.8% (34 of 48) said that they did, while 27.1% (13 of 48) said they did not, and 2.1% (1 of 48) said they did not know.

Corporations that are encouraging their in-house counsel to value diversity and inclusion are conveying that encouragement in a variety of ways. Statements by corporate general counsel or chief legal officers during internal meetings were the most frequently cited method of expression, followed by memos or policy statements from general counsel or chief legal officers or other corporation officers.

Part II: Law Firm Management

The second part of the Business Case for Diversity Research Project was directed toward law firms. 391 responded.

We began our inquiry by asking whether law firms receive Requests for Proposals (RFPs) that have a diversity component. 51.7% (106 of 205) of respondents answered “Yes,” while 48.3% (99 of 205) answered “No.” Of those who answered “Yes,” we asked how many RFPs they had received during the past 12 months.

We then followed up by asking about the types of diversity employment statistics law firms track. We found that, at a basic level, most law firms track attrition, salary, promotion attrition (level of seniority at which lawyers depart from firm), associate conversion (number of associates promoted to partnership), and partner conversion (number of non-equity partners promoted to equity partnership) as this data pertains to gender and racial/ethnic diversity. Approximately half track the same data by sexual orientation, and only a quarter track by disability status.

We were curious about the degree to which clients who ask about diversity might be able to influence a law firm’s actions or policies through a business case for diversity. Therefore, we asked about the percentage of a firm’s gross revenues from such clients. We found that 72.7% (136 of 187) of respondents receive 0-5% of their gross revenues from clients who ask about diversity.

The business case for diversity suggests that not only will diversity be rewarded with business but that a lack of diversity will result in a loss of business. Therefore, we also asked whether any of the clients who make diversity requests or inquiries have ever communicated that a firm was unsuccessful in receiving business because it did not meet a client’s diversity expectations. An overwhelming majority reported that they had not received such communications and, among those who had, it appears to be a relatively rare occurrence. When we controlled for law firm size, there was little variance.

We also asked about law firms’ diversity activities. Most firms appear to be directing their diversity activities toward women and racial/ethnic minorities, with a somewhat greater emphasis upon recruiting activities for racial/ethnic minorities, affinity groups and professional development-type of activities for women. Firm activities for GLBT lawyers were somewhat less, but, for the most part, still close to that for women and racial/ethnic minorities. Activities for lawyers with disabilities, however, were noticeably less than that for the other three groups.

Part III: Partners Who Are Diverse

We asked only those who hold the title “Partner” (or some similar indication such as “Shareholder”) to participate in the study. We defined diversity as being a member of any one of the following categories:

- Woman
- African American or Black
- American Indian or Native American
- Asian or APA (including South Asian, Southeast Asian, or Pacific Islander)
- Hispanic or Latino
- Having an ADA-recognized disability
- Openly Gay, Lesbian, Bisexual or Transgender

1,032 law firm partners who identified themselves as being diverse participated in the study.

In an effort to understand respondents’ general career track, we asked about equity status as well as whether respondents had been partners, equity or non-equity, at another firm, whether they had been associates or summer associates at their firms, and whether they were promoted to partner at their current firms.

Most respondents were partners at firms with more than one tier of partnership, with 84.1% (836 of 994) saying they were not partners at firms with a single tier of partners, and 85.7% (670 of 1015) identifying themselves as partners in firms with more than one tier of partners. In contrast, 15.9% (158 of 994) said they were partners at firms with a single tier of partners and 14.2% (146 of 1015) said they were not partners at firms with more than one tier of partners.

The number of non-equity partners who responded to the study was just over double the number of equity partners, with 31.7% (324 of 1022) identifying themselves as equity partners and 68.3% (698 of 1022) as non-equity partners. Of the equity partners, 36.7% (128 of 349) were previously non-equity partners at their current firms.

When we controlled for race/ethnicity, we found that among African Americans, 39.7% (141 of 355) were equity partners compared to 60.3% (214 of 355) who were non-equity partners. Among APAs, 13.7% (36 of 263) were equity partners, whereas 86.3% (227 of 263) were non-equity partners. Among GLBT Caucasian partners, 46.6% (125 of 268) were equity partners, while 53.3% (143 of 268) were non-equity partners. Among Hispanic partners,
17.3% (23 of 133) were equity partners, while 82.7% (110 of 133) were non-equity partners.

Understanding that business development is a key factor in making the conversion from associate to partner or non-equity partner to equity partner, we asked diverse non-equity partners when they anticipated becoming equity partners. Just over one-third of respondents anticipated becoming an equity partner within 5 years, while just over one-third said that they never anticipate becoming an equity partner.

Diverse males were generally more optimistic about becoming equity partners than females. Among males, 58.9% (142 of 241) anticipated becoming equity partner in five or fewer years compared to 41.1% (99 of 241) of females, while 40.2% (98 of 244) of males anticipated never becoming equity partner compared to 59.8% (146 of 244) of females. Even among those who anticipated it taking 10+ years to become equity partner, males were more optimistic, with 65.2% (92 of 141) of males in this category compared to 34.8% (49 of 141) of females.

When we controlled for race/ethnicity, we found that among African Americans, 42.9% (88 of 205) anticipated becoming equity partner in five or fewer years compared to 40% (82 of 205) who anticipated never becoming equity partner. APAs were more pessimistic, with 37.5% (81 of 216) anticipating becoming equity partner in five or fewer years, compared to 47.7% (103 of 216) anticipating never becoming equity partner. Among GLBT Caucasians, 47.8% (65 of 136) anticipate becoming equity partner within five or fewer years, while 40.4% (55 of 136) expect that they will never become equity partner. Hispanics overwhelmingly anticipate becoming equity partner in 10+ years, with 92% (103 of 112) giving this response.

When we controlled for minority and women-ownership, 99.6% (242 of 243) of respondents who anticipated that they would never become equity partner were from majority-owned law firms compared with 1 respondent from a minority-owned firm.

When we controlled for race/ethnicity, however, we found differences within each group. African Americans who made the conversion from associate to partner were more than four times as likely to do so than those African Americans who did not, 81% (265 of 325) compared to 19% (67 of 352). Hispanics who made the conversion from associate to partner were more than eight times as likely to do so than those Hispanics who did not, 90% (114 of 127) compared to 10.2% (13 of 127). GLBT Caucasians were twelve times as likely, 92.6% (250 of 270) compared to 7.4% (20 of 270). We discovered that APAs, however, were far less likely than other racial/ethnic groups to make the conversion from associate to partner, with only 11.5% (30 of 262) making the conversion, compared to 88.5% (232 of 262) who did not. This would seem to support contentions that APAs, despite entering the legal profession in increasing numbers, and entering the private sector in higher numbers than other racial/ethnic minority groups, have lower rates of conversion from associate to partner in law firms.

It also suggests that pipeline efforts focused on increasing the numbers of diverse lawyers should not simply assume that an increase in numbers of diverse lawyers will automatically and eventually translate into greater diversity among law firm partners, especially equity partners.

We also examined the involvement of diverse partners in their law firms’ management. Higher levels of firm management reflected lower numbers of diverse partners. 8.1% had served on their firm’s Executive or Management Committee while 84.1% (687 of 817) have served on their firm’s diversity committee.

Approximately three-quarters of respondents had not received business from any corporations that had signed one of the corporate or bar association diversity pledges or had otherwise expressed a strong commitment to or preference for diversity, prior to their signing a diversity pledge or otherwise expressing their commitment or preference.

When we controlled for gender, we found that among those who were receiving business from corporations who expressed a commitment to diversity, females accounted for 39.2% (93 of 237) compared to males, 60.8% (144 of 237). When we controlled for race/ethnicity, we found that by a slight majority, Hispanics were the only group of diverse lawyers receiving more business than not from corporate clients who expressed a commitment to diversity, with 54.5% (72 of 132) saying they had received business compared with 45.5% (60 of 132) who said they had not. The next most successful group to receive business were GLBT Caucasians, where 30.6% (81 of 265) were receiving business compared to 69.4% (184 of 265) who were not. African Americans followed with 17.6% (63 of 357) compared to 82.4% (294 of 357) who were not. APAs fared the worst with only 8.5% (22 of 259) getting prior business compared to 91.5% (237 of 259) who were not. Our Native American sample pool is so small that we report the numbers below, along with the other groups but draw no conclusions.

When we controlled for firm ownership, women-owned firms were less likely to receive business from corporations prior to signing a diversity pledge or otherwise expressing a commitment to diversity. Among women-owned firms, 18.2% (8 of 44), reported that they had been receiving prior business while 81.8% (36 of 44) said they had not. By comparison, among minority-owned firms, 29% (25 of 86) received prior business while 70.9% (61 of 86) did not, and among majority-owned firms, 22.3% (203 of 894) of the diverse partners received prior business while 77.1% (689 of 894) did not.

Among those who were receiving business from these corporations prior to signing corporate and bar association diversity pledges or expressing a diversity commitment through other initiatives, 55.6% (125 of 225) received business from 2-5 of these corporations, 30.7% (69 of 225) received business from 1 of these corporations, and 13.3% (30 of 225) received business from 6-10 of these corporations. Two respondents, 0.9%, reported that they had received prior business from 16-20 of these corporations.

Once these corporations expressed their diversity commitment or preference for diversity among outside counsel, more diverse partners received business from these corporations, with 40.1% (406 of 1,012) reporting that they had received business compared with the 23.5% (238 of 1,014) who reported that they had received business before the commitment to diversity was expressed by these corporations.

When we controlled for gender, however, we found that the corporate commitment to diversity had made little difference for female lawyers. Prior business was reported by 39.2% (93 of 237) of female lawyers compared to 60.8% (144 of 237) of male lawyers. After the commitment was made, 42.3% (170 of 402) of females lawyers were receiving business from these corporations compared to 57.7% (232 of 402) of male lawyers.

When we controlled for race/ethnicity, we found that GLBT Caucasians had joined Hispanics as the group of diverse lawyers receiving more business than not from these corporate clients, with 54.9% (146 of 266) of GLBT Caucasians and 59.8% (79 of 132) of Hispanics receiving business from these corporations. This represents a 24.3% increase for GLBT Caucasians and a 5.3% increase for Hispanics. African Americans saw a significant increase in the numbers of partners receiving business, with 41.5% (147 of 354) receiving business since these corporations expressed their diversity commitment compared to 17.6% (63 of 357) who received prior business. APAs continued to fare the worst, with only 13.5% (35 of 260) receiving business from these corporations, a modest gain from the 8.5% (22 of 259) who were receiving prior business. Again, our Native American sample pool is so small that we report the numbers below, along with the other groups but draw no conclusions.

When we controlled for firm ownership, we found that women-owned firms were faring much better than they had prior to any expression of diversity commitment by these corporations. Whereas prior business for partners in women-owned firms was reported at 18.2% (8 of 44), after the commitment, 59.1% (26 of 44) of partners in women-owned firms reported receiving business from these corporations. Minority-owned firms also fared better, with 67.1% (57 of 85) of the partners receiving business after the diversity commitment compared to the 29% (25 of 86) receiving prior business. In majority-owned firms, those diverse partners receiving business from these corporations increased from 22.9% (205 of 894) to 36.1% (323 of 894) after the diversity commitment.

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We discovered that APAs, however, were far less likely than other racial/ethnic groups to make the conversion from associate to partner...
Despite corporate clients’ expressions of commitment to diversity, few diverse partners are serving as billing or relationship partners for these clients. We found that 60% (594 of 981) of diverse partners were not the billing or relationship partner for any of these corporations, 21.3% (209 of 981) serve as the relationship or billing partner for one of these clients, 14.5% (142 of 981) for 2-5 of these clients, and 3.7% (36 of 981) for 6-10 of these clients. No diverse partner reported serving as the billing or relationship partner for more than 10 of these clients.

Diverse partners are employing a wide range of strategies to generate business. Attending national minority/women/diversity bar association programs or events was the most popular, with 72.8% (684 of 939), followed closely by sending follow-up emails, 72.1% (677 of 939), and sending marketing materials, 70.5% (662 of 939).

When we controlled for race/ethnicity, we found that African Americans were generally more likely to be employing these business development strategies. As a group, African Americans were also more likely than other diverse groups to be attending events such as association programs, conferences, and meetings, as a business development strategy. African Americans and GLBT Caucasians were more than twice as likely to attend company-specific diversity meetings, conferences or retreats than APAs or Hispanics. Because such events are typically by invitation-only, we cannot discern whether this is a result of preference by diverse partners or a result of invitation lists. GLBT Caucasians are using mainstream organizations such as the ACC, the ABA, and mainstream bar associations as a business development strategy more than organizations with a diversity focus, including GLBT bar associations. Minority bar organizations, at both national and local levels, followed by local mainstream bars and MCCAs, appear to be the most popular strategies for APAs for business development. Attending ACC and the ABA appear to be the most popular strategies for Hispanics.

Conclusions

IILP’s study provides the legal profession with its first hard data about the impact and effectiveness of the business case for diversity. While a business case for diversity does exist, it stops short of generating the significant amounts of business necessary to enhance career sustainability, viability and success of meaningful numbers of diverse partners. Corporate clients’ interest in diversity serves as an impetus for law firms to increase efforts to recruit, retain and promote diverse lawyers to their partnership ranks, and to otherwise support diversity efforts in the broader profession. These diversity efforts by law firms, however, regardless how successful, do not track with a corresponding increase or decrease in business from clients committed to diversity.

That may be understandable given that diversity is usually one among many criteria that corporate clients might be expected to apply in selecting outside counsel. Corporate clients may want to be clearer in communicating that to outside counsel; if they do not, they may be doing an inadvertent disservice to the very lawyers they are trying to support. So long as corporations imply that significant amounts of business follow diversity, they may be creating a misguided expectation among law firms as to the amount of business that reasonably might be expected in light of their diversity efforts. This, in turn, may result in there being unrealistically higher expectations for (and stress placed upon) diverse partners to generate business. And, in consequence, might help explain the relatively lower numbers of diverse partners who are equity partners and their attrition rates from their firms.

Diverse partners, in firms of all sizes and all ownership types, are seeing business from corporate clients committed to diversity, but, generally, these are smaller matters that would generate lower revenues and from only a few such clients. This is not to say that diverse partners are not receiving large amounts of business that generate large revenues, but that these may be the exception rather than the rule. It might be disheartening for diverse partners to hear this, but, it likely will not surprise them.

The legal profession’s diversity efforts have often included disabilities as part of a string of the types of diversity encouraged, but lawyers with disabilities are consistently being overlooked or ignored within the business case for diversity.

ABOUT THE AUTHOR

The Institute for Inclusion in the Legal Profession (IILP) is a 501(c)(3) organization that believes that the legal profession must be diverse and inclusive. Through its programs, projects, research, and collaborations, it seeks real change, now, and offers a new model of inclusion to achieve it. IILP asks the hard questions, gets the data, talks about what is really on people’s minds, no matter how sensitive, and invents and tests methodologies that will lead to change. For more information about IILP, visit www.thelilp.com.

The Association of Legal Administrators (ALA) is the largest international association providing support, high quality education, and services to professionals involved in the management of law firms, corporate legal departments, and government legal agencies. With nearly 10,000 members in 30 countries, ALA represents legal administrators who are leaders and industry experts on legal management issues such as finance, human resources, systems and technology, facilities, marketing and practice management. For more information about ALA, visit www.alanet.org.
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FREEDOM NETWORK MEMBER REPORT
A CLOSER LOOK AT HUMAN TRAFFICKING ACROSS THE UNITED STATES (2010-2012)

FREEDOM NETWORK USA
The Freedom Network (USA) is a national coalition of anti-trafficking service organizations and advocates. Our members take a rights-based approach to combating human trafficking and modern-day slavery.

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For more information about the Freedom Network (USA), visit http://freedomnetworkusa.org/.
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WHO we ARE

The Freedom Network is a coalition of 39 non-governmental organizations that provide services to, and advocate for the rights of, trafficking survivors in the United States using a human rights-based, empowering approach. Founded in 2001, its members are leaders and experts in the field.

The Freedom Network recognizes that human trafficking is fueled by complex and interconnected factors, including poverty and economic injustice, racism, gender-based discrimination, and political strife. At its core, the crime of trafficking is a violation of an individual’s basic rights and personal freedom. Thus, we believe that a rights-based approach is fundamental to combating human trafficking and ensuring justice for trafficked persons.

In practice, a true rights-based approach places a trafficked person’s priorities and narrative at the center of anti-trafficking work. The model relies on voluntary, non-judgmental assistance with an emphasis on self-determination to best meet an individual’s short- and long-term needs. This means allowing the trafficking survivor to accept or decline assistance, to receive culturally-competent services in a language he or she can understand, to have access to necessary reproductive health care, to decide whether or not to report the crime to law enforcement, to exercise victim witness rights, to sue the trafficker, and to participate in anti-trafficking leadership efforts if he or she chooses.

Our years of work with trafficked persons have shown that those served using a rights-based approach tend to regain trust, safety, and self-sufficiency. They tend to more fully recover from their victimization and trauma than those who are not served using a rights-based approach. In contrast, those who are treated like criminals instead of victims, who feel that their needs are not being considered, that their stories are not believed, or that their decisions and actions are being judged, are more likely to abandon services and the criminal justice process altogether. This leads to poorer justice outcomes and increases the risk that the individual will return to the trafficker or will face other challenges to safety and well-being.

Given our understanding of these realities, the Freedom Network’s rights-based approach takes many forms: client-centered service provision; dedicated criminal justice advocacy; representation of trafficked persons in civil litigation; evidence-based research and legislative advocacy; and survivor-led campaigns to end worker exploitation and economic injustice.

ABOUT the REPORT

In our efforts to contribute to a growing body of knowledge about the numbers and demographic realities of trafficked persons in the United States — as well as the concrete effects of the Trafficking Victims Protection Act and subsequent reauthorizations — the Freedom Network compiled a demographic report of its members’ cases from 2010 to 2012. This report reflects the needs and experiences of human trafficking survivors across the United States. For more information about the Freedom Network and its member agencies, visit www.freedomnetworkusa.org.
A cornerstone of the Freedom Network’s efforts to promote a rights-based approach in anti-trafficking work across the country is our annual conference, which brings together hundreds of anti-trafficking professionals from diverse disciplines to explore emerging issues and promising practices. The 13th Annual Freedom Network Anti-Trafficking Conference will be held in Washington, DC in April 2015.

For more information, visit www.freedomnetworkusa.org.
Total Number of Clients Served

This report was conducted in 2013 and covered actual human trafficking cases during the three-year period from the beginning of 2010 through the end of 2012. With 24 out of 29 organizational members reporting, Freedom Network members served at least 2236 clients.

A human trafficking case can last as long as seven years and may include identification, criminal justice advocacy, social service provision and case management, counseling, immigration relief, family reunification, civil litigation, adjustment to legal permanent residency, and applications for citizenship. In some cases, Freedom Network members have become involved in the criminal defense of trafficked persons or assisted survivors with vacating prior convictions.

Katarina’s Story

Katarina* left her home country to escape an abusive husband and severe anti-Semitism. She came into the United States believing she would be working as a nanny but ended up being coerced into prostitution to pay back a large debt.

While working, she was arrested multiple times for prostitution. The first two times she was arrested for prostitution, she was not screened for trafficking. Finally, the last time she was arrested, her defense attorney thought she may have been coerced into prostitution and contacted our agency to properly screen her for trafficking.

Katarina’s case was very complicated, and it was only after intense therapy was she able to fully express what had happened to her. During that time, Katarina cooperated extensively with law enforcement authorities, including returning to the apartment where she originally held.

Katarina also disclosed that her criminal record was going to cause problems when she was trying to open up her own business. She shared that she felt like the convictions were a scar on her record that she could not ever fully explain to her family, employers, or loan officers. However, due to Katarina’s status as a survivor of trafficking, she was able to have all of her convictions for prostitution vacated.

Katarina now no longer has a criminal record, and she has her own successful company.

– FREEDOM NETWORK MEMBER

*ALL NAMES & IMAGES HAVE BEEN CHANGED TO PROTECT SURVIVORS’ IDENTITIES
**DEMOGRAPHICS**

**Age**
Forty-one percent (485) of Freedom Network clients were reported to be between ages 18 and 29 during the relevant time period. Almost a third, or 30 percent (359), of reported clients were between 30 and 39. Clients who reported being over 40 at the time of trafficking were 15 percent (178). Finally, 14 percent (169) of Freedom Network clients reported to be under the age of 18.\(^{12}\) The vast majority, or 86 percent of clients, were adults. Taking into account Freedom Network members who do not track clients by specific ages other than adult or minor,\(^{13}\) 91 percent of clients were adults.

**Gender**
During the relevant time period, Freedom Network clients were reported to be majority female at 1,199 clients, almost half male at 1,006 clients, and one percent other at 28 clients.

\(^{12}\) Some organizations do not track for age at all. Their numbers are not reflected in the Age Distribution graph. For those who do not track for age at all, there are 180 clients identified.

\(^{13}\) Some FN member organizations do not track for specific ages beyond the categories of minor and adult. They include 768 adults. Their numbers are not reflected in the Age Distribution graph.
Miriam came to the United States at the age of 16 to perform with a youth acrobat troupe at schools throughout the country. She worked or traveled six days a week several months out of the year. She did not have homework or pursue any academic studies. She was deprived of sufficient food and was always hungry because the troupe organizers did not want her to gain too much weight. She was not allowed to go out on her own, her calls were monitored, and her pay was sent directly to her grandfather overseas. She was finally able to escape with the assistance of a staff member from one of the schools.

– FREEDOM NETWORK MEMBER

Notwithstanding the attention to domestic minor sex trafficking in recent years, children and young people are trafficked into a variety of sectors, including agriculture, domestic work, and restaurant work.
**Geographic Region**

The majority of trafficked persons represented by Freedom Network organizations during the relevant time period originate from the following regions: Southeast Asia (e.g. Philippines, Thailand, and Malaysia) at 30 percent (660 clients), Central America and Mexico at 24 percent (536 clients), and South Asia (e.g. Pakistan, India) at 21 percent (469 clients). The United States and Canada (126 clients) make up six percent as does Africa (129 clients). Four percent of FN clients descend from South America (81 clients). Three percent are from East Asia (74 clients) and the Caribbean (71 clients) each and two percent of clients are from Eastern Europe (49 clients). Finally, approximately one percent of FN clients are from Western Europe and Central Asia and the Middle East (e.g. Kazakhstan, Turkey, and Afghanistan) combined.

It is notable that the majority of FN clients (55 percent) originate from Asian countries and almost one-third of Freedom Network clients are from Latin American nations.
Nina and her sister Sita came to the United States with the expectation that they would become models. They plunged themselves into debt in order to pay a recruitment agency. However, instead of arranging for them to obtain visas, the agency brought them to the country through a smuggling operation via Canada. When they eventually arrived in New York, they were told that they had to work off an alleged debt by working as hostesses at a bar. There, they had to interact with customers and do whatever was needed in order to get customers to buy more alcohol. This often involved kissing, fondling, and other sexual touching.

They were eventually able to escape with the assistance of a customer who learned that they were there against their will. U.S. Citizenship and Immigration Services granted them T visas as victims of labor trafficking.

— FREEDOM NETWORK MEMBER

Some instances of trafficking may appear to be sex trafficking but may more appropriately fit under the federal definition of labor trafficking.
According to federal law, trafficking for labor occurs when a person is induced to provide labor or services through force, fraud, or coercion. Trafficking for sex occurs when a) an adult is induced to engage in commercial sex through force, fraud, or coercion or b) when a minor is induced to engage in commercial sex.

During the relevant time period, 73 percent (1634) of Freedom Network clients were seen for labor trafficking, 23 percent (518) were seen for sex trafficking, and three percent (66) were seen for both forms of human trafficking.

Sara was 18 when she was invited to come to the United States by her female cousin. She was told she could stay with the cousin and her husband and help out with their children. She thought this was a great opportunity to come to the United States and have the love and support of family. However, when she arrived it became clear that she was expected to be the primary caregiver to the children and also to cook and clean for the family. She was also forced to work outside the home at a chicken processing plant and hand over her paychecks to her cousin.

When her cousin went out of town, her husband started raping Sara regularly. He convinced her to drink alcohol and then forced her to have sex. He told her that because she was drunk it was not rape and that she was to blame.

– FREEDOM NETWORK MEMBER

For a trafficking case to meet the federal definition of sex trafficking, the victim must be compelled to engage in the sex trade. A situation where a victim has been raped or sexually assaulted but where there is no exchange of money or monetary value meets the federal definition of labor trafficking.
Many, if not most, human trafficking cases involve a coercive working environment where unscrupulous employers cultivate a climate of fear. They use various techniques to intimidate workers to maintain their compliance, including:

- threatening the workers
- threatening the workers’ families
- alleging substantial debts
- taking their passports or other identification documents
- limiting their contact with the outside world
- depriving them of adequate food or lodging
- threatening to contact law enforcement authorities to detain or deport them

We represent a group of approximately 20 Filipino labor trafficking victims. The workers were recruited by an employment agency in the Philippines who promised them good jobs at hotels in the United States, free room and board, and help obtaining their lawful permanent residence. The agency induced the majority of the workers to go into debt in order to pay the large recruitment fees charged by the agency, promising them that they would easily be able to pay off the debt in the United States.

The workers were sent to hotels in Arizona and Florida, where they soon found that conditions were not as promised. The hotels took out large deductions for room, board, and other fees from the workers’ paychecks and gave them inconsistent hours so that they could not pay off their debts in the Philippines. Many workers were mistreated by supervisors, forced to use chemicals without protection, and forced to work while sick. When the workers complained, they were threatened with deportation.

When other workers quit, hotel staff told the remaining workers that the workers had been reported to immigration authorities and the police who would search for the workers until they found them to arrest and deport them. Terrified of deportation and unable to pay their large debts in the Philippines, the workers felt they had no choice but to continue to work for the hotels.

We are now assisting the workers in applying for lawful immigration status. The majority of the workers have received their T Visas and are in the process of reuniting with their families abroad. We also reported the case to law enforcement, but law enforcement declined to investigate.

--FREEDOM NETWORK MEMBER
WE STRIVE TO ENSURE THAT TRAFFICKED AND ENSLAVED PERSONS ARE FREED, HAVE THE BENEFIT OF LEGAL AND HUMAN RIGHTS, RECEIVE JUSTICE, AND HAVE ACCESS TO APPROPRIATE SERVICES AND OPPORTUNITIES TO FIGHT FOR CHANGE.

For non-U.S. citizen victims and survivors, Freedom Network members have assisted in 652 principal T visa approvals, 244 Continued Presence approvals, 29 principal U visa approvals, and have reunified at least 147 families. The Trafficking Victims Protection Act provides for humanitarian immigration relief for trafficked persons and certain family members. U.S. Citizenship and Immigration Services issues principal T visas to trafficking survivors and principal U visas for victims of certain crimes, including human trafficking. Law enforcement authorities also have the ability to apply for Continued Presence, which provides temporary immigration relief for trafficked persons.

Freedom Network members served at least 39 percent of all principal T visa approvals for the United States, according to the U.S. Citizenship and Immigration Service’s T & U Visa Report from 2010 to 2012.

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1 Of the 23 participating organizations, one organization was not able to provide legal information. Therefore, that organization’s numbers are not included in this section.
Tiffany’s STORY

We represent Tiffany, a U.S. citizen sex trafficking survivor whose trafficker kidnapped her and forced her to engage in commercial sex against her will. During her trafficking, she was repeatedly beaten, raped, and threatened. The client eventually managed to call the police, who arrested her trafficker and charged him with sex trafficking in federal court.

We advocated for the client throughout the criminal case and provided her with housing, case management, and other critical services. As a result of the client’s ongoing cooperation, her trafficker pled guilty to his crimes and agreed to 10 years in prison.

— FREEDOM NETWORK MEMBER

Some law enforcement agencies that are sufficiently trained in identifying and screening for human trafficking are able to investigate such cases and refer victims and survivors for assistance.
Freedom Network members currently provide a wide array of services to their clients including but not limited to case management, legal services, legal referrals, counseling services, counseling referrals, shelter, medical referrals, employment assistance, translation and interpretation, education, expert testimony, community education, criminal justice advocacy, international training, technical assistance, and advocacy.
Lita came to the United States to continue working for her employer as a domestic worker. In their home country, she was one of two domestic workers and was only responsible for taking care of the children while the other worker took care of the cooking and cleaning. However, upon arriving in the United States, despite what she was told in their home country, she was responsible for childcare, cooking, and cleaning for the six-person household in the three-level home. She also had to work seven days a week, 18 hours a day, and she only received $250 per month, instead of working five days a week, eight hours a day, and receiving $1,700 per month.

When the employer was indicted, the interpreter that was used to interpret her testimony struggled to relay her statement verbatim. Subsequently, the judge ordered the interpreter to be replaced, nullifying the survivor’s entire day of testimony. Lita had to re-testify the following day, repeating the entire narrative of her trafficker’s exploitation and abuse.

– FREEDOM NETWORK MEMBER
the NEED for SAFE HOUSING
Lodging is one of the most critical needs a trafficked person has after leaving a trafficking situation. However, there are very few shelters in the United States that have the capacity to house survivors, much less shelters that are dedicated to housing trafficked persons exclusively. Many Freedom Network members must rely on local domestic violence shelters to accommodate survivors. Still, others may need to resort to placing survivors in homeless shelters until other accommodations can be made. These programs must be trained on how to sufficiently serve and assist trafficked persons. Such programs already have limited capacity to serve victims and survivors of intimate partner violence or homeless individuals, which makes shelter assistance the most difficult service for Freedom Network members to provide.

Ana's STORY
Ana had fled domestic violence in her home country and came to the United States to live free from abuse and give her child a better life. She was taken in by a woman who forced her to work in a commercial cleaning business and also forced her to take care of her children in her home. Ana came to us hoping to escape this woman and find a safe place to stay. We worked with her to contact a local domestic violence shelter.

We sat with Ana as the shelter put her through an hour-long intake and subsequently refused to serve her, stating that their programs were specifically intended for victims of domestic violence and that they did not feel they would be a good fit for this client. They did this knowing this woman was homeless; they had space and refused to take her in. We placed her in a hotel and eventually found a placement for her.

— FREEDOM NETWORK MEMBER
Freedom Network members have difficulty placing male trafficking survivors in shelters in particular. Many domestic violence shelters refuse to house males, regardless of their circumstances.

We do not use shelter services for male clients as most local shelters that allow men are homeless shelters and are not appropriate for victims and survivors. We have a few shelters that will provide services to men, but they are often full. Consequently, we have had to develop relationships with local landlords and other housing providers in order to obtain housing for male clients. Often our male clients find a room to rent through friends or family. They are forced to be resourceful in this area as housing services are very limited.

We have had domestic violence shelters refuse to serve clients for several reasons:

They say they are funded only to provide services to victims of intimate partner violence and few human trafficking cases fall into that category. Although our state passed a law two years ago that says any funds used for housing for domestic violence victims can be used for human trafficking victims as well, our clients still get refusals for much-needed housing.

They claim that trafficking victims are in more danger from their abusers than domestic violence victims. Clearly, this is not usually the case as an abuser in an intimate relationship with his/her victim poses an extreme threat when that victim has fled the relationship.

Their program is not set up to serve victims of human trafficking, and they believe their services are not appropriate for human trafficking survivors. However, like domestic violence survivors, trafficked persons often suffer from trauma, depression, and anxiety and could benefit from some of the services that domestic violence shelters offer.

They refuse to serve anyone involved in prostitution. However, trafficking survivors, regardless of the industry into which they were induced, need lodging and other critical services in order to stabilize and transition.

– FREEDOM NETWORK MEMBER
HUMAN TRAFFICKING IS NOT ONLY AN IMMIGRATION ISSUE; IT IS NOT ONLY A CRIMINAL ISSUE; IT IS NOT ONLY A MORAL ISSUE, OR A WOMEN AND CHILDREN'S ISSUE; IT IS A HUMAN RIGHTS ISSUE AND NEEDS TO BE REGARDED AS SUCH.

—FLORRIE BURKE, FREEDOM NETWORK CHAIR EMERITUS
REFERRAL SOURCES

Freedom Network organizations, during the relevant time period, reported that almost half of their active cases were referred for services by local community organizations and 15 percent were referred by victim service organizations. Federal law enforcement agencies referred about eight percent of FN clients while local law enforcement referred four percent and non-law enforcement government agencies referred about one percent. Faith-based agencies were responsible for one percent of referrals. Three percent of cases were referred by a Good Samaritan, two percent by hospitals or medical providers, and five percent were self-reported cases of human trafficking.

Our main source of referrals is community-based organizations to which we have provided training on identifying human trafficking and services available to victims and survivors.

– FREEDOM NETWORK MEMBER

Working with fewer resources than government agencies, community-based organizations are responsible for the largest percentage of referrals of trafficked persons that Freedom Network members have received.
Exploitation of Guestworkers

We represent a group of Mexican agricultural workers who were recruited from rural Mexico to work on a forestation project in Northern California. The workers were promised good pay, housing, and a 40-hour work week, and entered the United States on H-2B visas.

Once in the United States, they were forced to live in tents in the middle of the forest, drink river water, and use almost their entire salaries on food and supplies. The workers were also forced to work extremely long hours, spraying chemicals onto trees without the benefit of protective gear. They were supervised by armed crew leaders who fired shots to intimidate the workers and threatened to kill them if they stopped working.

We have been advocating on behalf of the clients as they cooperate with the Department of Labor and Homeland Security Investigations in the investigation of their traffickers, have applied for T visas on their behalf, and have helped the clients access medical care, housing, and other basic necessities.

--FREEDOM NETWORK MEMBER
Shannon’s STORY

Shannon, a transgender woman, first came into the United States as a child because of the violence and harassment she was experiencing in her home due to her perceived sexual orientation as well as the encouragement of a cousin who promised her better things in the United States.

Once she arrived, however, Shannon was sexually exploited and trafficked by her cousin. After a year of this exploitation, Shannon ran away to live with her boyfriend. After six months of living together, Shannon’s boyfriend became very violent, often so violent that Shannon had to be hospitalized.

During one of the hospitalizations, a nurse felt uncomfortable sending Shannon home with a person who was significantly older then her. The nurse called Child Protective Services (CPS) and Shannon was then sent back to the cousin who was trafficking and abusing her. CPS, which was not trained to identify the signs of trafficking, made a few visits but did not find anything wrong with her housing situation with her cousin. Shannon subsequently returned to her boyfriend.

However, after the abuse got worse, Shannon left her boyfriend and moved in with some friends who introduced her to an older man, Alex. The older man offered her a place to stay, which Shannon accepted. Shortly after, Alex trafficked her into commercial sex at the age of 16.

Shannon was able to escape Alex after about a year but was left with nothing. During that time, she was arrested multiple times for prostitution. On some of those occasions, she was engaging in prostitution, while other times she was falsely arrested and targeted by the police because of her gender identity. Each of those times she was pressured to plead guilty and did so. She was never offered services and her case was never diverted to New York’s Prostitution Diversion Court. She was also never screened for trafficking during any of the multiple arrests.

Once she was finally connected to services, Shannon reported all of the crimes she was a victim of to law enforcement. Rather than being treated as a victim, however, she was treated as a criminal because of her previous arrests for prostitution. One of the officers went as far as telling her that she was not trafficked despite the fact that her arrests for prostitution occurred before her 18th birthday. The officers would not even allow her to file a police report.

Every step of the way, law enforcement officials, if properly trained, could have rescued Shannon from multiple traffickers or at least taken a statement that could have been used to help identify other trafficked individuals.

When law enforcement agencies are insufficiently trained on how to identify and screen for trafficking, they often pose a danger to victims and survivors. Trafficked persons, especially if they are induced into the sex trade, face the constant risk of being arrested for prostitution.

– FREEDOM NETWORK MEMBER
MODERN-DAY SLAVERY DOESN'T TAKE PLACE IN A VACUUM. IT DOESN'T FALL OUT OF THE SKY AND GRAFT ITSELF ONTO AN OTHERWISE HEALTHY INDUSTRY. IT TAKES ROOT IN INDUSTRIES WHERE THERE'S ALREADY A WIDE RANGE OF LABOR VIOLATIONS: SUB-POVERTY WAGES, NO BENEFITS, A CONTINGENT WORK FORCE WITH LITTLE RIGHTS.

—LAURA GERMINO, FREEDOM NETWORK MEMBER
Angela’s STORY

We worked on a case that involved a minor victim and Child Protective Services (CPS). Angela, a 17-year-old girl, was being forced by her mother to care for her younger brother. She had to come straight home after school, was not allowed out of the house except to go to school, and had to do most of the cooking and cleaning in the home. There was verbal and emotional abuse, and Angela reported physical abuse as well. She had told a school counselor all of this, who made a report to CPS.

CPS investigated the report of physical abuse but, because the child had no bruises, decided it was safe to return the child to the home. Angela stated clearly that she did not feel safe in the home. On her behalf, the school counselor contacted law enforcement who contacted the U.S. Attorney’s Office who subsequently reached out to us.

There were clear indications of human trafficking, including the fact that the mother had taken all of the child’s identification from her, such as the child’s school identification, and created a coercive working environment for the child. We attended a meeting with CPS, the child, and the mother in which the child strenuously asked not to be returned to the home. CPS said they felt it was safe for her to be returned.

We offered to provide the child services and shelter, if the mother would consent to this. She did. CPS agreed to let us be involved only when we assured them they would not have to provide foster care for Angela. They did everything they could to extricate themselves from this case. It seemed they were willing to return this child to a home she felt was unsafe in order to close the case. A colleague who was at the meeting said, “I wanted to call CPS on CPS.” I have never seen such a failure to protect a child – not just a failure, an intentional effort to find ways to not serve this child.

– FREEDOM NETWORK MEMBER

Non-law enforcement government agencies may also have the occasion to encounter trafficking. Labor departments, child protective services, public schools, and other first responders may interact with potential victims and survivors. With sufficient training, they can be extremely helpful in timely identifying trafficked persons who vitally need assistance.
RECOMMENDATIONS

1. Understand that trafficking survivors include adults and children, foreign-born and U.S. citizens, and that people are trafficked into many forms of labor including, but not limited to, commercial sex.

2. Recognize that not all sex workers are being trafficked, so as not to ignore the needs of those who do not fit the profile of a victim. A rights-based approach meets the needs that clients identify, instead of treating clients as victims who should be grateful for rescue.

3. Promote economic security by protecting the rights of immigrant workers. Immigrant workers should be protected by U.S. laws that ensure safe working conditions; prevent discrimination, sexual harassment, and sexual assault; eliminate wage theft and fraud; and bar exploitation and human trafficking. Temporary workers in particular experience worker exploitation as a result of failed federal policies that capitalize on their temporary work without providing the protections, including the freedom to change employment, needed to work safely in the United States.

4. Expand access to protection and services for immigrant workers. First responders, often due to lack of training and awareness, fail to identify exploited immigrants. They should screen for victimization and provide victims and other vulnerable workers with early access to benefits and social services as well as immigration status.

5. Reevaluate immigration enforcement schemes. Local enforcement of immigration laws can lead to racial profiling and a chilling effect among the most exploited immigrants. Law enforcement agencies should conduct mandatory screening for victimization and immigration eligibility, particularly focused on relief available to people who are currently undocumented. Enforcement agencies should exercise prosecutorial discretion in cases where immigrants are eligible for humanitarian relief and reprioritize enforcement for the most dangerous cases.

6. Utilize a victim-centered perspective to identify and understand how temporary workers are trafficked and abused. Although not all abused temporary workers are trafficked, temporary workers should be appropriately screened and identified as potential trafficking survivors.

7. Support policies, legislation, and services that protect all trafficked children equally. The misconception that child survivors of sex trafficking are more “deserving” of attention, services, funding, and legislation not only hurts child survivors of labor trafficking but also limits the public’s understanding of human trafficking as a whole.

8. Expand access to services and protection for all child survivors of trafficking, and create training programs for relevant city and state agencies. Expanded services should include counseling, mentoring, housing, education, job training, and legal services. Large numbers of children slip through the cracks of an underfunded services network. Trainings should include, but not be limited to, labor investigators, first responders, truancy officers, and hospital workers. School systems should have protocols in place to identify all trafficked youth, refer to services and educate on prevention.

14 The Freedom Network (USA) has a series of policy papers on the intersection of human trafficking and other issue areas. See http://freedomnetworkusa.org/aboutus/policyadvocacy/freedomnetworkfactsheets2/.
9. **Promote appropriate placement with adults or family reunification, if appropriate.** Careful screening is required for assurance that families and other adults in the child’s life were not complicit in trafficking the child and are adults with whom the child can be reunited. Family reunification is one of the primary goals of immigration laws. The Unaccompanied Refugee Minors (URM) Program, if taking child labor into account, can properly help place children in foster families as needed.

10. **Encourage and support the Department of Labor, especially the Wage and Hour Division, in its efforts to screen for child labor trafficking in the course of enforcing child labor laws and the Fair Labor Standards Act.** The DOL attempted to implement rules to protect children working in the agriculture industry. It should be given the leeway to protect child workers who may be vulnerable to be exploited, trafficked, or abused.

11. **Support workers in their efforts to organize so that they can better access and exercise their labor rights.** The Domestic Workers Bill of Rights was signed into law in New York and other states and can be used as a model of the comprehensive response that is needed to address the vulnerabilities and abuse of domestic workers.

12. **Increase resources for the Department of Labor, specifically increasing the number of employees investigating claims of labor exploitation and other workplace abuses.**

13. **Advocate for policies, legislation, and services that protect all trafficked persons by recognizing that women are trafficked into many labor industries outside of the sex industry.**

14. **Increase legal and regulatory protections in labor sectors targeting traditional women’s work including domestic work, health care, informal sector work, part-time and contract work.**

15. **Understand the interwoven dynamics, similarities, and differences between human trafficking and sexual assault; assess for both sexual assault and trafficking, and seek all possible services and legal remedies available.**

16. **Inquire whether or not a person has experienced both domestic violence and human trafficking, and seek all possible services and legal remedies available.**

17. **Recognize interwoven dynamics, similarities, and differences between human trafficking and domestic violence.**

18. **Adapt and build upon domestic violence services and coalitions to support trafficked persons.**

19. **Increase dedicated funds for assisting trafficked persons, while recognizing cuts in funding domestic violence work and human trafficking work hurt both causes.** This includes funding for housing for trafficking survivors, including males.

20. **Train federal, state, and local law enforcement authorities on how to properly screen and identify victims and survivors of human trafficking.** They should screen those they arrest for engaging in illegal activity, such as prostitution, to determine whether they were subjected for force, fraud, or coercion.

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15 The Freedom Network Training Institute (FNTi), the training arm of the Freedom Network (USA), holds the core belief that collaboration among the trafficked person, law enforcement, social service providers and community organizations is central to the problem of modern-day slavery for both prevention and elimination. See http://freedomnetworkusa.org/training/.

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**FOR MORE ON THESE AND OTHER RECOMMENDATIONS FOR A STRONGER APPROACH TO COMBATING HUMAN TRAFFICKING, SEE FREEDOM NETWORK’S POLICY PAPERS SERIES AVAILABLE AT FREEDOMNETWORKUSA.ORG**
The Freedom Network is a coalition of 39 non-governmental organizations and individuals that provide services to, and advocate for the rights of, trafficking survivors in the United States using a human rights-based, empowering approach. Founded in 2001, its members are leaders and experts in the anti-trafficking field. For more information, visit www.freedomnetworkusa.org.
CIVIL LITIGATION ON BEHALF OF VICTIMS of HUMAN TRAFFICKING

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DISCLAIMER

This manual is intended to introduce attorneys representing trafficked clients to the basic litigation tools for trafficking civil cases. However, the legal theories discussed here do not address distinctions among jurisdictions, and the content of this manual is by no means exhaustive of the laws and litigation strategies available to trafficked persons. For these reasons, this manual is not to serve as a replacement for independent research of legal claims and strategy tailored to the circumstances of a particular case.

Non-lawyers or attorneys who are not civil litigators may also benefit from this manual by familiarizing themselves with the client’s options for civil relief. All those providing services to trafficked persons can inform their client that they have options for civil relief and assist their client in finding a competent attorney. However, the unauthorized rendering of legal advice, including the interpretation of these materials for a trafficking victim by individuals not licensed to practice law, should not occur under any circumstances. A civil attorney, preferably one who has previous experience with civil litigation on behalf of immigrant victims of exploitation, is in the best position to provide sound legal advice.
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PREFACE

Over the past years, economic and political conditions abroad and in the United States have caused modern-day slavery — commonly referred to as human trafficking — to thrive. From the shipyards of Mississippi to the post-Katrina reconstruction to domestic work in the Washington, D.C. suburbs to farmworkers in Colorado to massage parlors in San Francisco, trafficked people toil under unimaginably cruel conditions.

Escape means risking the security of their families and their families’ homes, their immigration status, and even their lives. Still, some modern-day slaves do find the path to freedom. It is for those people — and for the men, women, and children who remain captive — that this manual is written.

Civil litigation gives power to the powerless and is a critical tool to correct deep and pervasive wrongs. This is why the Southern Poverty Law Center is bringing litigation on behalf of human trafficking survivors and encouraging other attorneys to do so as well.

We recognize that this manual will not answer all of your questions. Some of the laws protecting human trafficking survivors are new, while others are infrequently used. Therefore, the human trafficking civil litigation slate is only intermittently marked.

We hope this manual gives civil attorneys guidance as they develop the law in a way that can lead more modern-day slaves to freedom and empowerment. Nearly 145 years after the Thirteenth Amendment became part of our Constitution and abolished legal slavery, we will work to finally put an end to involuntary servitude in the United States.

Morris Dees
Southern Poverty Law Center
October 2008
CHAPTER 1
LOGISTICAL CONCERNS

I. THE “PROS” AND “CONS” OF CIVIL LITIGATION

Attorneys representing victims of trafficking have a responsibility to discuss civil litigation with their clients, and to weigh the “pros” and “cons” of a lawsuit. Absent an effort from the criminal prosecutors to seek restitution from the traffickers, litigation may provide the only means by which victims of trafficking may be “made whole,” and litigation can provide forms of relief that may not be available through a restitution order. Litigation also discourages would-be-traffickers and employers hiring trafficked persons from engaging in these practices. Finally, and perhaps most importantly, civil litigation is often the only mechanism that allows a victim of human trafficking to confront the trafficker. This process can be important in the healing and empowerment of the victim.

When considering whether to file litigation on behalf of trafficking victims, attorneys and clients should consider the following factors:

- Are there potential defendants who have the resources to satisfy a judgment?
- Is your client available for discovery?
- Are the potential defendants located in the United States?
- Is your client willing to endure years of litigation?
- Are there safety concerns for your client and his or her family?
- Are there other potential plaintiffs?
- How will civil litigation impact the criminal case?
- Do you have the stamina and resources to prosecute the civil case? If not, are there firms that may be willing to co-counsel?
- Will civil litigation have any impact on your client’s immigration status?
- Will the criminal prosecutors seek restitution on behalf of your client and others, and if so, what form will the restitution take?
- Are there diplomatic immunity issues?

II. FINDING HELP FROM, AND CO-COUNSELING WITH, OTHER ATTORNEYS

Attorneys considering litigation on behalf of trafficking victims are encouraged to seek the assistance of other attorneys who have experience in this area. As a first step, consult the Anti-Trafficking Litigation and Assistance Support Team (“ATLAST”), a technical assistance project launched by the authors of this manual, at http://library.lls.edu/atlast/. The ATLAST website provides access to litigation resources, advice and referrals. Please contact the authors of this manual for more information.

Attorneys with limited resources should also consider seeking pro bono assistance from law firms. A good place to start is the website for the ABA Standing Committee on pro bono and public service: www.abanet.org/legalservices/probono/home.html. The ABA has also recently created a pilot program that will specifically link pro bono attorneys with human trafficking cases. For more information, visit www.abanet.org/domviol/tip/. Another good resource both for volunteering pro bono services and for finding a pro bono attorney is www.probono.net.
III. WORKING WITH A PARALLEL CRIMINAL PROSECUTION

A. Criminal Restitution
Under the Mandatory Victim Restitution Act of 1996,1 restitution is now mandatory in many cases. The Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”) enacted 18 U.S.C.S. § 1593, which provides that the court shall order convicted criminals to pay mandatory restitution “in the full amount of the victim's losses.”2 Therefore, restitution must be addressed in plea negotiations and in the court's sentencing colloquy. A criminal sentence that includes restitution may also be recorded by the victim and enforced as any other judgment. Thus, if prosecutors are aggressive about restitution, a criminal defendant pleads guilty or is convicted, and the court orders restitution, there may be no need to take the time and expense of engaging in civil litigation. On the downside, if restitution is not part of plea discussions, and the court fails to inform a criminal defendant upon accepting a sentence that restitution will be an element, then the court may not be able to impose restitution. Since prosecutors and criminal defendants are mostly focused on jail time, restitution can be forgotten to the detriment of the victim. Further, even where restitution is ordered, it frequently falls far short of what the victim could receive through civil litigation. As discussed later in this manual, significant other forms of relief may be available through a civil lawsuit that are not contemplated in a restitution order, including pain and suffering, punitive, statutory, liquidated, and treble damages. The prospect of a large attorneys’ fees award stemming from civil litigation may also have a significant deterrent effect on the trafficker. Finally, the prosecutors can only seek restitution against the criminal defendant. Joint employers or tortfeasors bear none of the burden of a restitution order.

Background
Restitution is money paid by a criminal defendant as a fine or as compensation to a victim for losses resulting from the crime. Restitution does not serve as an independent civil cause of action. However, if traffickers are successfully convicted, restitution may provide a significant source of monetary recovery for the trafficking victims.

Criminal restitution, distinct from civil damages, has reached the millions of dollars in a number of cases.

- **U.S. v. Lakireddy B. Reddy:**3 Defendant ordered to pay $2 million to four victims trafficked for restaurant work and sexual exploitation.
- **U.S. v. Kil Soo Lee:**4 Defendant ordered to pay $1.8 million in restitution to hundreds of Vietnamese and Chinese workers in American Samoa, in addition to a 40 year prison sentence.
- **U.S. v. Cadena:**5 Perpetrators of a trafficking ring in Florida were forced to pay $1 million in restitution to its victims.

Because restitution is not an independent civil cause of action, only the prosecutor of the criminal trafficking case may request it from the court. Thus, a lawyer or advocate representing the interests of a trafficked client should encourage prosecutors to request and pursue restitution. This may involve working with prosecutors to calculate the victim’s losses in a manner that achieves the greatest monetary compensation for the victim.

Making the Claim
In the event of a successful criminal prosecution of a trafficking case, the victims are entitled to mandatory restitution from their traffickers. A complete restitution order can compensate trafficking victims, for all

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3. Case No. 4:00-cr-40028-CW-1 (N.D. Cal. 2000).
actual economic losses he or she has suffered. This generally includes lost income pursuant to 18 U.S.C. § 1593(b)(3) as well as any out of pocket losses flowing as a direct result of the trafficking crime codified at 18 U.S.C.S. § 2259(b)(3).

Lost Income
A victim is entitled to “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.”

A human trafficking victim’s lost income or lost earning potential for purposes of restitution is calculated according to the time period in which the victim was acting under the direct control of the trafficker. There are various methods used to calculate lost earnings. The most common method is based on a minimum wage analysis under the Fair Labor Standards Act (“FLSA”) or an analogous state minimum wage law. For example, a victim was entitled to restitution of approximately $917,000 based on minimum wage analysis and overtime provisions spanning nearly 20 years of exploitation.

Where illegal work is involved, such as prostitution, a minimum wage analysis according to state and federal labor codes cannot be applied. In this situation, the appropriate method for calculating lost income is to determine the amount of the convicted trafficker’s gross income from the trafficking victim’s services. For example, when a criminal organization forced women into prostitution, the court ordered the victims restitution in the amount of $1 million based on the organization’s profits.

Other Economic Losses
As defined under 18 U.S.C.S. § 2259(b)(3) a victim’s losses include:

A) medical services relating to physical, psychiatric, or psychological care;
B) physical and occupational therapy or rehabilitation;
C) necessary transportation, temporary housing, and child care expenses;
D) lost income;
E) attorneys’ fees, as well as other costs incurred; and
F) any other losses suffered by the victim as a proximate result of the offense.

Victims have a right to compensation for any other out-of-pocket losses they suffer as a result of a crime. In calculating a victim’s losses, an advocate should communicate to the victim the utmost importance in documenting all expenses incurred. Receipts or other similar documentation is the most effective means in calculating actual losses.

Of note is 18 U.S.C. § 2259(b)(3)(F), which provides a broad catch-all phrase “any other losses suffered by the victim as a proximate result of the offense,” without specification of types of losses. Therefore, an advocate should work with prosecutors to define this provision as widely as possible. For example, “other losses suffered” could include future lost wages, future medical expenses, and future employment issues due to a victim’s physical or psychological impairment.

Strategic Recommendations
Advocates should communicate with prosecutors to establish the appropriate means for calculating the amount of restitution. The method employed to determine the amount of restitution should provide the victim with the maximum compensation possible. In addition to relief from lost earnings, advocates can index all other economic losses suffered by the victim and ensure that the totality of the losses are known to the

prosecutors. Advocates can also assist in gathering adequate proof, receipts or affidavits corroborating the victim’s losses. Finally, where there is no prosecution or where direct restitution has not been paid, advocates should consider tapping into their state’s crime victim’s restitution fund. At least 35 states have implemented some type of victim compensation program.9

Keep in mind also that restitution does not preclude an award of civil damages arising out of the same events.10

B. How a Criminal Conviction of the Traffickers May Help the Civil Case
Under the collateral estoppel doctrine, a guilty verdict in a criminal case may be used in a subsequent civil action to prove the facts upon which it was based.11 Keep in mind, however, that the guilty verdict only has a collateral estoppel effect on the guilty party and those who were his or her privies at the time of the criminal proceeding.12 Therefore, it may be difficult to argue that a guilty verdict of a trafficker has a preclusive effect on a joint employer or joint tortfeasor in the parallel civil litigation.

C. Immigration-Related Benefits of Client’s Participation in the Criminal Prosecution or the Civil Litigation
The TVPA provides that:

[F]ederal law enforcement officials may permit an alien individual's continued presence in the United States, if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible.13

As a result of this provision, trafficking victims who are available to be witnesses in a criminal prosecution often receive continued presence and employment authorization. Furthermore, in order to be eligible for a “T” visa, an immigrant who is 18 years of age or older must comply with “any reasonable request for assistance in the... investigation or prosecution of acts of trafficking” and show that he or she “would suffer extreme hardship involving unusual and severe harm upon removal.” Similar requirements apply for the “S” visa,15 and the “U” visa.16

The U.S. Department of Justice (“USDOJ”) has recently taken the position that human trafficking victims must be issued Notices to Appear, thereby placing the victims in removal proceedings, before an interview with U.S. Immigration and Customs Enforcement (“ICE”) related to the trafficking claims can occur. The victim also must be fingerprinted and photographed by ICE. The Notice to Appear does not include an actual court date, and the victim is not detained. ICE waits to set the court date until the investigation or prosecution is completed. This policy has been roundly condemned by advocates for survivors of human trafficking,

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10 See TVPA, 18 U.S.C. § 1593 (“Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter (emphasis added).”); see also Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987) (because there was no litigation of the amount of restitution awarded in the criminal action, it did not have a collateral estoppel effect on the subsequent civil action); cf. U.S. v. Barnette, 10 F.3d 1553, 1556 (11th Cir. 1994) (“an order of restitution is not a judicial determination of damages.”).
11 For a good review of case law on this subject, see In re Towers Financial Corp. Noteholders Litigation, 75 F. Supp. 2d 178, 181 (S.D.N.Y. 1999).
13 22 U.S.C. § 7105(c)(3) (2008). The Trafficking Victims Reauthorization Act of 2003 indicated that, in considering certification of a victim of a severe form of trafficking, the U.S. Department of Health and Human Services “shall consider statements from State and local law enforcement indicating that the individual has been cooperating with a state-level prosecution.” 22 U.S.C. § 7105(u)(1)(E)(iv). Whether this translates into continued presence for trafficking victims cooperating with state prosecutions remains unclear at the time of this update.
15 See id. at § 1101(a)(15)(S)(i).
16 See id. at § 1101(a)(15)(U)(III). The “U” visa regulations allow for a broad range of authorities investigating alleged criminal activity, including judges, to certify a petitioner’s application. See 8 U.S.C. § 1184(p)(1).
including the authors of this Guide, as processing for removal is likely to cause greater trauma for the survivor, and the uncertain outcome will likely dissuade many survivors from approaching law enforcement. Still, it is now imperative that attorneys discuss with their trafficked clients the potential risks associated with this policy before presenting the clients to ICE investigators. Legal advocates should also consider presenting trafficking survivors directly to trusted FBI or local law enforcement agents with whom a relationship has been cultivated, rather than to the USDOJ Civil Rights Division, as this would make it more likely — though not certain — that ICE would remain out of the picture.

Regularization of a client’s immigration status will help the client’s civil case. A plaintiff’s immigration status generally is not admissible in a civil proceeding. However, representing undocumented immigrants can be logistically tricky. For example, it may be difficult for an undocumented immigrant to travel to depositions or court appearances.

The civil litigation itself may also provide some immigration benefits. At least one judge has certified “U” visa applications in the context of a civil action brought by trafficked workers who were facing imminent removal from the United States.

D. The Prosecutors’ Position Regarding the Civil Action

**Staying the Civil Action until the Conclusion of the Criminal Prosecution**

If the civil action is filed before the introduction of evidence in the criminal proceeding, it is very likely that the criminal prosecutors will move to intervene in the civil case for the limited purpose of staying discovery. Where there are parallel civil and criminal actions, such motions are routinely granted. Alternatively, as occurred in one trafficking case, the Court may deny the government’s motion to intervene, but rule *sua sponte* to stay the civil proceedings. The prosecutors generally want a stay because criminal defendants should not be able to use the more permissive civil discovery process to make an end run around restrictions on criminal discovery. On the other hand, the defendants themselves may support a stay rather than having to choose between claiming Fifth Amendment privilege in civil discovery, which carries a negative inference in civil proceedings, and jeopardizing their defense in the criminal proceedings by responding to discovery. The government will likely also argue this position in its brief in support of the stay.

From the plaintiff’s perspective, a stay may be beneficial in several respects. First, if your client is concerned about his or her safety and has thus far maintained anonymity in both the civil and the criminal action, civil discovery may jeopardize this. For example, while you may obtain a protective order prohibiting deposition questions that may endanger your client, it is immensely difficult to assure that your client is sufficiently prepared so as to avoid revealing such information. This is particularly true if your client lacks formal education and experience with legal processes.

A stay also may be helpful if the defendants are expected to claim Fifth Amendment privilege in the civil discovery. As discussed above, though the Fifth Amendment privilege carries a negative inference in civil litigation, this inference is not helpful if you are trying to learn facts to support your claim against unindicted civil defendants. The spectre of the Fifth Amendment privilege will render much of this critical initial fact-finding

17 See Chapter 2, §1(C), *infra*.

18 See Garcia v. Audubon Communities Management, LLC, Civ. No. 08-1291 Section “C” (S), 2008 U.S. Dist. LEXIS 31221 (E.D. La. April 15, 2008) (finding that the moving plaintiffs “provided sufficient evidence to show that they ‘may be helpful at some point in the future’ to an investigation regarding qualifying criminal activity.”) (quoting 72 Fed. Reg. 53019).


practically impossible. Additionally, even if some civil discovery has taken place, new issues of contention will undoubtedly arise in the course of the presentation of evidence in the criminal trial. This will require a second round of discovery. This process would be stilted and duplicative, and seems unnecessary in light of the ease with which the court can relieve the burden.

Further, it is likely that you will be able to use some of the positions adopted by the criminal defendants in support of your client’s civil claims. The doctrine of judicial estoppel prevents a party from using one argument in one case, and then relying on a contradictory argument to prevail in another similar case. Under the same doctrine, the criminal defense will try to use any sworn testimony of your client from the civil litigation to attack your client’s testimony in the criminal case.

Finally, as discussed above, collateral estoppel will likely preclude a criminal defendant who was found guilty from raising certain defenses in the civil action.

The Trafficking Victims Protection Reauthorization Act of 2003 (“TVPRA”) grants a civil cause of action for violations of the Act, but requires that the civil action be stayed “during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.” This provision appears to create a statutory mandate that the civil action be stayed until the trial court proceedings have concluded. Still, the automatic stay only applies to “any civil action filed under this section.”

Since the passage of the TVPRA, only one court has issued an opinion addressing the automatic stay. In Ara v. Khan, the U.S. District Court for the Eastern District of New York granted the United States’ letter motion for a stay, which was apparently triggered by a scheduled Rule 34(a)(2) inspection of the defendants’ home. Still, the court tempered its decision:

... Fairness requires that I make the instant order now so that the defendants have time to decide whether they still wish to permit the inspection. The parties are of course free to conduct the inspection, and to exchange information in other ways that would normally be required under the relevant discovery rules, on a purely voluntary basis and according to any mutually agreeable schedule. By granting the government’s application I cannot and do not forbid such cooperation; instead I merely remove any specter of judicial compulsion for as long as the stay remains in effect.

Therefore, if you do not bring TVPRA claims, there is no automatic stay, although the prosecution may still intervene to attempt to stay your civil action.

There are two glaring downsides to a stay: first, defendants — particularly those who are not part of the criminal prosecution — will have ample time to manipulate their evidence. Therefore, you may want to request that a stay include an order requiring that the defendants preserve any documentary or other physical evidence pertaining to the action. In the securities litigation context, where stays are commonplace, courts frequently order that documents be preserved while a stay is in effect.29

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23 The U.S. Supreme Court most recently explained the judicial estoppel doctrine in New Hampshire v. Maine, 532 U.S. 742, 749 (2001). See also Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 527 (7th Cir. 1999) (stating that courts will apply judicial estoppel when “(1) the later position [is] clearly inconsistent with the earlier position; (2) the facts at issue [are] the same in both cases; and (3) the party to be estopped [has] convinced the first court to adopt its position.”).
26 The automatic stay provision applies to the entire civil action, rather than just to discovery in the civil action. Compare 18 U.S.C. § 1595(b)(1), with Javier H., 218 F.R.D. at 75-76.
27 See § 1595(b)(1).
29 Id. at “s.
30 See, e.g., Newby v. Enron, 338 F.3d 467, 469 (5th Cir. 2003).
Second, the defendants may exhaust all of their assets on their defense against the criminal charges—or the stay may give them time to hide their assets—leaving very little to satisfy a judgment in your civil case. If you are concerned about this, you may want to consider filing a notice of lis pendens31 (also called “notice of pendency”) or a mechanics or construction lien32 on the defendants’ property, though these mechanisms are somewhat limited. You may also want to file a motion for an Order of Attachment33 or for a temporary restraining order and preliminary injunction prohibiting the sale or transfer of assets.34

You should also be mindful of any deadlines in your court’s local rules. For example, many courts require plaintiffs bringing civil Racketeer Influenced and Corrupt Organization Act (“RICO”) claims to file civil RICO case statements shortly after the initial complaint is filed.35 Some courts also require that plaintiffs file their class certification motion within a set period of time.36 Failure to comply with these deadlines, or to obtain an extension, may constitute abandonment of certain claims. You should not assume that a stay of discovery or a stay of the civil case stays these local deadlines. If a stay has not yet been issued, make sure you request an extension of the deadlines within the allotted time period. If a stay will be or has been issued, you should request that the stay order specify that these deadlines are also stayed.

Willingness of the Prosecution to Share Evidence with Plaintiff’s Counsel
A grand jury indictment is perhaps the best source for information that is available to the prosecution. You should also frequently review the criminal case docket.37

The prosecution will not volunteer some evidence to you before it is presented at trial. However, the prosecution is required to provide any exculpatory evidence, or evidence that may be used to impeach the testimony or credibility of a witness, to the criminal defense counsel with sufficient time to allow defense counsel to prepare for trial.38 You may want to ask the prosecution to provide these materials to you, as well. Keep in mind, though, that these materials are certainly within the scope of permissible civil discovery. Therefore, once civil discovery resumes, you should not have much difficulty getting these materials through a Rule 34 request for production of documents.39 In addition to information bearing on claims and defenses in the civil and criminal cases, prosecutors may also share information regarding the extent and identity of defendants’ assets.

You may be able to get some information to support your client’s civil claims if you insist on being present during the prosecution’s interview of your client. Keep in mind, however, that you cannot be present during your client’s grand jury testimony.

Once the criminal prosecution is over, you should be able to get some evidence through the Freedom of Information Act (“FOIA”) and your state’s equivalent public records law. Be sure to send FOIA requests to all agencies that were involved in the investigation, including ICE (formerly the INS), FBI, U.S. Department of

31 See generally 51 Am. Jur. 2d Lis Pendens §§ 1-76.
32 Without taking a position as to the article’s conclusion, the authors recommend Ethan Glass, Old Statutes Never Die, 27 Ohio N.U.L. Rev. 67 (2000) for a helpful review of states’ mechanics lien laws.
33 See Fed. R. Civ. P. 64.
34 A sample motion for an order of attachment or a preliminary injunction is available upon request from author Werner.
35 See, e.g., NDNY Local Rule 9.2 (requiring civil RICO statement to be filed within 30 days of the initial pleading alleging civil RICO claims).
36 See, e.g., WDNY Local Rule 23(d) (class certification motion must be filed within 120 days of pleading alleging a class action).
37 You can access case filings from most federal courts at the PACER website: www.pacer.uscourts.gov. You must sign up for PACER, and there is a nominal fee for this service.
39 There may be restrictions on how you use some documents stemming from the criminal prosecution, and particularly transcripts of grand jury testimony. Even if grand jury transcripts were inadvertently provided to you, you may risk criminal or civil liability if you do not inform the prosecutor that you have the transcripts—and confirm with the prosecutor that the transcripts are in the public domain—before using the transcripts in your lawsuit or providing them in discovery.
Labor (“USDOL”), and the U.S. State Department. Every federal agency should have regulations governing requests for production of agency documents or testimony, commonly referred to as Touhy regulations.  

E. Impact of Your Client’s Prior Statements on the Criminal Prosecution
Be aware that non-privileged statements your client makes, or statements you make on your client’s behalf, may be used by the criminal defense if the statements are non-hearsay or fall within one of the hearsay exceptions. It is best to err on the side of caution. Clients should be advised not to discuss the case with anyone not covered by one of the privileges. As an attorney, you should also be circumspect in any public statements.

The most easily admissible statements are prior statements made under oath by the witness, as these statements are considered non-hearsay. Therefore, if your client has provided any sworn testimony, including deposition testimony as part of the civil litigation, before the introduction of evidence at the criminal trial, the criminal defense is very likely to review the testimony with a fine-toothed comb to find any inconsistencies. Therefore, as discussed above, it benefits the criminal prosecution, and hence your client, to support a stay of the civil proceedings until the conclusion of the criminal case.

F. Admissibility in the Civil Action of Your Client’s Statements Made in the Course of the Criminal Investigation
Any sworn testimony given by your client as part of the criminal proceeding (e.g., grand jury or trial testimony) most likely will be admissible in the civil litigation. Additionally, police reports — and therefore your client’s statements contained in police reports — will likely be admissible under the Federal Rule of Evidence 803(8)(C) hearsay exception, unless the sources indicate lack of trustworthiness. Further, there is no sweeping law enforcement or confidential informant privilege, though courts recognize a law enforcement privilege under many circumstances. Courts have also recognized an “informer’s privilege” in cases brought by the U.S. Secretary of Labor for violations of the FLSA, allowing the USDOL to withhold information about the identities of informants.  

IV. ASSESSING YOUR CLIENT’S CREDIBILITY
Essentially, there are two separate questions that must be answered in assessing your client’s credibility. First, as your client’s attorney, you must determine the truthfulness of your client’s story. Second, you should assess the factors the defense will use to attack your client’s credibility. Some of these factors are described below.

A. Impact of Prior Criminal and/or Immigration-Related Offenses
Most trafficking victims committed an immigration-related offense by entering the United States without inspection, overstaying a visa, or possessing fraudulent immigration documents. Therefore, the question of

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41 See generally Fed. R. Evid. 801-804; cf. Fed. R. Evid. 613 (regarding examining a witness or introducing evidence concerning prior statements).
42 See generally Fed. R. Evid. 501; cf. Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996) (stating that consultations with mental health professionals are generally privileged); U.S. v. Hayes, 227 F.3d 578, 585-86 (6th Cir. 2000) (there is no “dangerous patient” exception to the therapist-patient privilege). For a more detailed discussion of therapist-patient privilege, see Chapter 2, ¶ (D), infra.
43 Fed. R. Evid. 801(d)(2).
44 See, e.g., Miller v. Field, 35 F.3d 1088, 1091 (6th Cir. 1994) (explaining when hearsay in a police report lacks trustworthiness).
46 See, e.g., In re U.S. Dept. of Homeland Sec., 459 F.3d 565, 569 n.1 (5th Cir. 2006) (reviewing Circuit Court decisions supporting law enforcement privilege).
48 See Fed. R. Civ. P. 11(b) (by signing and filing a document with the Court, the attorney certifies that he or she conducted a reasonable inquiry).
whether the defense can use these offenses to attack your client's credibility is very likely to arise in the course of the civil litigation.

Generally, specific acts are admissible to attack a witness's credibility if, at the discretion of the court, the acts are probative of untruthfulness.49 Therefore, courts have allowed, for example, prior use of a false name,50 and filing of false or forged tax returns51 to prove untruthfulness. However, even if such evidence is probative of untruthfulness, the court may still refuse to admit this evidence because its probative value is substantially outweighed, *inter alia*, by the danger of unfair prejudice.52

Immigration-related offenses generally will not be admissible, even to the extent that they may impinge your client’s credibility — though there is some dispute over this. Mechanisms to avoid the disclosure of your client’s immigration status are discussed in Chapter 2, § I(C), *infra*. Still, unlike most employment law cases, in civil litigation involving victims of trafficking, the plaintiff’s immigration status at the time of his or her victimization is likely to be an essential element of the plaintiff’s claim. In most trafficking cases, it is one of the elements the trafficker used to compel forced labor. Therefore, it makes little sense to try to prevent this information from surfacing.

B. How the Defense May Use Your Client’s Benefits under the TVPA to Attack Your Client’s Credibility

If your client has received resettlement benefits under the TVPA, the defense will likely try to introduce evidence of these benefits to support an argument that your client fabricated his or her story in order to obtain the benefits. In the civil action, your best argument is that your client’s benefits are simply not relevant. The benefits are tied to participation in the criminal action and are not at all impacted by the civil action.

V. HOW TO HANDLE A RELEASE OR WAIVER SIGNED BY YOUR CLIENT

If your client signed any kind of a waiver purporting to release the trafficker from liability, it is very unlikely that the waiver will be binding. With some exceptions, the applicability of a waiver of rights will be governed by state law. Still there are some factors that generally apply. These include:

1. The clarity and specificity of the release language; 2. the plaintiff’s education and business experience; 3. the amount of time plaintiff had for deliberation about the release before signing it; 4. whether plaintiff knew or should have known his rights upon execution of the release; 5. whether plaintiff was encouraged to seek, or in fact received benefit of counsel; 6. whether there was an opportunity for negotiation of the terms of the Agreement; and 7. whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law.53

In labor exploitation cases — and particularly in human trafficking cases — many, if not all, of these factors will often lean in favor of the worker’s position that the waiver is not enforceable.

A waiver also may not be valid for unconscionability. In one human trafficking case, the plaintiff had signed a waiver in exchange for some wages soon after she left the trafficking situation. The defendants filed a motion to dismiss based in part on the waiver. The Court denied the motion, finding that the plaintiff had presented a

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49 See Fed. R. Evid. 608(b).
52 See Fed. R. Evid. 403; see also United States v. Morales-Quinones, 812 F.2d 604, 613 (10th Cir. 1987) (upholding exclusion of testimony regarding illegal entries into the U.S. not resulting in convictions).
colorable claim of unconscionability based on the gross disparity between the amount the plaintiff received in exchange for the waiver and the wages the plaintiff was actually owed.\textsuperscript{54}

It is worth noting, as well, that “waivers of federal remedial rights... are not lightly to be inferred.”\textsuperscript{55} This is particularly true in the context of minimum wage and overtime claims under the FLSA. In FLSA cases, courts recognize waivers in only two circumstances: (1) waivers that are supervised as part of a USDOL enforcement action, or (2) a court-supervised settlement of a private suit for back wages.\textsuperscript{56}

VI. LIMITATIONS ON CERTAIN TYPES OF TRAFFICKING CASES

Certain types of trafficked workers may be faced with additional limitations on the viability of their lawsuits against their traffickers. Such hindrances have appeared in cases involving trafficked domestic workers and sex workers, sometimes preventing a successful lawsuit altogether.

A. Domestic Workers

Domestic workers, who, according to reports from advocates and the USDOJ, constitute a large percentage of trafficking cases,\textsuperscript{57} continue to lack sufficient employment and labor protections. The National Labor Relations Act (“NLRA”) does not include domestic workers under its definition of “employee” and therefore provides no protection for domestic workers from employer retaliation for striking or collective bargaining.\textsuperscript{58} Individual domestic workers working in private homes are ineligible to assert violations of sex, race, or national origin discrimination under Title VII.\textsuperscript{59} Live-in domestic workers are not entitled to overtime pay under the FLSA.\textsuperscript{60} Finally, domestic workers employed by foreign diplomats cannot hold their employers accountable for workplace violations as diplomats enjoy immunity from civil, criminal, or administrative liability within the United States.\textsuperscript{61} While an exception to immunity exists for “any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions,”\textsuperscript{62} the Fourth Circuit ruled in Tabion v. Mufti,\textsuperscript{63} that “commercial activity” includes only activities for personal profit, explicitly stating that domestic workers are not “commercial activity.” Thus, pursuant to Tabion, domestic workers are denied claims against their diplomat employers in the civil justice system.

B. Sex Workers

To date, civil lawsuits utilizing the TVPRA on behalf of victims of sex trafficking have been few and far between.\textsuperscript{64} There may be sound reasons for the infrequency of TVPRA lawsuits in sex trafficking cases. The authors of this manual encourage practitioners and advocates to think carefully about the fragile circum-

\begin{itemize}
\item \textsuperscript{55} Torrez, 908 F.2d at 689.
\item \textsuperscript{57} McMahon, supra note 32.
\item \textsuperscript{58} 42 U.S.C.A. 12111 § 5(a) (2001).
\item \textsuperscript{59} 42 U.S.C.A. 12111 § 5(a) (2001). Title VII applies to employers with fifteen or more employees. Because domestic workers are frequently the sole employee in the workplace, they are excluded from Title VII protection.
\item \textsuperscript{60} 29 U.S.C.A. §§ 213(a)(15), 213(b)(2).
\item \textsuperscript{61} Human Rights Watch, Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States 34-35 (2001).
\item \textsuperscript{62} Vienna Convention on Diplomatic Relations art. 31(c), Apr. 18, 1961, 23 U.S.T. 3227.
\item \textsuperscript{63} 73 F.3d 535 (4th Cir. 1996).
\item \textsuperscript{64} Doe I v. Reddy, No. 02 Civ. 05570, 2003 U.S. Dist. LEXIS 26120, at *13 n.2, *33 & n.4, *35-36 (N.D. Cal. Aug. 4, 2003), pre-dated the TVPRA, but does serve as an example of a civil case brought on behalf of plaintiffs who were trafficked both for labor and sex.
\end{itemize}
stances of sex trafficked clients and the consequences of civil suits on their progress toward rehabilitation and stability. Some of these considerations are described below.

First, criminal prosecutions in sex trafficking cases are far more likely to occur than prosecutions in labor trafficking cases. The USDOJ's focus on enforcement of sex trafficking crimes is the official policy of the Bush Administration. As a result, over two-thirds of federal trafficking prosecutions are cases of sex trafficking, which conflicts with empirical reports from service providers who have found that sex trafficking cases comprise only one-third of their caseload. The zealously pursued prosecutions of sex trafficking crimes subjects victims in these cases to severe re-traumatization. Such victims must repeatedly divulge the facts of their cases to prosecutors, investigating officers and ultimately, juries. They must face their traffickers in trial and testify against them. Their traffickers, agents within a large criminal network, can and often will utilize their networks to retaliate against victims.

Second, sex trafficking cases present unique factors that impact a potential civil lawsuit. First, since a criminal prosecution is likely in a sex trafficking case, if successful, victims may receive and be satisfied with the monetary compensation received through restitution. Second, state and federal employment and labor laws, which generally provide the bulk of claims for compensatory damages in civil suits, exclude victims of forced prostitution since prostitution is not recognized as legal work. Finally, due to the clandestine nature of sex trafficking crimes, it is often much more difficult to identify defendants and locate assets.


66 For example, in 2005, the USDOJ reported that over two-thirds of ninety-one human trafficking cases were cases of sex trafficking: U.S. Dep't of Just., REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005, 25 (2006), available at www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

67 For example, a recent study by the Coalition to Abolish Slavery and Trafficking reports that clients trafficked to Los Angeles are subject to exploitation in many fields, including domestic work (40%), factory work (17%), sex work (17%), restaurant work (13%), and servile marriage (13%). Kathryn McMahon and Coalition to Abolish Slavery and Trafficking, Speaking Out: Three Narratives of Women Trafficked to the United States (2002).

68 See generally Jennifer Nam article.
CHAPTER 2
PROCEDURE

I. PROTECTING YOUR CLIENT FROM THE TRAFFICKERS

A. The Use of Pseudonyms in the Complaint to Conceal Your Client’s Identity

If you or your client is concerned that the defendants will attempt to retaliate once the defendants learn of the lawsuit, you should try to use pseudonyms in the complaint. The leading case on this subject is Doe v. Frank,1 which sets forth factors the court may consider when determining whether a plaintiff may proceed anonymously.2 In the trafficking context, one court allowed plaintiffs to proceed using pseudonyms based on the defendants’ previous use of threats as alleged in a parallel criminal indictment, and because of the government’s interest in protecting the identity of potential witnesses in the criminal case.3 In another human trafficking lawsuit, the Court allowed the plaintiffs to proceed anonymously where law enforcement officers found firearms in the home of one of the traffickers, a paralegal working for the plaintiffs’ counsel overheard family members of the defendants making threatening comments about the plaintiffs, and the Complaint includes “allegations of violence and coercion by the contractor defendants against the plaintiffs.”4 This was “sufficient to overcome the presumption of open judicial proceedings.”5

The mechanics for filing a lawsuit on behalf of anonymous plaintiffs vary between the circuits, with some circuits providing little or no guidance on the subject. In the Does I-IV v. Rodriguez human trafficking litigation,6 plaintiffs’ counsel filed a motion to proceed anonymously before filing the Complaint, based on Tenth Circuit guidelines.7 The motion was assigned a miscellaneous case number. Plaintiffs’ counsel then referenced the motion and the miscellaneous case number in the Complaint. In the Javier H. v. Garcia-Botello trafficking litigation, plaintiffs’ counsel filed their motion to proceed anonymously contemporaneously with the initial Complaint.8 In other contexts, counsel has filed under seal a complaint using the plaintiff’s real name, but used a pseudonym in the Complaint in the public file.9

B. Temporary Restraining Orders and Preliminary Injunctions

If there is an immediate risk of harm to your client, you may wish to seek a temporary restraining order (“TRO”) and/or a preliminary injunction. For example, you may want to seek a TRO or preliminary injunction to prevent the defendants from contacting your client and your client’s family.10 To obtain a TRO or preliminary injunction, a plaintiff first must establish that he will suffer irreparable harm if no injunction is issued. Then, a plaintiff generally must show “(1) that he or she will suffer irreparable harm absent injunctive relief, and (2) either (a) that he or she is likely to succeed on the merits, or (b) that there are sufficiently serious

1. 951 F.2d 320 (11th Cir. 1992).
2. 628 F.2d 180 (5th Cir. 1981).
5. See id. at *3.
6. See id.
7. See W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001).
10. As discussed in Chapter 1, 5 III(D), supra, you may also want to seek a TRO to prevent the Defendant from transferring ownership of his or her assets.
questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party.”

Specifically obtaining a TRO can be difficult, and courts are even more reluctant to issue an ex parte TRO. A TRO is a court order that enjoins a party from engaging in a particular action. The TRO remains in effect until the court rules on your motion for a preliminary injunction, which can take a long time, depending on the weight of the court’s docket. Unless you are seeking an ex parte TRO, the court will hear arguments on the motion for a TRO once notice is given to the opposing party.

Generally, if you are seeking a TRO, you must also prepare a motion for an expedited hearing, where you will indicate when you expect to serve the opposing party. You will also have to draft a proposed Order to Show Cause. Usually, a party seeking a TRO will hand-deliver the motion papers to the court and will wait for the assigned judge to issue the order to show cause. The order to show cause must then be personally served (usually within the next 24–48 hours) on the opposing party. Consult your local rules and talk to the clerk of the court before seeking a TRO. Most courts have very specific and sometimes convoluted rules that must be followed when seeking a TRO.

C. Protective Orders

Once the litigation proceeds into discovery, defendants are likely to seek information about your client that may jeopardize your client’s security or privacy. For example, defendants may ask for your client’s immigration status, current address and employer, and for information on your client’s hometown address in his or her country of origin. In a case where security is not a concern, this type of background discovery is usually acceptable. However, where retaliation is a concern, this information can put the safety of your client and his or her family in jeopardy.

If the defendants seek this information in discovery, you should move for a protective order. The court may limit discovery where the disclosure would present a “danger of intimidation” which could “inhibit plaintiffs in pursuing their rights.” In one case, the court prevented the disclosure of the plaintiffs’ addresses and employers where a member of the defendants’ family had publicly accused the immigrant workers of being members of a terrorist “sleeper cell.” In that case, the court found that:

[A]ssuming, arguendo, that information regarding plaintiffs’ residences and places of employment could lead to evidence relevant to the defense of this action,... any such evidence is clearly outweighed by the potential that this information may be used to harass, oppress, or intimidate the plaintiffs.

The law is well developed in the area of preventing disclosure of immigration status, and there is very helpful language that can be borrowed from some decisions on this subject. One court, for example, determined that:

[I]respectively of whether the desperate, and illegal, effort of an indigent Mexican immigrant to work here seriously brings his character into question, it was not clearly erroneous... to conclude that this evidence would be highly prejudicial.

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11 Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 510 (2d Cir. 2005). There is some minor variation between the circuits with regard to the requirements for a TRO or a preliminary injunction. Compare, e.g., Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1201-02 (9th Cir. 2006) (same standard as 2d Cir. in Moore); with Straights & Gays for Equality v. Osseo Area Schs., 471 F.3d 908, 911 (8th Cir. 2006) (the court should consider “(1) the likelihood that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between the harm to the movant and the harm to the other party; and (4) the public interest.”); and Sanofi-Synthelabo v. Apotex, Inc., 470 F.3d 1368, 1374 (Fed. Cir. 2006) (same).
14 Id.
In fact, there is a plethora of case law supporting the non-discoverability of immigration status,\textsuperscript{16} with only a few courts taking a contrary position.\textsuperscript{17}

Defense counsel may also argue that the U.S. Supreme Court’s decision \textit{Hoffman Plastic Compounds v. NLRB}\textsuperscript{18} makes immigration status relevant to damages. So long as your client’s wage claims are for work that was performed, such a position would be misguided. Still, the impact of \textit{Hoffman Plastics} on claims for lost future wages resulting from an illegal firing has yet to be clearly addressed by the courts. For a more detailed discussion of \textit{Hoffman Plastics}, see Chapter 3 § V(H), infra.

The argument to prevent the disclosure of your client’s current employer or address is essentially the same as the argument to prevent disclosure of immigration status. You may also present the alternative argument that, if these matters are to be disclosed, they should not be disclosed to the defendants, but rather only to their counsel.\textsuperscript{19}

With respect to information about the plaintiff’s current employer, several cases are on point. In \textit{Doe v. Handman},\textsuperscript{20} a plaintiff obtained a protective order protecting her present and former employers and business acquaintances from being deposed by defendants. The court noted that plaintiff had demonstrated a “legitimate personal harm” in showing that her job would be in jeopardy if her employer knew of the pendency of her case.\textsuperscript{21} Moreover, the defendant had not met his burden of showing that depositions of these individuals would be relevant to the plaintiff’s cause of action. For these reasons, the \textit{Handman} court granted to the plaintiff the protective order requested.

In \textit{Graham v. Casey’s Gen. Stores}, the court noted that a subpoena sent to a plaintiff’s current employer “could be a tool for harassment and result in difficulties for [the plaintiff] in her new job.”\textsuperscript{22} The defendant had sought through the deposition of the plaintiff’s current employer information as to whether the plaintiff had filed prior lawsuits or administrative charges in connection with this new job. The court, however, quashed the defendant’s subpoena, requiring the defendant to provide independent evidence that there had been any such prior lawsuits or administrative charges.\textsuperscript{23} These cases suggest that allowing access to a current employer poses a significant risk to a plaintiff in an employment matter. Allowing a defendant to discover a plaintiff’s current landlord could present similar problems.


\textsuperscript{17} See, e.g., Samborski v. Linear Abatement Corp., No. 96 Civ. 1405, 1997 U.S. Dist. LEXIS 1337, at *2-3 (S.D.N.Y. Feb. 10, 1997) (“While I am not at this point deciding whether [commission of immigration offenses is] properly admissible at trial, I do find that it may be relevant as to plaintiffs’ credibility and as such is discoverable.”).\textsuperscript{20}

\textsuperscript{18} 535 U.S. 137, March 27, 2002


\textsuperscript{21} Id. at *13.

\textsuperscript{22} 206 F.R.D. 251, 256 (S.D. Ind. 2002).

\textsuperscript{23} Id.; see also \textit{Centeno-Bernuy}, 219 F.R.D. 59, 61-62 (“to enable [defendants] to discuss plaintiffs’ allegations of illegal treatment by their former landlords/employers with plaintiffs’ current landlords and/or employers, is inherently intimidating”); cf. Conrod v. Bank of N.Y., No. 97 Civ. 6347, 1998 U.S. Dist. LEXIS 11634, at *5 (S.D.N.Y. July 30, 1998) (noting the “negative effect that disclosures of disputes with past employers can have on present employment” and sanctioning defendants for subpoenaing plaintiff’s current employer without conferring with the court and plaintiff’s counsel).
Still, you should keep in mind that you probably will not be entitled to prevent discovery of work history if you include a claim for lost wages based on an illegal termination. Defendants would argue, probably correctly, that subsequent employment would mitigate lost wages and therefore is relevant to damages.24

A protective order may also be appropriate where a defendant takes action designed to intimidate participants in a lawsuit. In EEOC v. City of Joliet,25 the U.S. District Court for the Northern District of Illinois issued a protective order in a Title VII case preventing the defendant from requiring employees to complete I-9 forms, where this was not the defendant’s practice before the litigation. The court found that “the main purpose behind this alleged new found desire to abide by the law is to effect a not-so-subtle intimidation of the intervener, plaintiffs, and all the potential class members. Such actions are meant to, and if unchecked most certainly will, chill the exercise of the employees’ Title VII rights — which rights the current lawsuit was filed to safeguard.”26

Your claim for a protective order should be bolstered by any evidence (such as the criminal indictment) of prior efforts to intimidate your client. It is even stronger if the court already allowed your client to proceed using a pseudonym. It logically follows that, if the plaintiff’s identity cannot be revealed, information that would subject him or her to identification, and therefore intimidation, must also be protected from discovery.

D. Protecting Others

Anyone with knowledge of your client’s case — witnesses, friends, family members, Good Samaritans, even social service providers — may also face intrusive discovery requests. If revealing their identifying information puts their safety in jeopardy, it may also be concealed through protective orders. However, their knowledge of the case does risk exposure to the defendants since their communications with the client do not necessarily enjoy the same privilege that exists between the attorney and client. Typically, testimony from those playing a supportive role in your client’s life will help to corroborate your client’s case.

While the supporting testimony of social service providers may also be to the benefit of your client’s case, there is good reason to keep certain information confidential, such as written notes taken in the course of treatment that may damage your client’s credibility or other information that your client simply does not want revealed. The Supreme Court has held that communications between a psychotherapist and patient in the course of treatment are privileged and therefore, protected from discovery.27 Psychotherapist is defined as psychiatrist, psychologist, and clinical social worker. Each must be licensed. The Supreme Court has not determined whether this privilege extends to non-licensed social service workers. However, some lower federal courts have extended the privilege to non-licensed counselors.28 State evidence codes and case law may differ in the application of the psychotherapist-patient privilege.

26 Id. at 492.
27 Jaffe, 518 U.S. at 9-10.
28 See Oleszko v. State Comp. Ins. Fund, 243 F. 3d 1154, 1157 (9th Cir. 2001) (extending the psychotherapist-patient privilege to counselors at an employment assistance program who “[a]re trained as counselors, are held out as counselors...and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how to best assist them.”); see also United States v. Lowe, 948 F. Supp. 97 (D. Mass. 1996) (extending privilege to rape crisis counselors). But see Jane Student 1 v. Williams, 206 F.R.D. 306 (S.D. Ala. 2002) (refusing to extend privilege to unlicensed counselors at a mental health center).
II. INDIVIDUAL ACTIONS VERSUS CLASS ACTIONS, REPRESENTATIVE ACTIONS, AND MASS ACTIONS

A. A Brief Introduction to Class Actions, Representative Actions, and Mass Actions in the Context of Trafficking Cases

Most cases of trafficking are limited to a small number of victims. However, cases occasionally arise with large numbers of victims. Often, these victims are difficult to locate, are intimidated by the legal process, or the traffickers prevent them from accessing an attorney and the courts. Where there are large numbers of victims, you should consider bringing the civil litigation as a class action, a representative action, and/or a mass action.

A federal class action is brought pursuant to Federal Rule of Civil Procedure 23 (“Rule 23”). Most causes of action may be brought on behalf of a Rule 23 class, with the notable exception of the FLSA, the Age Discrimination in Employment Act (“ADEA”), and the Equal Pay Act (“EPA”). In a Rule 23 class, individuals who meet the class definition are automatically members of the class, though in Rule 23(b)(3) they may affirmatively opt out of the class. Therefore, unless a class member opts out, the class member is bound by any judgments or court decisions in the class action. In a class action, the statute of limitations is tolled for all class members when the class action Complaint is filed, but it starts to run for an individual eligible class member once the individual opts out of the action.

A representative action (frequently also referred to as a “collective action” or a “FLSA class action”) is allowed only for actions brought under the FLSA, the ADEA, or the EPA. As discussed above, Rule 23 class actions are prohibited under each of these statutes. (Note that your state minimum wage, overtime, or employment discrimination laws most likely allow class actions.) In a representative action, a similarly situated employee must opt into the case by filing a consent to sue with the court. Unless a worker opts into the action, the worker is not bound by judgments or decisions of the court. However, in most cases (unless you can make an argument for equitable tolling) the statute of limitations is only tolled once the consent is filed.

A mass action is a lawsuit with multiple plaintiffs. Some include hundreds of plaintiffs. To file a mass action, you must only meet the requirements for joinder. More plaintiffs may be added later in the litigation by amending the complaint, so long as you have not passed the deadline to amend as set forth in the scheduling order. If defendants have not filed a responsive pleading to the prior complaint, or if no responsive pleading is required and no more than 20 days have passed since the prior complaint was served, you may amend the complaint as a matter of right.29 Otherwise, you must either obtain written consent from the defendants to amend the complaint or file a motion for leave to amend.30

Finally, many courts allow hybrid actions, allowing a class action to proceed on claims subject to Rule 23 and a representative action for claims under the FLSA, the ADEA, or the EPA. These cases may also have mass action components.

B. Consider the Following Questions as You Evaluate Whether to Bring a Class Action or an Individual Action

- Does the case satisfy the requirements of Rule 23?
- Does your client want to be a class representative?
- Does your client understand the responsibilities of being a class representative and how bringing the case as a class action may impact your client’s damages?
- Does your client have an understanding of the case?
- Does the defendant have the solvency to satisfy a class-wide judgment?

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30 Id.
- Do you have the time, and does your firm have the resources, to distribute class notice and to be class counsel?
- Is there a cap on damages under any of the statutes alleged to be violated?
- How might bringing the case as a class action impact the likelihood of settlement?
- Does Legal Services Corporation fund your program? (In which case, you cannot bring a Rule 23 class action.)
- Are there other attorneys who will be willing to co-counsel the case with you?
- How do courts in your jurisdiction approach class actions?

C. Rule 23 Class Actions

Requirements for Certification

In order for a case to be filed as a class action, the case must satisfy the numerosity, commonality, typicality, and adequacy of representation requisites of Rule 23(a).

With respect to numerosity, the unique nature of the trafficking case may allow for certification of a relatively small class because “Joinder of all members is impracticable.”31 Please consider that:

Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers. Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.32

There is substantial overlap between the typicality question and the commonality question, and similar issues may arise in either context. Unlike commonality, however, which requires that all members of the class have common claims, the typicality requirement compares the claims of the class representatives with the claims of the remainder of the class. The most common problem with satisfying the typicality requirement arises when the class representatives lack standing to bring a claim alleged on behalf of the class,33 or the representatives’ claims are time-barred.34

In the trafficking context, commonality and typicality questions may arise if the class consists of many victims over several years, or if different class members performed different jobs or were housed in different locations. These scenarios should not present a problem for certification.35 The adequacy of representation prong

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32 Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) (citations omitted); cf. Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 645 (4th Cir. 1975) (“Where the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable.”).
33 See, e.g., Cornett v. Donovan, 51 F.3d 894, 897 n.2 (9th Cir. 1995), cert. denied, 518 U.S. 1033 (1996).
34 See, e.g., Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1347 (11th Cir. 2001).
35 See, e.g., Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 371 (S.D.N.Y. 2007) (commonality and typicality found although class members worked with different kinds of animals, and the plaintiffs worked in feeding while other class members worked in slaughtering and packaging.); Does I v. Gap, Inc., No. 01 Civ. 0031, 2002 WL 1000073, at *2-3 (D. N. Mar. I. 2002) (in human trafficking case, although plaintiffs’ experiences giving rise to the causes of action vary significantly, commonality existed because plaintiffs’ injuries, “[a]lthough different, all stem from the same alleged conspiracy among the defendants,...” and typicality was found on the same basis); Ansomuma v. Gristede’s Operating Corp., 201 F.R.D. 81, 87 (S.D.N.Y. 2001) (class members working during different periods of time does not defeat typicality); Ramirez v. DeCoster, 203 F.R.D. 30, 36 (D. Me. 2001) (in AWPA case, class certified although “[n]ot every job or every housing unit was identical.”); Rodriguez v. Carlson, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (AWPA class certified “[a]lthough there might be some variances regarding the housing conditions of the class members”); Siedman v. Am. Mobile Sys., Inc., 157 F.R.D. 354, 360-61 (E.D. Pa. 1994) (commonality found although damages differed among class members but common questions of liability predominated). Though not addressed in the class certification context, Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 332-35 (D.N.J. 2005) has an enlightening discussion of the extent to which one state’s law should “[p]rovide the standard against which the sufficiency of Plaintiffs’ allegations are measured” where plaintiffs worked in eight different states. The Court concluded that the legal standards for false imprisonment in New Jersey were sufficiently similar to the standards in the other seven states so as to allow plaintiffs to rely on New Jersey law. For class certification purposes, this could prove very helpful where state law class claims are brought for plaintiffs and class members in various states.
encompasses both the representation of the class by the named plaintiffs, and the quality of the legal representation provided by class counsel. First and foremost, the courts will look for potential conflicts between the class representatives and the remainder of the class. In trafficking cases, make sure your class representatives did not play a role in the trafficking. For example, if a class representative was used as a guard to assure that other victims did not leave a forced labor situation — even if the representative himself or herself was trafficked — the court may determine that he or she will not protect the interests of the class.

Courts may consider other factors, including those reflecting the honesty and trustworthiness of the class representative, such as a class representative’s contradictory testimony. This raises obvious questions for victims of trafficking, many of whom may have committed immigration offenses that a hostile court may determine impacts their credibility. Further, many trafficking victims lack formal education, which certainly will be highlighted by a party trying to resist class certification. Courts may also consider the class representatives’ understanding of the case. However, familiarity with the nuances of the legal theories in the case is not required.

Unavailability for discovery may impact this prong. In a trafficking case, the adequacy prong should not be impacted by a representative’s undocumented status. Still, a class representative who resides abroad and who is unable to lawfully enter the United States to participate in discovery may be deemed an inadequate representative, though there is apparently no case law directly on point. You may wish to present the importance of your client’s presence in the United States as a class representative as an equity supporting your client’s “T” visa application.

Finally, with respect to the adequacy of counsel, if you work for a small law office with limited resources or limited class action experience, you should consider bringing in a larger firm to co-counsel the case. In a trafficking case, you may need to distribute class notice abroad, which will require a substantial investment of resources.

**Class Certification under Rule 23(b)(1)**

Though rarely used as a basis for class certification, a class action may be maintained under Rule 23(b)(1) if “persecuting separate actions... would create a risk of inconsistent or varying adjudications... [which] would establish incompatible standards of conduct for the party opposing the class...” In one human trafficking case, the Court certified a Rule 23(b)(1) class where plaintiffs sought to implement a monitoring program holding all defendants and various factories to the same standard of conduct. Plaintiffs correctly indicated that:

[A]bsent class action [sic], the defendants would be faced with potentially numerous lawsuits which could easily lead to conflicting injunctions that impose different standards of conduct, monitoring programs, and remedial rules on the various defendants.

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36 See Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994).
37 See, e.g., Retired Chicago Police Assn. v. City of Chicago, 7 F.3d 584, 598-99 (7th Cir. 1993), cert. denied, 519 U.S. 932 (1996).
40 See Iglesias-Mendoza, 239 F.R.D. at 372 (“Rule 23 requires that the named plaintiffs have adequate personal knowledge of the essential facts of the case. ... For the legal underpinnings of their claims, [they] are entitled to rely on the expertise of their counsel.”); Gap, Inc., 2002 WL 1000073 at *4 (same conclusion).
41 See Kline v. Wolf, 702 F.2d 400, 402-03 (2d Cir. 1983) (refusal to answer discovery questions is a factor indicating inadequate representation); see also FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.26 (2008) (class representative must “vigorously pursue the litigation in the interests of the class, including subjecting themselves to discovery.”).
42 See Ansoumana, 201 F.R.D. at 87.
44 See Gap, Inc., 2002 WL 1000073 at “S.
45 Id.
Class Certification under Rule 23(b)(2)

A Rule 23(b)(2) class may be certified for injunctive or declaratory relief. You may be able to construe some monetary damages, such as front or back pay, as equitable relief within the purview of a Rule 23(b)(2) class if the injunctive or declaratory relief sought predominate.\(^{46}\)

In a Rule 23(b)(2) class, as compared to a Rule 23(b)(3) class, notice to class members is not required and class members need not be provided the opportunity to opt out.\(^{47}\) This, of course, makes a (b)(2) class far easier to litigate than a (b)(3) class. Additionally, in a (b)(3) class, common issues must predominate—a requirement absent from a (b)(2) class where the common issues must merely exist. Still, it is hard to imagine a scenario in a trafficking case where injunctive or declaratory relief would predominate sufficiently to meet the standards set forth in either Allison\(^ {48} \) or Robinson.\(^ {49}\) Therefore, it is most likely that class certification in a trafficking case would be sought under Rule 23(b)(2) only for injunctive relief, and certification of a (b)(3) class would be sought for monetary damages.

Class Certification under Rule 23(b)(3)

Rule 23(b)(3) requires (1) that common issues predominate over individual claims; and (2) that class treatment is superior to other adjudication methods.\(^ {50}\) In a trafficking case, the most significant obstacle to (b)(3) certification is the requirement that common questions predominate. However, even within the context of a Rule 23(b)(3) class action, this should not present a problem so long as the allegations involve a common scheme.\(^ {51}\) However, it is important to look at the law in your jurisdiction, as the circuit courts’ approach to predominance varies.

In the context of human trafficking litigation, challenges to the predominance prong will most likely arise where there are allegations of fraud because, some courts suggest, these claims require a showing of individual reliance.\(^ {52}\) Still, it is possible to distinguish a trafficking-related fraud class action from the fraud alleged in cases, such as Castano.\(^ {53}\) Further, as detailed in Chapter 3, § IV(B), infra, the U.S. Supreme Court’s recent decision in Bridge v. Phoenix Bond & Indemnity Co.\(^ {54}\) holds that individual reliance is not an element of civil RICO fraud. Some courts also will not find predominance where claims for damages arising out of emotional distress and “other intangible injuries” are sought.\(^ {55}\) For briefing related to these issues, please contact author Werner.

\(^ {46} \) See Robinson v. Metro N. Commuter R.R., 267 F.3d 147, 162-64 (2d Cir. 2001); see also Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 332 (4th Cir. 2006) (“Rule 23(b)(2) class certification is proper in the Title VII context not because backpay is an equitable form of relief, but because injunctive or declaratory relief predominates despite the presence of a request for back pay.”); Gap, Inc., 2002 WL 1000073 at *6 (Rule 23(b)(2) class certified, although it is a “close call” as to whether monetary relief is “merely incidental” to injunctive relief); but see Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) ("[M]oney is not an element of civil RICO fraud. Some courts also will not find predominance where claims for damages arising out of emotional distress are sought."").

\(^ {47} \) See Fed. R. Civ. P. 23(c).

\(^ {48} \) Allison, 151 F.3d at 415.

\(^ {49} \) Robinson, 267 F.3d at 162.

\(^ {50} \) Cf. Gap, Inc., 2002 WL 1000073 at *8 (superiority existed even though "30,000 class members worked in 28 different factories for numerous different departments and supervisors, at different times spanning a 13-year period.").

\(^ {51} \) See, e.g., Iglesias-Mendoza, 239 F.R.D. 363, 372-73 ("Minimum wage and overtime claims are among the most perfect questions for class treatment. Some factual variation among the circumstances of the various class members is inevitable and does not defeat the predominance requirement."); Gap, Inc., 2002 WL 1000073 at *7 (same conclusion); CV Reit, Inc. v. Levy, 144 F.R.D. 690, 699-700 (S.D. Fla. 1992) (predominance of common issues even though different misrepresentations and disclosures made over time).

\(^ {52} \) See, e.g., Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).


\(^ {54} \) 128 S.Ct. 2131 (June 9, 2008).

\(^ {55} \) See, e.g., Steering Committee v. Exxon Mobil Corp., 461 F.3d 598, 602 (5th Cir. 2006).
D. Representative Actions under the Fair Labor Standards Act

Procedure for Representative Action Certification
The FLSA allows plaintiffs to sue on behalf of themselves and “other employees similarly situated.”56 Plaintiffs may therefore seek court approval to bring the FLSA claims as a collective action on behalf of other workers. Procedurally, collective action certification usually occurs in two stages. Pre-certification (sometimes referred to as “conditional certification”) allows you to obtain the names and addresses of all similarly situated workers from the defendants. It also allows for the distribution of court-authorized notice.57 Once distribution of notice begins, prospective plaintiffs will have a set amount of time to opt into the lawsuit, though the amount of time courts will allow varies.58 As the statute of limitations in a FLSA action is only tolled once an opt-in plaintiff files the consent to sue, you should seek pre-certification of the representative class very early in the litigation. This generally is not a problem, as the burden on plaintiffs to prove that there are other similarly situated individuals is very light.59 The second stage—final certification—usually only becomes an issue if the defendant moves to decertify the collective action. At that point, if the court finds that the opt-in claimants are similarly situated “the collective action proceeds to trial, and if they are not, the class is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice, and the class representative may proceed on his or her own claims.”60

Discovery Considerations
Unlike a Rule 23 class action, class members who have opted into a representative action may be subject to discovery. However, courts typically, but not universally, allow for representative testimony,61 reducing the burden of producing large numbers of opt-in plaintiffs for discovery. This may be particularly important in trafficking cases, where many of the opt-in plaintiffs likely live abroad.

Interrelationship with Rule 23 Class Certification
An action may simultaneously be a representative action for the FLSA components and a Rule 23 class action for other causes of action, and some courts—though not all—will certify a Rule 23 class solely for state minimum wage and/or overtime violations, while at the same time certifying a FLSA representative action.62

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58 See, e.g., Cuzco, 477 F. Supp. 2d at 635 (nine months allowed because “[m]any of the prospective opt-in plaintiffs are transient immigrant day laborers.”); Roebuck, 239 F. Supp. 2d at 240-41 (nine months allowed because some prospective plaintiffs are transnational migrants); but see Salinas-Rodriguez v. Alpha Servs., L.L.C., No. 05 Civ. 440, 2005 U.S. Dist. LEXIS 39673, at *14 (S.D. Miss. Dec. 27, 2005) (request for eight months denied as “excessive” although prospective plaintiffs reside in remote locations in Guatemala and Mexico; 180 days allowed).
59 See Cuzco, 477 F. Supp. 2d at 632 ("unlike class certification under Fed. R. Civ. P. 23, ‘no showing of numerosity, typicality, commonality and representativeness need be made’ for certification of a representative action.") (internal citation omitted).
60 Id.
62 See Lindsay v. Gov’t Employees, Ins. Co., 448 F.3d 416 (D.C. Cir. 2006) (Rule 23 class certified for NY Labor Law claims, and representative action certified for FLSA claims); Iglesias-Mendoza, 239 F.R.D. at 373-75 (same); but see DeAsencio v. Tyson Foods, Inc., 342 F.3d 301, 311-12 (3d Cir. 2003) (denying Rule 23 class certification for PA labor law claims where FLSA representative action certification was also sought, because “novel and complex issues of state law were at stake”).
E. Restrictions on Recipients of Legal Services Corporation Funding
Organizations receiving Legal Services Corporation ("LSC") funding may not represent plaintiffs in a Rule 23 class action or the state equivalent.63 However, LSC-funded programs may bring representative actions or mass actions so long as each plaintiff or opt-in plaintiff otherwise meets LSC eligibility requirements.64

III. WHEN TO FILE THE CIVIL ACTION

A. Statute of Limitations

Watch for Short Statute of Limitations
If you primarily practice employment law, you may not be aware that the statute of limitations on some causes of action is quite short. For example, in New York and many other states, the statute of limitations for most intentional torts is one year.65 For some causes of action, the statute of limitations may be six months or less. There are also strict and very short time limits for filing many administrative complaints, such as U.S. Equal Employment Opportunity Commission (“EEOC”) charges, which may be prerequisites for bringing suit. You should immediately determine the causes of action and their respective statutes of limitations after being retained by a trafficking victim. Failure to do so may constitute malpractice if, as a result, your client is precluded from bringing certain claims.

Equitable Tolling
If a worker is held in bondage, or even in immigration custody, he or she has a strong argument that the statute of limitations should be equitably tolled for that time period. Bondage likely constitutes just the kind of extraordinary circumstance contemplated in the equitable tolling doctrine.66 In the trafficking context, at least two courts have found that the statute of limitations should be equitably tolled under these circumstances.67

You also may be able to argue that the two-year statute of limitations for FLSA actions (three years for willful violations) should be tolled if the employer failed to display a poster, as required by the FLSA, informing employees of their minimum wage and overtime rights.68

B. Consider the Impact on the Criminal Prosecution
If you do not need to toll a short statute of limitations, it is always best to wait to file a civil action until the conclusion of the introduction of evidence in a parallel criminal case. This way, you avoid altogether the question of whether a stay is necessary. Still, if you must file your civil action, there is no question that you are permitted to do so while the criminal action is pending.69

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63 See 45 C.F.R. § 1617.3 (2008).
64 Letter from LSC Office of Compliance and Enforcement, to Kenneth F. Boehm 8–9 (April 18, 2002) (“Congress expressly barred class actions, not representative action or other cases in which relief might be granted to more than a small group...of plaintiffs.”), available upon request from author Werner. For additional LSC requirements, see Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504, 110 Stat. 1321(1996) (each plaintiff must be identified by name).
66 See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (statute of limitations on Torture Victims Protection Act is tolled while plaintiff is imprisoned or incapacitated); National Coalition Gov’t of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 360 (C.D. Cal. 1997); cf. Osborne v. U.S., 164 F.2d 767 (2d Cir. 1947) (plaintiff’s internment by Japan during World War II tolled the limitations period on his claim under the Jones Act against his employer for injury occurring immediately prior to his internment).
67 See Deressa, 2006 U.S. Dist. LEXIS 8659, at *9-14 (defendant attempted to mislead plaintiff, who relied on misrepresentation in neglecting to file charge; and defendant’s actions and threats “[c]onstitute affirmative acts designed to prevent [plaintiff] from obtaining her wages or taking steps to enforce her...rights.”); Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at “15-16 (S.D.N.Y. Dec. 3, 2003) (because employer took and held plaintiff’s passport, “[s]he was unable to pursue her conversion claim before her escape from their home.”).
68 See Chapter 3, § V(E), infra, for supporting cases.
C. Media and Publicity Considerations
Legal battles are fought both in the courtroom and in the court of public opinion. An effective use of the media may benefit your client, while a less-than-circumspect approach may potentially be very damaging.70

IV. WHERE TO FILE THE CIVIL ACTION

A. State Court Versus Federal Court
Most trafficking cases will have both state and federal causes of action. Therefore, you will have a choice of filing your case in state or federal court. You should make your decision based on an evaluation of the forums available to you. Research the size of verdicts, the make-up of the potential jury pool, and the politics of the court in light of your client’s claims, ethnicity and immigration status. Talk to experienced plaintiffs’ lawyers in your area if you are not sure how to answer these questions.

B. Bankruptcy Court
When your client retains you, as soon as you know the identities of the potential defendants, you should check to see if any of them have filed for bankruptcy. Bankruptcy courts often impose a short time period during which creditors may file proofs of claim. If you miss that deadline, you may not be able to collect any money from the bankrupt debtor.

If one of the defendants is in bankruptcy or files for bankruptcy, any civil action against the debtor will usually be automatically stayed.71 It is often helpful to have this automatic stay on the civil proceedings lifted.72 In trafficking cases, which likely involve complex issues of federal law, your motion to lift the stay will likely be granted.73

You may also try to claim that your client’s damages are exempt from dischargeability under section 523(a)(2) (services obtained by fraud) and/or (a)(6) (willful or malicious injury) of the U.S. Bankruptcy Code.74

If you are not familiar with bankruptcy procedure, you should contact a bankruptcy attorney who represents creditors. Most local bar associations have a bankruptcy section. The authors also have some limited materials regarding litigating in bankruptcy court.

C. Personal Jurisdiction/Venue
If it benefits your client, you may be able to assert personal jurisdiction over out-of-state defendants in the state where your client were recruited.75 This may be helpful if the venue where your client was recruited

70 See Chapter 1, § III(E), supra. For an interesting review of the ethics of an attorney’s contact with the media, see Jonathan M. Moses, Note, Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 Colum. L. Rev. 1811 (1995).
71 See 11 U.S.C. § 362(a). A creditor who violates the automatic stay may be subject to significant liability. See 11 U.S.C. § 362(k) (“an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages”).
73 See 28 U.S.C. § 157(d) (requiring withdrawal of the stay “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce”); see also, City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991) (“Withdrawal is mandatory when a bankruptcy judge would be required “to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes”); In re TPI Int’l Airways, 222 B.R. 663, 667 (S.D. Ga. 1998); In re Am. Body Armor & Equip. v. Clark, 155 B.R. 588, 590 (M.D. Fla. 1993); In re White Motor Corp., 42 B.R. 693, 703-04 (N.D. Ohio 1984).
75 See, e.g., Ochoa v. J.B. Martin & Sons Farms, Inc., 287 F.3d 1182, 1187-93 (9th Cir. 2002).
would tend to view cases of this nature more favorably. Additionally, the cost of distant litigation may provide a strong incentive for defendants to settle the case. Still, if you pick a “friendlier” court, the court may still entertain a motion for a change of venue based on “[t]he convenience of parties and witnesses, [and] in the interest of justice....”

V. WHOM TO NAME AS DEFENDANTS

Trafficking schemes frequently are multi-tiered. At the “bottom” may be the smugglers. Within the smuggling network may be the recruiters in the country of origin—who involved with moving the victims across borders and within the United States. Next may be labor contractors, who often are directly responsible for putting the “severe” in severe forms of trafficking. The labor contractors may have agents who help maintain control of the victims. Next, there are the employers. In situations where there are not labor contractors involved, the employers may have direct involvement in the severe form of trafficking. However, many employers retain contractors under the often mistaken belief that these “middle men” will isolate the employers from liability for labor law violations. Employers may range in size from individual homeowners who employ trafficking victims as housekeepers, to multi-national manufacturers or retailers who hire trafficking victims in their plants. Often there are several employers. For example, a small textile manufacturer and several large clothing producers may jointly and simultaneously employ trafficking victims.

In light of these frequently complex and convoluted layers, figuring out whom to sue can be a daunting challenge. At the lower end, the smugglers may be difficult to identify and impossible to serve. Frequently, the contractors and the small employers are the actors who end up under indictment and may be the easiest to name in a lawsuit. However, these individuals may lack the solvency to satisfy a large judgment on behalf of trafficking victims.

The larger entities, though frequently overlooked in criminal prosecutions or simply unindictable due to the government’s burden of proof in a criminal action, should be named in civil litigation if they are joint employers and/or joint tortfeasors. Ultimately, these larger entities may end up paying the bulk of any judgment arising from the civil litigation.

A. What to Consider in Sex Trafficking Cases

Aside from suing the traffickers and procurers (such as pimps, owners of escort services, saunas, and other prostitution-related businesses) in sex trade trafficking cases, you may be able to sue the purchasers of the sex (the “Johns”), to the extent you are able to identify some of them, under a number of causes of action. You may even consider suing a class of defendant purchasers if, for example, through the records of the sex trade business you are able to establish the requisites for a class. The causes of action against the traffickers, procurers, and the purchasers may include the trafficking private right of action, intentional torts, such as assault, false imprisonment, and intentional infliction of emotional distress; you may also be able to bring actions under civil RICO and the Alien Torts Claims Act. (These causes of action are discussed in detail in Chapter 3, infra.) Additionally, some states have passed legislation giving a person the right to sue for damages caused by being used in prostitution, though the volume of litigation under these statutes has been very limited.


that the potential civil rights cause of action under the federal Violence Against Women Act, 79 appears to have been eliminated by the U.S. Supreme Court’s decision in United States v. Morrison. 80

B. Naming the Employers

**Determining who Employed the Plaintiffs**

If you do not know who employed your client other than the trafficker, you may wish to engage in some immediate discovery to determine this. The trafficker himself or herself should be able to shed some light on this question, as may your client. Keep in mind, however, that many courts apply a broad definition of “employ” to actions under the FLSA, and other statutes. Therefore, just because the trafficker was not necessarily an agent of a larger entity, you should not rule out suing the larger entity. Be careful, however, to look at the definition of “employ” for all of the labor-related causes of action in your complaint. Some statutes may have a definition that is more limited than the FLSA definition.

Before applying a joint employment analysis, you should first examine whether the larger entity directly employed the trafficking victims. If the victims were direct employees of the larger entity, you may be able to extend liability to the larger entity for labor law violations and for torts.

**Agency and Vicarious Liability: When Employers May Be Liable for the Torts of the Traffickers**

A larger entity may be liable for the torts of a smaller entity (e.g., traffickers) if (1) the larger entity employs a smaller entity; (2) the smaller entity employs trafficking victims; and (3) the employment of the trafficking victims is within the scope of the smaller entity’s employment to the larger entities. 81 This rests on the existence of privity between the victims and the larger entity. In other words, where an agent has the principal’s express or implied authority to hire subagents (trafficking victims), there is privity between the subagents and the principal. 82 As a result, “[t]he relation of agency exists between the principal and authorized subagent. Persons employed by an agent to perform the work of a principal are employees of the principal and not the employees of the agent.” 83

Unlike joint employment issues under federal statutes, state law generally controls questions of agency. Therefore, you should look at the law on agency in the jurisdiction where you will be filing the civil action.

**Labor Law Violations: Joint Employment Standards**

Larger entities often incorrectly argue that, if traffickers, for example, acted outside the scope of their agency while employing the plaintiffs, the plaintiffs are necessarily precluded from impugning liability to the larger entity. However, this theory errs by conflating joint employment theory and agency theory. A worker may, as a matter of economic reality, be economically dependent on two or more entities, and therefore, be jointly employed by these entities under the FLSA and some other labor laws. A worker’s relationship as an employee of a second (and less directly involved) entity exists regardless of whether the first entity is acting as an independent contractor, an agent, or both. Joint employment liability hinges solely on the worker’s economic dependency on two or more entities, not the relationship between the putative employers. 84

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80 529 U.S. 598 (2000).
81 See Gap, Inc. 2002 WL 1000068 at *19-20 (in trafficking case, agency between retailer and manufacturer was properly plead); but see Doe I v. Gap, Inc., No. 01 Civ. 0031, 2001 WL 1842389, at *12 (D.N.Marl. 2001) (agency not properly pled in prior complaint in aforementioned lawsuit).
84 See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (FLSA definition of “employ” has such breadth as to “stretch[ ] the meaning of employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”).
The application of the “economic reality” test differs significantly between the circuits. Within the circuits, the test may be applied differently to different industries. The joint employment doctrine is particularly well-developed in agricultural labor — including in a recent farmworker trafficking case — where the use of labor contractors is commonplace. Courts also have addressed joint employment questions in other industries, a lawsuit with human trafficking elements, provides perhaps the most helpful and detailed recent review of joint employment standards under the FLSA.

One should be aware that a worker might be jointly employed by multiple entities, even if the worker’s employment is not concurrently with all of the entities. For example, in Bureerong, the Court found that plaintiffs adequately stated a cause of action alleging that nine separate purchasers were employers within the meaning of the FLSA.

The Corporate Veil: Why it Does Not Matter in Some Employment Law Cases, and Otherwise How to Sue a Principal at a Corporation

It is a well-established principle that “a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.” This is not based on piercing the corporate veil, but rather on the employee’s economic dependence on the officer, making him or her an employer. In a trafficking case, one court examined the following factors to determine that corporate officer liability under the FLSA had been adequately pled:

The significant ownership interest of the corporate officers; their operational control of significant aspects of the corporation’s day to day functions, including compensation of employees; and the fact that they personally made decisions to continue operating the business despite financial adversity and the company’s inability to fulfill its statutory obligations to its employees.

Some courts also have found that an officer or director of a corporation can be found personally liable for torts he or she personally commits “irrespective of whether the corporation for which he was acting was a tortfeasor or not or whether the defendant was acting in its behalf as its agent.” The law in this respect, however, varies significantly between the states.

Absent individual liability as an employer for claims under the FLSA and some other labor laws, or in some states for torts he or she personally commits, it may still be possible to pierce the corporate veil. The standard for piercing the corporate veil will generally be based on state law.

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86 See, e.g., Reyes, 495 F.3d 403, 406–410 (7th Cir. 2007); Charles v. Burton, 169 F.3d 1322, 1328-29 (11th Cir. 1999); Torres-Lopez v. May, 111 F.3d 633, 638-39 (9th Cir. 1997); Antenor v. D & S Farms, 88 F.3d 925, 937 (11th Cir. 1996); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973); Luna v. Del Monte Fresh Produce (Southeast), Case No. 06-CV-2000, 2008 U.S. Dist. LEXIS 21636, *9-20 (Mar. 18, 2008).
89 959 F. Supp. at 1233.
90 For the purpose of this discussion, we use the term “corporation” broadly. Most states have created mechanisms for business entities to limit the liability of their principals outside of the corporate forum, such as limited liability companies (LLCs) or partnerships (LLPs or LPs). Generally, this analysis will apply to principals at any such entity. See, e.g., MAG Portfolio Consult, GM8H v. Merlin Biomed Group, LLC, 268 F.3d 58, 63-65 (2d Cir. 2001) (applying New York corporate veil-piercing inquiry to LLCs).
93 id. at 1293 (trafficking-related tort claims against corporate officer were “not merely an action to recover on a corporate debt.”).
The standard in New York is similar to most other states, but you should, of course, look at your own state’s law in this respect. New York courts disregard the corporate form and find liability against an individual “when the corporation has been so dominated by an individual or another corporation...and its separate identity so disregarded, that it primarily transacted the dominator’s business rather than its own and can be called the other’s alter ego.”

In order to determine whether a corporation has been so dominated, courts consider a number of factors, including:

The intermingling of corporate and personal funds, under-capitalization of the corporation, failure to observe corporate formalities, such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors.

Significantly, this doctrine allows the corporate veil to be pierced where the controlling individual so dominated the corporation as to have the power to stop the infringement of the plaintiffs’ legal rights.

In the context of federal labor laws, courts have adopted a standard that is even “more favorable to a party seeking to pierce the veil than the state law standard.” Under this broader federal standard, courts have weighed the following factors to determine whether the corporate veil should be pierced:

1) the amount of respect given by the shareholders to the separate identity of the corporation and to its formal administration,
2) the degree of injustice that recognition of the corporate form would visit upon the litigants,
3) the intent of the shareholders or incorporators to avoid civil or criminal liability,
4) inadequate corporate capitalization, and
5) whether the corporation is merely a sham.

What to do When the Defendant Operates Multiple Corporations

Employers, and particularly those with questionable labor practices, may do business through multiple corporations. Often, some corporations will function solely as holding companies, which retain title to all or most of the employer’s assets. The business owner may operate a separate corporation that nominally functions as the employer of his or her workers.

In the employment law context, courts examine whether multiple entities are so interrelated that they constitute a “single employer.” To determine this, Courts examine the following four factors:

1) interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
2) common management, common directors and boards;
3) centralized control of labor relations and personnel; and
4) common ownership and financial control.

None of these factors is conclusive, and all four need not be met in every case. Nevertheless, control over labor relations is a central concern.

94 Bridgestone Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 17-18 (2d Cir. 1996) (quoting Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979)).
95 Id. at 18.
99 Swallows v. Barnes & Noble Book Stores, 128 F.3d 990, 993 (6th Cir. 1997); see also Id. at n.4 for a helpful discussion of the distinction between “joint employer” and “single employer” analysis.
100 Id. at 994 (internal citations omitted).
Outside of the employment law context, the analysis is very similar to the analysis required to determine whether the corporate veil can be pierced. Courts have determined that the corporations are alter egos of each other where they have “substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.”

Finally, some courts will extend liability to two or more businesses if they operate as a “joint venture.” A joint venture will be based on state law, and will generally require “(1) joint interest in a common business; (2) an understanding to share profits and losses; and (3) a right to joint control.”

C. Naming Different Defendants for Different Causes of Action
It is entirely appropriate to name some defendants in some counts and other defendants in other counts. For example, you may name the trafficker or the direct employer for the intentional tort allegations, and the manufacturer as a joint employer for some of the labor law violations. A good way to organize the complaint is to specify with each count which defendants are included, and to include topical headings in your factual allegations.

VI. WHEN TO INCLUDE A JURY DEMAND
The general rule is that plaintiffs prefer jury trials and defendants prefer bench trials. This is because juries award far greater damages on average than do judges. However, in trafficking cases, you should weigh the likelihood of greater damages against the potential risk of bringing your case before a jury. First and foremost, you should know your judge and know your jury pool. Consider who your client is and who the defendants will be in light of the politics of the court and the biases of the community.

VII. SERVICE OF PROCESS: SERVING A FOREIGN DEFENDANT OR A DEFENDANT YOU CANNOT FIND
In trafficking cases, it is very likely that some of the defendants will be difficult to serve. Federal Rule of Civil Procedure 4(e) allows for service upon an individual within a judicial district of the United States pursuant to the laws of the state in which the action is brought, or the state in which service came into effect. Therefore, if service by mail or personal service is not successful, many states allow for a “nail and mail” or “leave and mail” option. If these methods fail or are not available, you may petition the court for an alternative means of service, which must be “reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The most common form of alternative service is service by publication, which generally requires that you show that (1) service is otherwise impossible (or cannot be made with due diligence); (2) it is reasonable to conclude that the defendant is likely to read the newspaper in which notice is published; and (3) the defendant is otherwise on notice that there may be a case pending against him or her. In the trafficking context, one court allowed service by publication based in part on a declaration of an INS Special Agent indicating that the defendant to be served had been indicted, but remained at large and was considered a fugitive. These requirements,
however, will vary from state to state. State law will also govern the specific form of service by publication, so you will need to look this up in your jurisdiction.

A foreign defendant residing in a country that is a signatory to the Hague Convention on the Service Abroad of Judicial or Extrajudicial Documents may be served pursuant to that convention.\footnote{107} Where the Hague Convention does not apply, Fed. R. Civ. P. 4(f) sets forth alternative methods of service that may be available. The assistance of a foreign court in the service of process may also be requested through a letter rogatory,\footnote{108} though this process can be extremely slow and cumbersome.

\footnote{107} See Fed. R. Civ. P. 4(f)(1). Information about the requirements of Hague convention can be downloaded or ordered from www.hcch.net. On request, author Werner can provide additional information regarding these requirements.

\footnote{108} See generally 23 Am Jur 2d Depositions and Discovery § 17 (Issuance and enforcement of letter rogatory or request).
CHAPTER 3
CAUSES OF ACTION

The Trafficking Victims Protection Act of 2000 was enacted to comprehensively combat human trafficking in the United States by strengthening criminal laws against the traffickers while providing conditional protection and benefits to the victims. It was amended in December 2003 to include a private right of action. In addition to the trafficking civil claim, many other U.S. laws may provide civil remedies to trafficked persons. These laws, including federal and state labor and employment laws and tort laws related to forced labor conditions, are intended to protect all workers from exploitation.¹ Be sure to consult your state labor codes, constitution and other statutes for additional causes of action.


A. Civil Remedy for Violation of the TVPRA²
The TVPRA allows an individual who is a victim of a violation of sections 1589, 1590, or 1591 to bring a civil action against the alleged defendant in a district court to recover damages and reasonable attorneys fees.³ Note that a civil action filed under section 1595 shall be stayed during the criminal action arising out of the same occurrence.⁴ A section 1595 claim may be made even in the absence of a criminal investigation or prosecution.

B. Background
The TVPRA provides private rights of action for the trafficking crimes of forced labor, trafficking into servitude and sex trafficking. The TVPRA also makes human trafficking crimes predicate offenses for RICO charges and adds, “trafficking in persons” to the definition of racketeering activity. Please refer to the RICO section of this manual for more information on bringing RICO civil claims.

Since the enactment of the TVPRA, over twenty civil lawsuits have been filed utilizing this cause of action. Many of these cases have settled without trial, and some are still pending. Among the pending cases, some have been stayed by law enforcement pursuing criminal prosecutions. Other pending cases are in discovery. Finally, a few cases have not succeeded in challenging motions to dismiss the TVPRA claim, but have moved forward on other claims.

C. Making a Claim
In order to bring a viable claim under section 1595, the plaintiff must be a victim of one of three specified trafficking crimes: forced labor, trafficking into servitude, or sex trafficking.

**Forced Labor**
Whoever knowingly provides or obtains the labor or services of a person:

1) by threats of serious harm to, or physical restraint against, that person or another person;

⁴ 18 U.S.C. § 1595(b)(1). See also Chapter I, § III(C), supra.
2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
3) by means of the abuse or threatened abuse of law or the legal process...⁵

**Trafficking into Servitude**

“Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter...⁶

**Sex Trafficking of Children or by Force, Fraud, or Coercion**

Whoever knowingly — (1) in or affecting interstate or foreign commerce... recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture... knowing that force, fraud, or coercion... will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act...⁷

It should be noted that although section 1595 specifies violations of sections 1589, 1590, and 1591 as grounds for civil relief, section 1590 itself is in fact a catchall provision, incorporating all the trafficking-related violations enacted by the TVPA. The “in violation of this chapter” reference in the language of section 1590 pulls in all of Chapter 77, Title 18 of the U.S. Code (“Chapter 77”). Therefore, section 1590 appears to offer a private right of action for each and every provision of 18 U.S.C. §§ 1581 – 1594, so long as the defendant “recruits, harbors, transports, provides, or obtains” the victim. This raises a number of possible additional claims. For example, a defendant knowingly involved in the recruitment, harboring, or transporting of individuals for the purpose of placing them in forced labor or involuntary servitude could be liable under this section even if the individuals never ended up in a forced labor situation. It also arguably provides a private right of action for document theft under section 1592, or even attempt under section 1594(a). This strategy should be distinguished from the plaintiff's litigation strategy in *Cruz v. Toliver*,⁸ where the court failed to find independent causes of action for sections 1581 and 1592.

The plaintiff in *Cruz* did not cross-reference to violations of sections 1581 and 1592 through a section 1590 claim. Instead, the plaintiff brought sections 1581 and 1592 claims as distinctly separate causes of action that were pled in addition to claims brought pursuant to sections 1589 and 1590. The court dismissed the sections 1581 and 1592 claims as independent causes of action. In an unpublished opinion from the Western District Court of Kentucky, the court cited *Gozlon-Peretz v. United States*,⁹ to conclude that, “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” The Kentucky court reasoned that the TVPRA specifically provided for private causes of action under sections 1589, 1590, and 1591, but omitted private causes of action for sections 1581 and 1592. Therefore, the court argued that if it had been the intent of Congress to include private causes of action for sections 1581 and 1592, it would have explicitly done so in section 1595. The court also cited older cases in other jurisdictions, which denied implied rights of action for section 1581.¹⁰

However, the court’s conclusion in *Cruz* should not discourage litigators from bringing claims based on additional Chapter 77 violations that would be incorporated through the section 1590 “catch-all” provision. Again,

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⁹ 498 U.S. 395, 404 (1991)
violation of section 1590 is specified in section 1595 as a ground for civil relief. Therefore, had the plaintiff cross-referenced to sections 1581 and 1592 within her section 1590 claim, the court would not have been able to dismiss the sections 1581 and 1592 claims based on statutory interpretation.

D. Scope of “Coercion”

Perhaps most controversial in the interpretation and application of the TVPRA is the meaning of “coercion” and “serious harm,” as intended by Congress in drafting the original TVPA. Guidance on the scope of these terms can be found from two sources. First, federal court opinions in criminal trafficking cases have interpreted the definitional scope of “coercion” and “serious harm” to establish violations of sections 1589, 1590, and 1591. Second, the TVPA itself and its congressional conference report elaborate on the intended meanings of “coercion” and “serious harm” for purposes of enforcement and adjudication.

Court Opinions

**U.S. v. Calimlim**

In this case, a Philippine woman was forced to work as a domestic servant for a couple in Wisconsin for nineteen years. The Defendants kept the victim’s passport, withheld information from her about opportunities to regularize her immigration status, and made vague threats that she might be subject to arrest, imprisonment, or deportation if she was discovered. After the trial, the jury convicted the Defendants of violating the forced labor prohibitions of 18 U.S.C. § 1589(b) and (c), as well as other crimes. On appeal, the Defendants argued, *inter alia*, that the phrases “serious harm” and “threatened abuse of the legal process” in section 1589 were too vague and overbroad to pass constitutional muster. The Seventh Circuit rejected this argument and upheld the convictions. After a detailed examination of allegations against the Defendants, the court concluded that the Defendants’ actions “could reasonably be viewed as a scheme to make [the victim] believe that she or her family would be harmed if she tried to leave. This is all the jury needed to convict.” Significantly, the court noted that:

[W]ith reference to § 1589, after the Supreme Court ruled that a similar statute involving involuntary servitude, 18 U.S.C. § 1584, prohibited only servitude procured by threats of physical harm,...

**U.S. v. Bradley**

**U.S. v. Bradley** involved workers from Jamaica trafficked to New Hampshire and forced to labor on a tree farm. A federal prosecution rendered guilty verdicts against each of the defendants for violation of section 1589, the forced labor provision of the TVPA. The defendants appealed the verdict, arguing that “forced labor” required evidence of physical force and could not be based on non-physical coercion. The First Circuit rejected the defendants’ argument and affirmed the lower court’s ruling. The *Bradley* court made clear that the TVPA was intended to encompass “subtle psycholog-
cal methods of coercion." The court also stated that determining the sufficiency of coercion to evidence a forced labor violation required consideration of a worker’s “special vulnerabilities.”

**U.S. v. Garcia**

Section 1589 of the TVPA survived a 2003 challenge in a federal district court that it was unconstitutionally “void for vagueness.” In **U.S. v. Garcia**, the government indicted various farm labor contractors for trafficking Mexican farm laborers to New York State and forcing them to work under threats of violence and deportation. The defendants sought to dismiss the forced labor charges against them, arguing that the TVPA’s undefined nature — specifically, the terms “obtains,” “threats of serious harm” and “abuse or threatened abuse of law,” made it impermissibly vague. The **Garcia** court rejected the claim, declaring that the statute provided the guidance necessary to overcome the vagueness challenge.

**Congressional Record**
The TVPA’s Purpose and Findings explicitly proclaims that crimes of involuntary servitude include those perpetrated through psychological abuse and nonviolent coercion: “Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion.” Thus, the TVPA supersedes the restrictive definition set forth in **United States v. Kozinski**, 487 U.S. 931 (1988), the Supreme Court case that narrowly interpreted the definition of involuntary servitude as servitude that is brought about through the use or threatened use of physical or legal coercion. The TVPA’s legislative conference report emphasized the Act’s intent to “provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in Kozinski.”

With the objective to expand the legal meaning of involuntary servitude to address human trafficking, the TVPA’s new criminal codes are based upon a broadened version of coercion.

The TVPA defines coercion as:

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

The Act further declares that, “statutes on involuntary servitude have been narrowly construed, in the absence of a definition by Congress, to exclude certain cases in which persons are held in a condition of servitude by nonviolent coercion.” Thus, the TVPA incorporates its description of coercion into a new definition of involuntary servitude.

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17 390 F.3d at 150-51 (discussing various interpretations of coercion under the Act).
18 id. at 152-53.
20 id. at “1-2.
21 id. at “14-15, 17.
22 id. at “17, 27. According to the court, section 1589, the forced labor statute enacted by the TVPA, was sufficiently definite on its face to provide fair notice to criminal defendants because it required scienter: “Since § 1589 only applies to a person who ‘knowingly provides or obtains the labor or services of a person’ ... the issue of notice is properly ‘ameliorated.’” Id. at “18 (emphasis added). Additionally, the court stated that nothing in the statute encouraged indiscriminate over-enforcement by law officials: “There is nothing in § 1589 that would cause one to conclude that ... ‘it furnish[es] a ... tool for harsh and discriminatory enforcement.’” Id. at “26 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).
25 id.
The term involuntary servitude includes a condition of servitude induced by means of:

A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
B) the abuse or threatened abuse of the legal process.28

Finally, the new crime of forced labor, like the new definition of involuntary servitude, also incorporates the broadened meaning of coercion, officially expanding the forms of unfree labor prohibited pursuant to Congress’ Thirteenth Amendment section 2 enforcement power.

Whoever knowingly provides or obtains the labor or services of a person:

1) by threats of serious harm to, or physical restraint against, that person or another person;
2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
3) by means of the abuse or threatened abuse of law or the legal process...29

The accompanying legislative conference report instructs that Congress meant the above provisions to address the subtle methods that traffickers use to “place their victims in modern-day slavery.”30 Such subtle methods include threats to “harm...third persons, restrain[ing] [the] victims without physical violence or injury, or [threats of] dire consequences by means other than overt violence.”31 “The term serious harm... refers to a broad array of harms, including both physical and nonphysical.”32 Moreover, in addition to direct threats, traffickers may employ “a scheme, plan[,] or pattern,” amounting to a subtler, but equally effective, form of coercion.33 The TVPA explains that Congress intended the language of serious harm and scheme, plan, or pattern to assist prosecutors in proving forced labor violations in the absence of “physical harm or threats of force against victims.”34 Finally, in determining the degree of coercion that is criminally actionable, the TVPA instructs that courts must take into account the victim’s individual circumstances, such as age and background.35

The TVPA’s conference report illustrates subtle and non-physical methods of coercion with three examples.36 In one scenario, the conference report states that a trafficked domestic worker suffers a threat of serious harm when a trafficker leads her to believe that “children in her care will be harmed if she leaves the home.”37 A trafficker subjects another worker to a “scheme, plan, or pattern” when the worker is caused to believe that “her family will face harms, such as banishment, starvation, or bankruptcy in their home country.”38 In a third example, individuals traffic children into forced labor by means of “nonviolent and psychological coercion” including “isolation, denial of sleep, and other punishments.”39

31 id.
32 id.
33 id.
34 id.
35 id.
36 id.
37 id.
38 id.
39 id.
E. Application of the TVPRA to Trafficking Outside the United States

The extraterritorial reach of the TVPRA was considered by the Southern District of Indiana in *Roe v. Bridgestone Corp.* In that case, plaintiffs were workers in a rubber plantation in the West African country of Liberia, who brought suit for forced labor against Bridgestone and Firestone corporations and holdings. Among other claims, plaintiffs alleged violation of section 1589 and sought relief pursuant to section 1595. The defendants sought to dismiss the claim arguing that even if the conditions on the plantation in Liberia amounted to forced labor, section 1589 did not apply to labor conditions outside the United States. Finding no previous case law on the issue, the court concluded that “[s]ection 1595 [did] not provide a remedy for alleged violations of section 1589’s standards that occur outside the United States.”

The court relied on the general presumption derived from Supreme Court precedent that “[u]nless a contrary intent appears, [congressional legislation] is meant to apply only within the territorial jurisdiction of the United States.” The court noted, however, one Supreme Court case that departed from this general presumption due to the “nature of the crime” legislated, as well as indications of congressional intent that inferred extraterritorial application of the statute in question. Despite plaintiff’s arguments that trafficking was international in dimension and that the TVPA contemplated enforcement of trafficking violations overseas, the *Bridgestone* court refused to extend section 1589 to the conditions at the Liberian plantation. The court recognized the international nature of trafficking, but contended that unless made explicit, section 1589 must be presumed to apply domestically: “The other closely related statutes addressing slavery and related practices in Chapter 77 of Title 18 show that Congress has been acquainted with the question of international reach in this context for more than 200 years. Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so.” Thus, the plaintiff’s TVPRA claim in this case did not survive the motion to dismiss.

More recently, the U.S. District Court for the District of Columbia reached a similar conclusion, referencing the *Bridgestone* decision.

Despite these court opinions, the extraterritorial implementation of the TVPRA remains a viable option for attorneys representing trafficked clients in foreign countries. The TVPA’s congressional record demonstrates a clear intent to execute anti-trafficking strategies abroad. Moreover, neither the language of the TVPA nor the TVPRA explicitly precludes such claims.

F. Pleading Requirements

Without making a definitive ruling on the question, one court strongly suggested that the heightened pleading requirements of Fed. R. Civ. P. 9 did not apply to claims brought under the TVPRA.

G. Retroactive Applications

It should be noted that courts are unlikely to allow the new trafficking claim to be applied retroactively. There is a general presumption against retroactive application of legislation. Principles of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

40 492 F. Supp. 2d 988 (S.D. Ind. 2007).
41 Id. at 999.
42 Id. at 1000.
43 Id. at 1000 (citing United States v. Bowman, 260 U.S. 94, 98 (1922).
44 Id. at 1002.
47 But cf. United States v. Hudson, 299 U.S. 498, 500-01 (1937) (holding a retroactive provision in a tax statute valid because it had long been the practice of Congress to apply taxes retroactively for short periods in order to tax profits obtained while the legislation was in the process of enactment).
In Landgraf v. USI Film Products, the Supreme Court stated, “prospectivity remains the appropriate default rule.” The Court further states, “[our statement in Bowen that ‘congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result’...” was a step in a long line of cases barring retroactivity unless it was clearly intended by Congress. Therefore, only clear congressional intent allowing retroactivity, established by explicit statutory language, will overcome the presumption of prospectivity.

Although the legislative history of the original TVPA from the year 2000 indicates that a private right of action was contemplated, this civil remedy was eliminated in the final version of the bill. The 2003 TVPRA’s private right of action does not expressly provide for retroactive application. Of note, however, in two actions arising out of trafficking claims pre-dating the TVPA, courts allowed the plaintiffs to merge the TVPA’s expanded definition of coercion into their claims under the Alien Tort Claims Act. Yet, in another case, the court denied retroactive application of the TVPA to events that occurred before December 19, 2003. Applying the Landgraf test and finding no congressional intent to allow for retroactive application, the court further reasoned that retroactive application would impermissibly subject the defendant to a new legal burden of monetary liability with respect to past events.

H. Statute of Limitations
The TVPRA does not specify a statute of limitations for the private right of action. Current pending legislation reauthorizing the TVPA includes an amendment to codify a ten-year statute of limitations for section 1595.

I. Damages
The TVPRA civil remedy provides for damages and reasonable attorneys’ fees.

II. IMPLIED RIGHTS OF ACTION UNDER THE THIRTEENTH AMENDMENT AND ITS ENABLING STATUTE

A. Thirteenth Amendment of the U.S. Constitution
Section 1. [Slavery prohibited.]
“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

Section 2. [Power to enforce amendment.]
“Congress shall have power to enforce this article by appropriate legislation.”

Sale into Involuntary Servitude
Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both.
If death results from the violation of this section, or if the violation includes kidnapping or an
attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.55

B. Background
The Thirteenth Amendment and its enabling statute, 18 U.S.C. § 1584, prohibit “involuntary servitude.”56 Unlike the Fourteenth Amendment, the Thirteenth Amendment and section 1584 apply to both state action and private conduct.57

Neither the Thirteenth Amendment nor section 1584 expressly provides a civil remedy for victims of involuntary servitude. However, section 1584’s provision of a criminal penalty does not preclude implication of a private cause of action for civil damages.58 A court may imply a private right of action where Congress intended to create one by implication.59 Courts that have implied a cause of action have generally done so when “the statute in question ... prohibited certain conduct or created federal rights in favor of private parties.”60

To date, the U.S. Supreme Court has yet to recognize a private cause of action for involuntary servitude under the Thirteenth Amendment.61 Lower federal courts have been divided on the issue.62 The Eastern District of New York in Manliguez recently found a private cause of action under section 1584 based on involuntary servitude, holding that the beneficiaries of section 1584’s protection are victims of a constitutionally prohibited practice; the statute is rooted in the Thirteenth Amendment, which confers the federal right to be protected from involuntary servitude; and a private cause of action would be consistent with section 1584’s legislative intent.63 The Manliguez court noted that other circuits have declined to extend civil liability to cases under section 1584.64 However, the Manliguez court differentiated these cases by noting that they involved claims that did not meet the definition of “involuntary servitude” established under Kozminski.65 At least one court since Manliguez, however, has found there is no private right of action under the Thirteenth Amendment.66

Still, as set forth in Chapter 3, § I(C), supra, because of the broad language of section 1590, a plaintiff has a private right of action for involuntary servitude under section 1584 so long as the defendant recruited, harbored, transported, or provided the plaintiff for labor or services in violation of section 1584.67 Of note as well, one court suggested that 42 U.S.C. § 1985(3)’s anti-conspiracy provisions provided for a private right of action under the Thirteenth Amendment and 18 U.S.C. § 1584.68

C. Making a Claim
To make a valid private right of action claim under section 1584 a plaintiff must demonstrate that defendant’s actions fit the definition of “involuntary servitude.” The U.S. Supreme Court in Kozminski has held that for

57 Id.
58 Id. at 383-84.
59 Id. at 384 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979)).
60 Id. (quoting 442 U.S. at 569).
61 Manliguez, 226 F. Supp. 2d at 384 n.7 (citing City of Memphis v. Greene, 451 U.S. 100, 125 (1981)).
62 See id. at 384 & n.8.
63 Id. at 384.
64 Id. at 384 n.8 (citing Buchanan v. City of Bolivar, 99 F.3d 1352, 1357 (6th Cir. 1996); Turner v. Unification Church, 473 F. Supp. 367, 375 (D.R.I. 1978)).
66 See Redy, 2003 U.S. Dist. LEXIS 26120, at *37-42 (does not reference the Manliguez decision); see also Gap, Inc., 2001 WL 1842389 at *16-18 (pre-dating Manliguez, but with a detailed discussion denying private adjudication of Thirteenth Amendment protections).
68 See Deressa, 2006 U.S. Dist. LEXIS 8659, at *13-14. The Plaintiff in this action did not raise claims under the TVPRA, although the forced labor continued until 2004. See also § IX, infra.
purposes of prosecution the term “involuntary servitude” means: “[a] condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”

This definition includes all cases “in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.”

It should be noted, however, that evidence of other means of coercion, of poor working conditions, or of a victim’s special vulnerabilities may be relevant in determining whether the physical or legal coercion or threats could have compelled the victim to serve. Furthermore, evidence of other means of coercion or poor working conditions may be used to corroborate disputed evidence.

The TVPA enacted an expanded definition of “involuntary servitude” that includes labor compelled by psychological coercion.

Therefore, trafficked plaintiffs pleading an implied cause of action under the Thirteenth Amendment and section 1584 should encourage courts to consider the TVPA’s broader definition of “involuntary servitude.”

The argument could be presented as follows:

In *Kozminski*, the U.S. Supreme Court expressly limited the definition of “involuntary servitude” to the activities the Court concluded Congress intended to prohibit when the Thirteenth Amendment was passed.

Because “involuntary servitude” was not otherwise defined by Congress, the Court felt that it should:

Adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity. ... The purposes underlying the rule of lenity — to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts — are certainly served by its application in this case.

Still the Court specified that its definition was only applicable “absent change by Congress.”

In passing the TVPA’s broader definition of “involuntary servitude,” Congress expressly found that:

[I]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.

By creating an expanded definition of involuntary servitude in 22 U.S.C. § 7102(5), Congress fully intended to answer the invitation of the *Kozminski* Court to do just that. Therefore, as a result of Congress’s action, the

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69 Kozminski, 487 U.S. at 952.
70 Id.
71 Id.
72 Id.
73 22 U.S.C. § 7102(5) (2008) (defining involuntary servitude as “a condition of servitude induced by means of (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process”).
74 See Kim & Hreshchysyn, supra note 143, at 35 (discussing the TVPA’s broader definition of involuntary servitude, which includes psychological coercion).
75 Kozminski, 487 U.S. at 944-53.
76 Id. at 952 (internal citations omitted).
77 Id.
Kozinski Court’s restrictive interpretation of involuntary servitude under the Thirteenth Amendment and 18 U.S.C. § 1584 is probably no longer good.\textsuperscript{79}

D. Statute of Limitations
Plaintiffs bringing civil claims under section 1584 must also meet the appropriate statute of limitations. Though section 1584 does not specify a statute of limitations, the Supreme Court in *North Star Steel Co. v. Thomas*\textsuperscript{80} directs courts to borrow from the most analogous state law in the absence of a federal statute of limitations: “A look at this Court’s docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims.”\textsuperscript{81} The state limitations period must not, however, “frustrate or interfere with the implementation of national policies,’... or be at odds with the purpose or operation of federal substantive law.”\textsuperscript{82} The applicable statute of limitations may vary from state to state. Complaints must be filed in as little as one year from the alleged violation.\textsuperscript{83} However, in New York, the appropriate statute of limitations has been found to be three years, in part because the state recognized a federal interest in providing effective remedies to civil rights violations.\textsuperscript{84}

E. State Anti-Trafficking Provisions

*Background*
Nearly half of the states in the United States have constitutional provisions prohibiting slavery and involuntary servitude. The states which include slavery and involuntary servitude provisions in their constitutions include: Alabama, Arkansas, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, and Wisconsin. These provisions do not explicitly provide for a private right of action.

In 2004, the USDOJ publicly encouraged states to enact state level anti-trafficking legislation. To guide state legislatures in drafting anti-trafficking measures, the USDOJ released model anti-trafficking criminal laws.\textsuperscript{85} One after another, individual states began to develop and codify anti-trafficking legislation. State anti-trafficking legislation ranged from sparse, focusing only on anti-trafficking criminal provisions, to lengthy omnibus bills that included new trafficking crimes, as well as attendant social services and compensation to trafficking victims. To date, 34 states have enacted anti-trafficking legislation.\textsuperscript{86}

*State Anti-Trafficking Civil Remedies*
Despite the national movement toward state anti-trafficking legislation, only one state, California, has enacted a state level trafficking private right of action. This was the result of strong advocacy efforts by the California Anti-Trafficking Initiative,\textsuperscript{87} a coalition of non-governmental organizations that closely collaborated with


\textsuperscript{80} 515 U.S. 29 (1995).

\textsuperscript{81} Id. at 33.

\textsuperscript{82} Id. at 34 (quoting Del Costello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 161 (1983) (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977))).


\textsuperscript{87} The California Anti-Trafficking Initiative was led by Asian Pacific Islander Legal Outreach, Coalition to Abolish Slavery and Trafficking and Lawyers’ Committee for Civil Rights of San Francisco. For more information on the California TVPA, contact Kathleen Kim.
Assemblymember Sally Lieber, the principal author of the bill, to draft legislation primarily intended to broaden trafficked persons’ rights and protections.\textsuperscript{88}

\textit{California Trafficking Victims Protection Act}

AB 22, the California Trafficking Victims Protection Act was signed into law by Governor Arnold Schwarzenegger on September 21, 2005.\textsuperscript{89} In addition to criminalizing trafficking and providing a trafficking civil cause of action, AB 22 mandates that state and local law enforcement issue an Law Enforcement Agency Endorsement within 15 days of encountering a trafficking victim in order to expedite the provision of federally granted social services and immigration relief. AB 22 enacts a trafficking victim-caseworker “privilege” to protect communications between victims and their social services caseworkers from intrusive discovery. AB 22 also provides victims with state crime victim compensation funds and state health and human services.

The California trafficking private right of action was amended as section 52.5 of the Cal. Civil Code. Section 52.5 provides that a trafficking victim may bring a civil action for actual, compensatory and punitive damages, and injunctive relief. Among other things, section 52.5 also provides for treble damages, as well as attorney’s fees, costs and expert witness fees to the prevailing plaintiff. Similar to the federal trafficking private right of action, section 52.5 also provides that a civil action “shall be stayed during the pendency” of a criminal investigation and prosecution arising out of the same set of circumstances.\textsuperscript{90} Thus far, two civil lawsuits have been filed utilizing section 52.5. Both are pending at this time.

\textit{Making the Claim}

In order to make a claim under section 52.5 of the Cal. Civil Code, a plaintiff must be trafficked as defined by section 236.1 of the Cal. Penal Code.\textsuperscript{91}

Section 236.1 of the Cal. Penal Code defines trafficking as the unlawful deprivation or violation of liberty of another to maintain a felony violation or obtain forced labor or services.\textsuperscript{92} “Unlawful deprivation” may be established by showing:

- Fraud, deceit, coercion, violence, menace, threat of unlawful injury to victim or another person, or circumstances where person receiving threat reasonably believes that person would carry out threat.
- Duress, which includes knowingly destroying, concealing, removing, confiscating, or possessing any purported passport or immigration document of victim.\textsuperscript{93}

“ Forced labor or services” is defined as labor or services performed or provided by a person obtained through force, fraud, coercion, or equivalent conduct that would “reasonably overbear the will of the person.”\textsuperscript{94}

\textit{Statute of Limitations}

The statute of limitations for adult plaintiffs under section 52.5 of the Cal. Civil Code is five years from the date when the trafficked person was liberated from the trafficking situation. For trafficked minors, the statute of limitations is eight years from the date that the minor reaches majority age.\textsuperscript{95}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{88} Assemblymember Sally Lieber, Press Release – AB 22: Rare Show of Unity: Law Enforcement Leaders Join with Activists for Civil Rights and Women’s Rights to Announce Governor’s Signature of Comprehensive Human Trafficking Bill, http://democrats.assembly.ca.gov/members/a22/Press/p222005018.htm (last visited June 16, 2008).
\item \textsuperscript{89} Id.
\item \textsuperscript{90} \textsc{Cal. Civ. Code} § 52.5(h) (2007).
\item \textsuperscript{91} \textsc{Cal. Civ. Code} § 52.5(a).
\item \textsuperscript{92} \textsc{Cal. Penal Code} § 236.1(a) (2007).
\item \textsuperscript{93} \textsc{Cal. Penal Code} § 236.1(d).
\item \textsuperscript{94} \textsc{Cal. Penal Code} § 236.1(e).
\item \textsuperscript{95} \textsc{Cal. Civ. Code} § 52.5(c).
\end{itemize}
\end{footnotesize}
The statute of limitations may be tolled due to a variety of circumstances including a trafficked individual’s disability, minor status, lack of knowledge, psychological trauma, cultural or linguistic isolation, inability to access victim services as well as threatening conduct from a defendant preventing a trafficked individual from bringing a civil action.\footnote{\textit{CIV. CODE} § 52.5(d-e).}

\textbf{Restitution}

Section 52.5 provides that restitution paid by the defendant to the trafficked plaintiff should be credited toward any judgment or award resulting from a section 52.5 action.\footnote{\textit{CIV. CODE} § 52.5(g).}

Restitution is granted pursuant to Cal. Penal Code § 1202.4(q), which was also enacted with the passage of AB 22. A convicted trafficker must pay two types of restitution: a fine that goes into the California State treasury as part of a general fund to compensate crime victims, and restitution paid directly to the particular victims of his or her particular crime.\footnote{\textit{CIV. CODE} § 1202.4(a)(3); § 1202.4(e, q).}

A court must order restitution to the trafficking victim according to the greater of the following:

\begin{enumerate}
\item the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred;
\item the value of the victim’s labor as guaranteed under California law; or
\item the actual income derived by defendant from the victim’s labor or services; or
\item any other appropriate means to provide reparations to the victim.\footnote{\textit{CIV. CODE} § 1202.4(q) (emphasis added).}
\end{enumerate}

The first three elements of the list provide baseline formulas to ensure that the victim receives some amount of monetary relief for the exploited labor. However, because the baseline formulas are generally insufficient to calculate the totality of the harm suffered by a trafficking victim, restitution includes other appropriate means for providing reparations to the victim. This provision should be construed broadly to give it its intended effect. Important considerations in these cases might include:

\begin{itemize}
\item Future medical and mental health related expenses
\item Future lost wages
\item Difficulties in procuring and maintaining employment
\item Pain and suffering
\item Loss of enjoyment of life
\end{itemize}

\section*{III. THE ALIEN TORT CLAIMS ACT\footnote{\textit{CIV. CODE} § 1350 (2008).}}

The Alien Tort Claims Act (“ATCA”) grants federal jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\footnote{Id.}

\textbf{A. Background}

The statute was enacted in 1789 by the first Congress, but was rarely invoked for almost 200 years. It has reemerged in more recent years as the primary civil litigation tool for addressing human rights abuses.\footnote{See Kim & Hreschchyshyn, supra note 143, at 29-34 (discussing the application of ATCA in trafficking civil suits).} In a recent court decision, the Supreme Court upheld ATCA jurisdiction and conferred a cause of action for a
narrow class of torts.\textsuperscript{103} Additionally, several federal appeals courts have upheld ATCA jurisdiction based on violations on a variety of human rights norms.\textsuperscript{104} Still, ATCA litigation has ensued with much judicial scrutiny and the role of courts in adjudicating and enforcing international law continues to be contested.

\textit{Filartiga v. Pena-Irala}\textsuperscript{105}

This landmark decision determined by the Second Circuit marked the first modern case in which a court upheld ATCA jurisdiction for a suit between non-U.S. citizens for violations of the “laws of nations.” The \textit{Filartiga} court upheld jurisdiction pursuant to the ATCA over a claim by one Paraguayan citizen against another for causing the wrongful death of the former’s son by torture. The court determined that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”\textsuperscript{106}

The \textit{Filartiga} decision has lifted the two-hundred year old ATCA from obscurity and has given optimism to foreign plaintiffs trying to acquire jurisdiction in federal courts in the United States for cases alleging human rights abuses both here and abroad.

\textit{Kadic v. Karadzic}\textsuperscript{107}

In \textit{Kadic}, the United States Court of Appeals for the Second Circuit held that alien plaintiffs could bring a claim against Radovan Karadzic, a Bosnian-Serb leader. The allegations pertained to certain tortuous acts, which violated international law and were committed in Bosnia-Herzegovina by forces under Karadzic’s authority. The Second Circuit broadened ATCA jurisdiction for a range of human rights violations occurring abroad committed by non-state actors, including rape, torture, genocide, slavery and slave trade, and other war crimes by a Serbian military. Most importantly, the decision solidified the view that ATCA claims can be brought against non-state actors who commit atrocities in pursuit of genocide and war crimes, or who act under color of law.

\textit{John Doe I v. Unocal Corp.}\textsuperscript{108}

This case was brought against Unocal Corporation by forced laborers in Burma. Originally the court dismissed this case,\textsuperscript{109} but the plaintiffs — building on the \textit{Kadic} decision — persuaded the Ninth Circuit to reinstate a suit against Unocal for forced labor, rape, and extrajudicial killing that took place in Myanmar. Unocal did not act under color of state law, but the corporation ostensibly supplied “assistance” or “encouragement” to the offending government actors.\textsuperscript{110} The case was reargued in July 2003 before an en banc panel of the Ninth Circuit. The court in this case had the capability of handing down a monumental decision by ruling in favor of the plaintiffs. However, the parties reached a confidential settlement in principle in December 2004.\textsuperscript{111} \textit{Unocal} would have been the first case in which an American-based corporation stood trial in federal court because of jurisdiction predicated on ATCA for suspected violations of international law.

\begin{itemize}
\item \textsuperscript{104} The Court, however, has passed on a number of opportunities to grant certiorari in ATCA cases. See, e.g., Royal Dutch Petroleum Co. v. Wiwa, 532 U.S. 941 (2001); Kadic v. Karadzic, 518 U.S. 1005 (1996); Estate of Marcos v. Hilao, 513 U.S. 1126 (1995); Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985).
\item \textsuperscript{105} 630 F.2d 876 (2d Cir. 1980).
\item \textsuperscript{106} Id. at 878.
\item \textsuperscript{107} 70 F.3d 232 (2d Cir. 1995).
\item \textsuperscript{108} 395 F.3d 932 (9th Cir. 2002).
\item \textsuperscript{109} 110 F. Supp. 2d 1294 (C.D. Cal. 2000).
\item \textsuperscript{110} 395 F.3d 932, 947.
\end{itemize}
Sosa v. Alvarez-Machain\textsuperscript{112}  
The Supreme Court in Alvarez recognized ATCA jurisdiction and a cause of action for a narrow class of torts. In Alvarez, the Court rejected an ATCA cause of action on behalf of a Mexican national who was arbitrarily arrested and kidnapped by another Mexican national collaborating with U.S. federal agents. The Court reasoned that “arbitrary arrest” did not rise to the level of an international norm that created legal obligations enforceable by federal courts. The Court reiterated vague language that an ATCA cause of action could only be brought for a “modest number of international law violations” that must be specific and definite. In determining whether an international norm is sufficiently definite to support a cause of action, courts must consider the “practical consequences” on foreign policy of allowing plaintiffs to bring the action in U.S. courts.\textsuperscript{113} The Court also emphasized Congress’ sole role in creating private rights and that Congress has never “affirmatively encouraged greater judicial creativity” regarding ATCA jurisprudence.\textsuperscript{114}

The Court’s opinion has the unique effect of bolstering an ATCA claim based on trafficking now that the TVPRA has been passed. With the TVPRA, Congress has expressed clear intent to provide a private right of action for trafficking. Thus, the availability of an ATCA claim for trafficked persons does not run the risk of creating “new rights,” which the Alvarez Court cautioned against. Continued use of ATCA will contribute to the development of ATCA case law recognizing forced labor and other slave-like practices as binding international legal norms; it will emphasize the importance of enforcing these international norms in domestic courts.

Khulumani v. Barclay Nat’l Bank Ltd.\textsuperscript{115}  
In this recent decision, the Second Circuit allowed an ATCA case to proceed against 50 corporate defendants and hundreds of corporate “Doe” defendants who “actively and willingly collaborated with the government of South Africa in maintaining... apartheid.”\textsuperscript{116} Significantly, this decision found that aiding and abetting violations of customary international law could provide a basis for ATCA jurisdiction.\textsuperscript{117}

B. Making a Claim

In order to establish subject matter jurisdiction under the ATCA, a plaintiff must show that defendant violated a “specific, universal and obligatory” norm of international law.\textsuperscript{118} Courts have held that the following claims satisfy this standard: torture; forced labor; slavery; prolonged arbitrary detention; crimes against humanity; genocide; disappearance; extrajudicial killing; violence against women; and cruel, inhuman, or degrading treatment.\textsuperscript{119} However, a number of other serious violations have not met the standard, including forced transborder abduction involving a one-day detention prior to transfer of custody to government authorities.\textsuperscript{120}

Plaintiffs hoping to establish subject matter jurisdiction based on other norms of international law must show widespread acceptance of the norm by the community of nations. Such acceptance may be demonstrated by

\begin{thebibliography}{119}
\bibitem{113} Id. at 732.
\bibitem{114} Id. at 728. A number of courts have since rejected ATCA claims based on the Alvarez Court’s reasoning. See, e.g., De Los Santos Mora v. New York, 524 F.3d 183 (2d Cir. 2008) (failure to inform detainee that he had the right to contact his nation’s consulate); Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008) (agent orange was only secondarily, and not intentionally, harmful to humans and therefore manufacturers did not violate international norms); Taveras v. Taveras, 477 F.3d 767 (6th Cir. Ohio 2007) (international child abduction did not give rise to ATCA claim).
\bibitem{115} 504 F.3d 254 (2d Cir. 2007).
\bibitem{116} Id. at 258.
\bibitem{117} Id. at 260.
\bibitem{118} Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).
\bibitem{120} Alvarez, 542 U.S. at 738.
\end{thebibliography}
reference to state practice, international treaties, the decisions of international tribunals, and the writings of international law scholars.\textsuperscript{121}

It should be noted, though, that since international law traditionally applied only to states, there are some restrictions regarding ATCA jurisdiction in cases brought against private individuals or corporations. In such cases, the rule of international law will apply in two contexts: (1) where the rule of international law includes in its definition culpability for private individuals; or (2) where the private actor acted “under color of law.”\textsuperscript{122}

First, the ATCA applies to private actors who violate the limited category of international law violations that do not require state action. These limited violations of customary international law are known as jus cogens norms, “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.”\textsuperscript{123} To date, courts have held this category to include war crimes, genocide, piracy, and slavery. Courts have also held that international law is violated where a private individual commits wrongs, such as rape, torture, or murder in pursuit of genocide, slavery, or violations of the laws of war.

Second, a private individual or entity may also be sued under the ATCA by acting “under color of law” in committing violations of international law norms that only apply to states. In applying this rule, courts have looked to standards developed under 42 U.S.C. § 1983 in suits seeking to redress violations of rights protected by the U.S. Constitution. In general, a defendant has acted under “color of law” where he or she acted together with state officials or with state aid.\textsuperscript{124}

The ATCA not only creates subject matter jurisdiction for violations of international law, but also provides a cause of action.\textsuperscript{125} Once a plaintiff successfully pleads a valid international law violation under the ATCA, he or she may then proceed to prove his or her case based on the relevant definition under international law. Where international law does not provide the relevant rules of decision, courts have at various times applied domestic federal common law and statutory law including the TVPA, state law, or the law of the foreign nation in which the tort was committed.

In \textit{Reddy},\textsuperscript{126} the court provides a helpful review of the applicability of the ATCA to human trafficking inside the United States.

In \textit{Bridgestone},\textsuperscript{127} the Southern District of Indiana rejected an ATCA claim based on forced labor brought by plaintiffs who were workers on a rubber plantation in Liberia. The court agreed that a valid ATCA claim could be based on the international law violation of forced labor. However, the court concluded that the working conditions of the plaintiffs in \textit{Bridgestone} did not meet the standard of forced labor as understood under international law. The \textit{Bridgestone} court took a rather restrictive view on the types of conditions that amounted to forced labor. According to the court, the \textit{Bridgestone} plaintiffs could not show that they were forced to work under “menace of penalty.” The court elaborated that the \textit{Bridgestone} plaintiffs were not actually physically confined at the work premises nor did they suffer any direct threats of non-economic harm “deliberately inflicted” to compel them to work. Thus, the court concluded that the unfortunate economic

\begin{itemize}
\item[\textsuperscript{121}] For international sources giving substance to forced labor as a violation of international legal norm, please refer to the ATCA appendix.
\item[\textsuperscript{122}] See Kadic, 70 F.3d at 239-42, 243-44.
\item[\textsuperscript{124}] See Kadic, 70 F.3d at 245.
\item[\textsuperscript{125}] Flores v. S. Peru Copper Corp., 343 F.3d 140, 153-54 (2d Cir. 2003); Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996); Hilo, 25 F.3d at 1475. See also Alvarez, 542 U.S. at 724-25.
\item[\textsuperscript{126}] 2003 U.S. Dist. LEXIS 26120 at *31-37. “[A]ssertions explaining that plaintiffs were brought to the United States and forced to work involuntarily and how defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions” are sufficient to state a claim under the ATCA for forced labor, debt bondage, and trafficking. Id. at *36.
\item[\textsuperscript{127}] 492 F. Supp. 2d 988 (S.D. Ind. June 26, 2007).
\end{itemize}
circumstances of the workers and their inability to choose better employment could not provide the bases for an ATCA forced labor cause of action.\textsuperscript{128}

C. Statute of Limitations
The text of the ATCA does not specify a statute of limitations. However, in \textit{Papa v. United States}, the Ninth Circuit found that the 10-year statute of limitations of the Torture Victims Protection Act applies to ATCA claims.\textsuperscript{129} In the \textit{Javier H.} human trafficking litigation, the Court also found that “It is well-established that the ten-year statute of limitations of the [Torture Victims Protection Act] applies to [the ATCA].”\textsuperscript{130} Further, the statute of limitations may be equitably tolled while the victim is unable to bring his or her claim.\textsuperscript{131}

D. Damages
While courts are not consistent in the method by which they determine the scope of damages, they have been consistent in allowing victims to receive both compensatory and punitive damages for infringement of the ATCA.\textsuperscript{132}

IV. FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT\textsuperscript{133}
The Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) extends civil liability to any person, as defined in the act, who:

\begin{itemize}
\item A) ... receive[s] any income derived... from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal... to use or invest... any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce;\textsuperscript{134} and/or
\item B) through a pattern of racketeering activity or through collection of an unlawful debt [acquires or maintains]... any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce;\textsuperscript{135} and/or
\item C) [is] employed by or associated with any enterprise engaged in... interstate or foreign commerce [and] conduct[s] or participate[s]... in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt;\textsuperscript{136} and/or
\item D) conspire[s] to violate any of [these provisions].\textsuperscript{137}
\end{itemize}

A. Background
Congress passed RICO in 1970 as part of the Organized Crime Control Act, aimed at strengthening legal mechanisms for combating organized crime. In particular, it broadened civil and criminal remedies and created evidentiary rules tailored to admitting evidence of organized crime.
B. Making a Claim

A successful RICO civil claim must be based on a “pattern” of “racketeering activity.” “Racketeering activity” is defined as behavior that violates certain other laws, either enumerated federal statutes or state laws addressing specified topics and bearing specified penalties. “Pattern” requires at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act of racketeering activity.138

The TVPRA adds human trafficking crimes as predicate offenses for RICO charges and “trafficking in persons” is now included in the definition of a racketeering activity.139

Other racketeering activities that qualify as criminal predicate acts for bringing a civil RICO claim in the trafficking context include:

- Mail and wire fraud
- Fraud in connection with identification documents
- Forgery or false use of passport
- Fraud and misuse of visas, permits, and other documents
- Peonage and slavery
- Activities prohibited under the Mann Act
- Importation of an alien for immoral use140
- Extortion (i.e., an employer threatening deportation when an employee complains about minimum wage or overtime amounts to unlawful extortion of employee’s property interest in minimum wage or overtime)141

Keep in mind, though, that fraud claims—including predicate act fraud claims under the RICO—are not subject to the liberal notice pleading requirements of the federal rules. Rather, they must be pled with particularity in your Complaint.142 Still, the elements of fraud that must be pled are different from common law fraud. In a recent decision clarifying the burden of proof for civil RICO mail fraud claims, the U.S. Supreme Court held that “a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant’s alleged misrepresentations.”143 This is a significantly lighter burden than most state fraud or intentional misrepresentation claims, and may have significant implications for cases where, for example, a trafficker defrauded immigration authorities to obtain a visa for a victim and this fraud proximately causes the victim’s injuries.

Many federal courts also require the filing of a detailed RICO case statement shortly after the civil RICO claims are first alleged in the pleadings.

The RICO also requires the existence of an “enterprise” through which the defendant engages in racketeering activities.144

An “association of fact” RICO enterprise is most common.145 It has two key requirements:

- The defendant “person” must be separate from the “enterprise.”146

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138 Id. at § 1961(5).
139 Id. at § 1961(1)(B).
140 Id. at § 1961(1)(A-C).
141 Violation of state theft or extortion criminal laws is a RICO predicate act. Id. at § 1961(1)(A). Practitioners should consult their state’s laws on this issue.
142 See Fed. R. Civ. P. 9(b); Giuliani v. Fulton, 399 F.3d 381, 388-89 (1st Cir. 2005); Catalan v. Vermillion Ranch Ltd. P’ship, No. 06 Civ. 1043, 2007 U.S. Dist. LEXIS 567, at *15-21 (D. Colo. Jan. 4, 2007); but see Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1050-51 (7th Cir. 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).
143 Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. —, 128 S. Ct. 213; 170 L. Ed. 2d 1012 (June 9, 2008).
145 Id. at § 1961(4).
146 See Bennett v. United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985), cert. denied, 474 U.S. 1058 (1986).
• The “enterprise” must be a continuing unit and “separate and apart from the pattern of activity in which it engages.”

If you don’t know which enterprise to plead, you should consider pleading several alternatively.

C. Statute of Limitations

RICO does not specify a statute of limitations. However, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, the Supreme Court applied a four-year statute of limitations. The Court adopted the four-year statute of limitations period from the civil remedies provision of the Clayton Anti-Trust Act as applicable to all federal civil RICO claims.

D. Damages

Plaintiffs in RICO civil actions are entitled to treble damages and recovery of reasonable attorney’s fees and costs. Other remedies include: “ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise.” Any person whose business or property has been damaged as the result of proscribed racketeering activities may file a suit in federal court. The U.S. Supreme Court recently rejected RICO claims in two cases because the plaintiffs’ injuries lacked direct relation to the alleged RICO violation necessary to satisfy the requirement of proximate causation.

In a recent decision in a tobacco liability case, one court delicately addressed the question of whether a RICO defendant can be liable for personal injuries. In dicta, the court suggested that “[i]t is not clear that personal injury damages are not recoverable under the RICO. ... A prohibition on recovery for personal injuries would not be consonant with the statutory language.”

E. RICO Claims in the Human Trafficking Context

Six recent decisions from five cases addressed RICO claims brought by victims of human trafficking.

*Abraham v. Singh*

The plaintiffs in this case were H-2B visa holders from India who had paid a principal of the defendant corporation a recruitment fee between $7,000 and $20,000. When they arrived, their passports were confiscated, they were housed in poor conditions with little food, and they were threatened with punitive measures if they complained. The plaintiffs filed a lawsuit under four separate provisions of the RICO: section 1962(a), (b), (c),

151 483 U.S. at 155.
153 Id. at § 1964(a).
154 Id. at § 1964(c).
157 The authors provide details of these cases because they provide a helpful glimpse into the complexity of the RICO, and guidance as to how to wade through these complex issues. Of note, a seventh decision, *Javier H.*, 239 F.R.D. 342, 347-48 (W.D.N.Y. 2006), addresses civil RICO only to indicate that the four-year statute of limitations was equitably tolled for new RICO claims while discovery was stayed for the pendency of the criminal action.
158 480 F.3d 351 (5th Cir. 2007).
and (d). The U.S. District Court granted the defendants’ Fed. R. Civ. P. 12(b)(6) motion, dismissing all of the plaintiffs’ RICO claims.

Plaintiffs appealed to the Fifth Circuit, which reversed the district court in part. The circuit court found that the plaintiffs had adequately alleged a pattern of racketeering activity: “The Plaintiffs did not allege predicate acts ‘extending over a few weeks or months and threatening no future criminal conduct.’... Rather, they alleged that the Defendants engaged in at least a two-year scheme involving repeated international travel...”\(^{159}\) The Fifth Circuit upheld the dismissal of the section 1962(a)\(^{160}\) and (b)\(^{161}\) claims. However, the Fifth Circuit allowed the section 1962(c) claim to proceed. Plaintiffs had adequately claimed that the corporate principal who recruited them was a RICO person separate from the corporation, which was the RICO enterprise.\(^{162}\) Similarly, the section 1962(d) claims survived, as “Plaintiffs specifically alleged that the Defendants entered into an agreement and that each agreed to commit at least two predicate acts of racketeering.”\(^{163}\)

**Catalan v. Vermillion Ranch Ltd. P’ship**\(^{164}\)

In this case, the plaintiffs were Chilean cattle herders employed at the defendants’ ranch with H-2A visas. Among other things, the defendants allegedly confiscated the plaintiffs’ identity documents and held the plaintiffs in debt peonage, whereby at the end of each month the plaintiffs would owe more money to the defendants. The plaintiffs filed suit under the FLSA, the RICO (section 1962(c) and (d)), the TVPRA, and state law. The defendants filed a motion to dismiss several of the plaintiffs’ claims, including the plaintiffs’ civil RICO claims.

The court denied the defendants’ motion to dismiss in all respects. With respect to the RICO claims, the plaintiffs had alternatively pled two different RICO enterprises—a wise approach where there is some uncertainty as to which enterprise satisfies the requirements of the RICO. The court found that the plaintiffs had adequately alleged an enterprise for both alternatives.\(^{165}\) The court also found that the plaintiffs had presented the allegations “sounding in fraud” with sufficient particularity.\(^{166}\) Still, the court leaves unresolved the question of whether RICO claims that do not sound of fraud must meet the heightened pleading requirements of Rule 9, indicating that the plaintiffs’ allegations of the predicate acts of extortion and human trafficking meet either notice pleading or Rule 9 pleading requirements.\(^{167}\)

**Zavala v. Wal-Mart Stores, Inc.**\(^{168}\)

The facts underlying this lawsuit received much media attention in 2002 and 2003. According to the Complaint, the plaintiffs were undocumented immigrant janitorial workers nominally employed by contractors—and occasionally by Wal-Mart—to clean Wal-Mart stores throughout the United States for sub-lawful wages. Wal-Mart allegedly hid the workers from law enforcement, threatened the workers with deportation, and locked them into the stores for the duration of their shifts.\(^{169}\) Plaintiffs filed a lawsuit alleging violations of the RICO, the FLSA, 42 U.S.C. § 1985, and common law. Defendants filed a motion to dismiss the entire Complaint.

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159 Id. at 356.
160 Id. at 357 (“conclusory allegations are insufficient to state a claim under § 1962(a).”).
161 Id. (no causal connection shown between the injuries and the defendants’ “acquisition or maintenance of an interest in the enterprise.”).
162 Id.
163 Id.
165 Id. at “16.
166 Id. at *17-20.
167 Id. at *20-21.
169 Id. at 301.
The court granted the defendants’ motion as to the RICO and section 1985 claims. As for the RICO claims, the court concluded that the plaintiffs had not alleged two underlying predicate acts.170 In summary, the court conducted a detailed review of each alleged predicate act, and for each found at least one element that plaintiffs had failed to support in their complaint.171 The RICO conspiracy claims under section 1962(d) also failed. The court found that the plaintiffs’ allegation that Wal-Mart knew the plaintiffs were undocumented was not sufficient to show that Wal-Mart “agreed to the commission of the predicate acts or racketeering.”172 This should serve as a cautionary note to attorneys bringing civil RICO claims on behalf of victims of trafficking: in spite of liberal notice pleading requirements of the federal rules (with the exception of claims specified in Rule 9), courts may approach civil RICO claims with some skepticism. It may be better to “over-plead” the underlying facts, rather than risk dismissal.173

Doe I v. Reddy174
Like the Abraham case, these plaintiffs were also from India. They claimed:

Defendants fraudulently induced them to come to the United States from India on false promises that they would be provided an education and employment opportunities, but then forced them to work long hours under arduous conditions for pay far below minimum wage and in violation of overtime laws, and sexually abused and physically beat them.175

The lawsuit alleged claims under the RICO, the FLSA, the ATCA, the Thirteenth Amendment, and state law. The defendants filed a motion to dismiss certain claims. The RICO portion of the resulting opinion is discussed here.

The Court allowed the RICO claims to proceed. In a very helpful description of the requirements of civil RICO in the context of a human trafficking case, the Court found that (1) the plaintiffs’ claims for lost personal property and wages constituted an “injury to business or property” and “the fact that plaintiffs also allege personal injury as a result of defendants’ racketeering actions does not extinguish plaintiffs’ standing based on their economic loss alleged;”176 (2) defendants’ visa fraud conspiracy continuing from 1986 to 2000 was sufficient to show a “pattern of racketeering activity;”177 (3) plaintiffs sufficiently pled an “association in fact” RICO enterprise that exists “separate and apart from the pattern of racketeering activities;”178 (4) plaintiffs’ “investment-injury” claims under section 1962(a) survived, as plaintiffs alleged that “defendants used the proceeds [from the racketeering activity] in order to make it more difficult for plaintiffs to assert their rights, to eliminate plaintiffs’ alternatives and to deprive of their scheme so the plaintiffs’ rights would not be vindicated;”179 (5) because plaintiffs alleged that the corporate defendants were alter egos of the individual defendants, the defendants were joint or single employers of the plaintiffs, and each defendant aided and abetted sexual abuse of the plaintiffs, the RICO conspiracy claims under section 1962(d) survived;180 and finally (6) because plaintiffs were alleged to be “vulnerable and powerless” in the Complaint, the fact the plaintiffs may have known that they entered the United States illegally does not make plaintiffs “in equal fault” under the in pan delicto or unclean hands doctrine.181

170 Id. at 303.
171 Id. at 305-16.
172 Id. at 316-17.
173 Plaintiffs’ civil RICO claims were dismissed without prejudice, giving plaintiffs the opportunity to amend their complaint to remedy the deficiencies. Id. at 303.
175 Id. at *12.
176 Id. at *15.
177 Id. at *16-18.
178 Id. at *18-23 (conglomerate enterprise was alleged to operate restaurants, manage real estate, and perform computer work, which was distinct from the racketeering).
179 Id. at *23-25.
180 Id. at *25-26.
181 Id. at *26-28.
Doe(s) v. Gap, Inc. 182
Two decisions in this case emerging out of the plaintiffs’ employment in the Northern Mariana Islands provide a detailed examination of the requirements of civil RICO, though neither provides a review of the factual allegations in the case. Both involve motions to dismiss complaints: the 2001 decision addressing the First Amended Complaint, and the 2002 decision addressing the Second Amended Complaint. The significant difference between the two complaints, and therefore between the two decisions, involves the pleading of the RICO allegations against the retailer.

The 2001 decision upheld section 1962(c) claims against the manufacturer, but dismissed these claims against the retailer, finding the “failure to act is not participation in the conduct of an enterprise,” and “quality control monitoring is insufficient to give rise to the inference that the retailer defendants were directing the enterprise at some level through a pattern of racketeering activities.”183 The Court did, however, find that the plaintiffs had adequately alleged RICO conspiracy claims against the retailer defendant under section 1962(d).184 Conversely, the 2002 decision found that the plaintiffs had sufficiently modified the allegations in their Second Amended Complaint so as to adequately allege section 1962(c) claims against the retailer. The plaintiffs had alleged “affirmative action and participation by [all] defendants in the control and direction of the alleged enterprises.”185

V. FAIR LABOR STANDARDS ACT 186
The Fair Labor Standards Act (“FLSA”) is designed to alleviate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”187 The minimum wage and maximum hour protections offered by the FLSA provide trafficked workers with compensatory damages as well as liquidated damages for the willful wage and hour violations that occur in the context of forced labor.

A. Substantive Protections

Minimum Wage
FLSA section 6(a) provides that:

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates... except as otherwise provided in this section... not less than... $5.85 an hour beginning on the 60th day after the date of

182 2001 WL 1842389 (motion to dismiss 1st Am. Compl., hereinafter “2001 decision”), and 2002 WL 1000068 (motion to dismiss 2d Am. Compl., hereinafter “2002 decision”). These decisions are not published in any reporter, nor are they available on LEXIS.
183 2001 decision at *9-10. The Court also found that plaintiffs adequately alleged various “single retailer–single manufacturer” enterprises, but not an enterprise consisting of all retailer defendants and all manufacturer defendants, see id. at *3; lost wages, employer’s overcharging for food and housing, and payment of recruitment fees constituted “injury to property,” but “deposits” that may not be returned are not an injury to property, see id. at *4-5; investment injury under § 1962(a) was not sufficiently plead, see id. at *5-6; and Northern Mariana Island statutory offenses, peonage, and Hobbs Act were adequately plead as predicate acts, but involuntary servitude was not, see id. at *6-8.
184 Id. at *10.
185 2002 decision at *13. The Court’s 2002 decision was otherwise consistent with its 2001 decision, summarized in n.314, supra, with several notable exceptions: the Court found the existence of five new RICO enterprises, see id. at *6-8; plaintiffs sufficiently alleged “investment injuries” under § 1962(a) so as to survive the motion to dismiss both the § 1962(a) case in principle and the § 1962(d) conspiracy to violate § 1962(a) claim, see id. at *10-12; and plaintiffs adequately alleged proximate cause between the defendants’ acts and the § 1962(c) injury (this question was not addressed in the 2001 decision), see id. at *13-14.
187 Id. at § 202.
enactment of the Fair Minimum Wage Act of 2007 [enacted May 25, 2007]... $6.55 an hour, beginning 12 months after that 60th day... $7.25 an hour, beginning 24 months after that 60th day.188

Any amount paid under minimum wage will suffice for a claim of unpaid wages under the FLSA. Trafficked workers are often paid far less than federal minimum wage or are not paid at all. If the state minimum wage standard is higher, the USDOL will calculate unpaid wages according to federal and state standards, and inform the employer of their obligation under both. However, the USDOL can only enforce requirements under the FLSA.189 If your state minimum wage is higher, you should consider filing with your local labor commissioner or exercising your client’s private right of action, if available. You may use the FLSA claim to attain federal court jurisdiction and include a supplemental state minimum wage claim. Keep in mind that, even if the state minimum wage is higher, the liquidated damages provision of the FLSA may result in higher overall damages for your client if your state law does not have a similar provision.

Maximum Hours and Overtime

FLSA section 7(a)(1) states that:

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.190

Trafficked workers are often forced to work far more than forty hours per week. Exceedingly high hours can amount to significant damages in unpaid overtime. Be aware that some states provide more overtime protections than given by the FLSA. For example, California increases the overtime rate to two times the minimum wage for a workday of over twelve hours.

B. Calculating Hours

Hours worked are defined as “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.”191 Trafficked workers may be required to be “on-call” 24 hours a day without breaks or uninterrupted sleeping time. This “on call” time may constitute compensable work time.192

The FLSA regulations provide guidelines for calculating hours worked and include specific interpretations for rest and meal breaks, sleep time and other periods of free time.193 In general, if sleeping time, meal periods or other periods of free time is interrupted by a call to duty, the interruption must be counted as hours worked. The following is an overview of these guidelines. Please look to the regulations for more detailed information.

Breaks

Meal breaks where the employee is still required to work are compensable.194 Break periods of less than twenty minutes are also compensable.195

188 id. at § 206(a) (2008).
189 See id. at § 216(c) (2008).
190 See id. at § 207(a)(1) (2008).
192 See 29 C.F.R. § 785.23 (2008). For domestic workers it can be argued that spending the night with a child is working because the worker’s presence is comforting to the child. There are no reported decisions on this though.
193 id. at § 785.1.
194 id. at § 785.19(a).
195 id. at § 785.18.
Sleep
For shifts shorter than 24 consecutive hours, all hours are compensable including time spent sleeping or engaging in personal activities, if the employee is on duty during that period.\(^{196}\) For shifts longer than 24 hours, up to eight hours of sleep time may be excluded from compensable hours.\(^{197}\) However, interrupted sleep time can be compensated for the length of the interruption; and if sleep time is interrupted to the point where the employee is denied a reasonable night’s sleep, the full eight hours can be compensated.\(^{198}\)

Other Free Time
For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of that time for his or her personal purposes.\(^{199}\)

C. Record Keeping
The FLSA requires that employers keep contemporaneous records of hours worked by their employees.\(^{200}\) If an employer fails to maintain accurate records, the employee can provide a reasonable estimation of the hours worked. The burden then falls on the employer to affirm or deny the reasonableness of the employee’s estimation by showing the exact number of hours worked by the employee.\(^{201}\) Some state labor codes award the employee damages for the employer’s failure to maintain records. Employers may also be subject to civil penalties for record-keeping violations and pay stub violations under state laws. However, there is no private right of action to enforce the FLSA’s record-keeping provisions.

D. Deductions
A deduction only violates the FLSA if it brings the worker’s hourly wages below the minimum wage, or if it cuts into the worker’s overtime wages.\(^{202}\) Generally, an employer who pays a worker cash wages below the minimum wage or overtime may consider certain facilities as credits towards the required wages, unless:

- the employee has not actually and voluntarily received the benefit (note that several circuits have held that meal deductions do not need to be voluntary);\(^ {203}\)
- the facilities for which the deduction is taken are furnished primarily for the benefit or convenience of the employer;\(^ {204}\)
- the benefit has been furnished in violation of federal, state, or local law.\(^ {205}\)

\(^{196}\) See id. at § 785.21.

\(^{197}\) See id. at § 785.22(a). Note that “[w]here no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.” Id.

\(^{198}\) See id. at § 785.22(b).

\(^{199}\) See id. at § 785.15.

\(^{200}\) See 29 U.S.C. § 211(c) (2008).

\(^{201}\) See Anderson, 328 U.S. at 687.


\(^{203}\) See id. at § 531.30; see also David Bros. Inc. v. Marshall, 522 F. Supp. 628 (N.D. Ga. 1981). But see Herman v. Collis Foods, Inc., 176 F.3d 912, 918-19 (6th Cir. 1999) (USDOOL regulation requiring deductions for meals to be voluntary is “no longer a viable regulation” and therefore involuntary meal deductions were proper); Davis Bros., Inc. v. Donovan, 700 F.2d 1368 (11th Cir. 1983) (same); Donovan v. Miller Props., Inc., 547 F. Supp. 785 (M.D. La. 1982), aff’d 711 F.2d 49 (5th Cir. 1983) (same).

\(^{204}\) See 29 C.F.R. § 531.3(d) (2008); see also Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002).

\(^{205}\) See 29 C.F.R. § 531.31 (2008); see also Archie v. Grand Cent. P’ship, Inc., 86 F. Supp. 2d 262, 270 (S.D.N.Y. 2000) (finding that deductions for housing costs were not proper where they violated state administrative regulations); but see Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 638-41 (W.D. Tex. 1999) (finding that 1) deductions for substandard housing is unauthorized; but 2) deductions for housing that is paid to a third party and consented to by the employee is appropriate even if the housing is substandard).
• the credit exceeds the “reasonable cost” of the item;\textsuperscript{206} or
• they are not deducted under the terms of a bona fide collective bargaining agreement.\textsuperscript{207}

The following deductions might arise in trafficking cases:

\textit{Inbound Transportation (Smuggling Fees)}

Smuggling fees are the most common charge to victims of trafficking. Though no cases have directly addressed the question of smuggling fees, the FLSA unequivocally prohibits deductions for facilities furnished in violation of federal, state, or local law.\textsuperscript{208} Because smuggling violates federal immigration laws, deductions for smuggling fees violate the FLSA to the extent that they bring the worker’s wages below the minimum. Similarly, if the worker were transported in violation of federal, state, or local transportation safety laws (e.g., the worker was transported in a severely overcrowded vehicle), deductions for this transportation would also be illegal.

Additionally, a line of cases has developed in the H-2A and H-2B worker context finding inbound transportation costs to be for the benefit of the employer.\textsuperscript{209} Therefore, courts have determined that these costs must be reimbursed to the worker during the first workweek, because otherwise the inbound transportation costs, which the worker expended for the employer’s benefit, will bring the first week’s wages below the minimum.\textsuperscript{210}

Finally, the cost of transportation from one worksite to another cannot be deducted.\textsuperscript{211} However, the actual cost of transporting a worker from his or her home to the worksite can be deducted so long as the travel time does not constitute hours worked under the FLSA.\textsuperscript{212} Arguably, however, charges for transportation beyond normal commuting distances are to the benefit of the employer, and therefore, should not be deducted.\textsuperscript{213}

\textit{Housing}

Generally, the reasonable cost of housing can be deducted from a worker’s minimum or overtime wages. However, there are significant exceptions that might arise in the trafficking context. First, if the conditions of the housing violate federal, state, or local law, the employer cannot charge the worker for the housing if it brings the wages below the minimum.\textsuperscript{214} Second, if the housing is furnished for the benefit of the employer, the deduction violates the FLSA.\textsuperscript{215}

If the housing is legal and is not for the benefit of the employer, the amount of the permissible deduction is frequently disputed. The question of how to calculate the reasonableness of deductions varies between the circuits. For example, the Second Circuit allows a deduction for the “fair rental value” of the housing.\textsuperscript{216} Other circuits have found, however, that the employer can only deduct the “actual cost” of providing the housing.\textsuperscript{217}

\textsuperscript{207} See id. at § 531.6.
\textsuperscript{208} See id. at § 531.31.
\textsuperscript{210} See Arriago, 305 F.3d 1228.
\textsuperscript{211} See 29 C.F.R. § 531.32(c) (2008).
\textsuperscript{212} See id. at § 531.32(a).
\textsuperscript{213} See Arriago, 305 F.3d at 1240-41.
\textsuperscript{217} See, e.g., Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1513-14 (11th Cir. 1993); Donovan v. Williams Chem. Co., 682 F.2d 185, 189 (8th Cir. 1982); Lopez v. Rodriguez, 668 F.2d 1376, 1381 (D.C. Cir. 1981).
Meals
Only the actual cost of meals may be deducted from a worker’s minimum wages.218 The employer, however, need not calculate the cost of providing each meal to each individual employee, but rather may deduct the average cost of providing the meals to a group of workers.219 Obviously, deductions from wages for alcohol furnished without the proper license, and deductions for illegal drugs, both violate the FLSA.

Essential Tools and Uniforms
“Tools of the trade and other materials and services incidental to carrying on the employer’s business” are for the benefit of the employer, and therefore, charges for these materials cannot be deducted from a worker’s wages.220 Likewise, an employer cannot charge a worker for the purchase221 or rental of a uniform “where the nature of the business requires the employee to wear a uniform.”222

FICA and Other Employment Taxes
Deductions for taxes are permitted to bring a worker’s wages below the minimum if (1) the employer remits the withheld taxes to the appropriate agency, and (2) the underlying law permits the employer to deduct the taxes.223 In the trafficking context, employers who know that their employees are using false Social Security numbers often withhold payroll taxes but do not report these withholdings to the IRS or the state taxing authority. This, of course, is a violation of the FLSA and of other federal and state laws. Likewise, some employers attempt to charge workers with the employer’s portion of the payroll taxes. As this charge is illegal under federal tax law, it also violates the FLSA if it brings the worker’s wages below the minimum.

Payments of Debts
As discussed above, payment of a debt incurred for an activity that violates the law, such as a smuggling fee or charges for illegal drugs, is prohibited under the FLSA. However, an employer may advance wages to a worker and then deduct the advance from the worker’s paycheck, even if it cuts into the minimum wages.224 However, if the employer benefits in any way, such as through a profit, kickback, or other means, the debt charge is illegal if it reduces the wages below the minimum.225 You should also look at your state labor law, which may impose requirements on employers advancing money to workers. If the employer failed to follow a procedure dictated by state law, recuperating a debt from a worker’s wages would violate the FLSA because the loan was a “facility” provided in violation of state law.

E. Statute of Limitations
Actions for non-willful violations of the FLSA must be commenced within two years after the violation occurs. Actions for willful violations of the FLSA must be commenced within 3 years after they occur.226 Still, there

219 Herman, 176 F.3d at 920-21 (6th Cir. 1999).
221 Id. at § 531.3(d)(2)(iii).
222 Id. at § 531.32(c).
223 Id. at § 531.38.
224 Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1369 (5th Cir. 1973).
225 Id.; 29 C.F.R. § 531.35 (2008).
are several cases which suggest that if an employer fails to post notice of FLSA rights and/or promises to catch workers up in unpaid wages, the employer is estopped from later arguing statute of limitations.\textsuperscript{227}

F. Damages
An employer who violates the minimum wage and maximum hours provisions of the FLSA is liable to the employee for the amount of their unpaid wages and overtime. Additionally, the employer will almost always be liable for an additional, equal amount as liquidated damages.\textsuperscript{228}

Defendants in violation of the FLSA must also pay a plaintiff’s reasonable attorney’s fees in addition to any judgment awarded.\textsuperscript{229} Civil penalties of up to $10,000 may be awarded in certain circumstances.\textsuperscript{230} Injunctive relief is available to restrain violation of the minimum wages or overtime provisions of the Act, or the prohibition on engaging in transport of items produced in violation of such provisions.\textsuperscript{231} Some circuits also allow the award of punitive damages.\textsuperscript{232}

G. Other Protections
The FLSA prohibits an employer from firing or otherwise retaliating against an employee for exercising his or her rights under wage and hour laws.\textsuperscript{233} An employer’s improper behavior during litigation may itself also constitute a violation of the FLSA’s anti-retaliation provisions.\textsuperscript{234} An employer who violates the anti-retaliation provisions is liable for legal or equitable relief, such as employment, reinstatement, promotion, and payment of wages lost plus an additional amount as liquidated damages.\textsuperscript{235}

The FLSA does not require severance pay, sick leave, vacations, or holidays.\textsuperscript{236}

H. FLSA Coverage
The minimum wage provision of the FLSA provides that “[e]very employer shall pay [the minimum wage] to each of his employees who in any workweek is engaged in commerce or in the production of goods for


\textsuperscript{228} 29 U.S.C. § 216(b) (2008); Chellen, 446 F. Supp. 2d at 1279-81 (liquidated damages awarded in trafficking case, when defendants failed to show a reasonable and good faith belief that they were executing a “training program”); but see 29 C.F.R. § 790.22(b) (2008) (setting forth limited prerequisites for the court to exercise discretion in the award of liquidated damages).

\textsuperscript{229} 29 C.F.R. § 790.22(d).


\textsuperscript{232} See Travis v. Gary Cmty. Mental Health Ctr., 921 F.2d 108 (7th Cir. 1990) (plaintiff entitled to punitive damages under FLSA, 29 U.S.C.S. § 215(a)(3), because damages under that section were not limited). But see Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000) (holding that punitive damages go beyond the statutory goal of making a plaintiff whole again, so are not available in an anti-retaliation claim).


\textsuperscript{235} 29 U.S.C. § 216(b).

\textsuperscript{236} It can be argued that there should be a private right of action to enforce the hot goods provision of the FLSA. However, the provision has not yet been litigated yet. See, e.g., Lara Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation, 103 YALE L.J. 2179, 2208-09 (1994).
commerce, ... or is employed in an enterprise engaged in commerce or in the production of goods for commerce. ... The FLSA’s overtime provision has an identical commerce requirement.

For enterprise coverage, the enterprise must have annual gross volume “of sales made or business done” of not less than $500,000. However, enterprise coverage and interstate commerce coverage are mutually exclusive. For an employer to show that it is exempt under these provisions of the Act, it must show that it is subject to neither interstate commerce coverage nor enterprise coverage.

The FLSA affords protection to “any individual employed by an employer” who has “suffered or [is] permit[ted] to work.” The “economic reality” test is used to determine whether this employment relationship exists for purposes of FLSA enforcement. The test analyzes the circumstances of the whole activity to determine whether the individual is economically dependent on the supposed employer. Some of the factors that may be considered in this analysis include: direct or indirect supervision of employees and direct or indirect authority to determine and modify employment terms. Whether an individual meets the definition of an employee under the FLSA is not affected by factors, such as the place where the work is performed, the absence of a formal employment agreement, the time or method of payment, or whether an entity is licensed by the state or local government.

While the FLSA applies to nearly every occupation and industry, special rules may modify or limit recovery in some situations. The rules that are particularly relevant to human trafficking cases are described below. An employer who claims an exemption under the FLSA has the burden of showing that it applies.

Undocumented Workers
A worker’s immigration status is irrelevant in determining “employment relationship” for purposes of FLSA enforcement. All workers are protected under the FLSA regardless of immigration status. Widespread misunderstanding regarding back pay recovery for undocumented workers has occurred due to Hoffman Plastic Compounds v. NLRB. In Hoffman Plastics, an undocumented worker who used falsified immigration documents to secure employment attempted to assert his rights under the National Labor Relations Act, alleging that he was wrongfully terminated in retaliation for his participation in a unionization campaign. The court determined that the plaintiff was not entitled to recover for wages he would have earned had he not been fired. However, Hoffman Plastics does not limit recovery of any unpaid wages and overtime for work already

237 29 U.S.C. § 206(a) & (b) (emphasis added).
240 See, e.g., 29 C.F.R. § 776.22a (referring to enterprise coverage, “any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged in commerce or in the production of goods for commerce”); see also Wirtz v. Melos Constr. Corp., 408 F.2d 626, 627 (2d Cir. 1969) (explaining that the 1961 amendments to the FLSA adding enterprise coverage expanded coverage of the Act beyond employees who were themselves engaged in commerce).
241 29 U.S.C. at § 203(e) and (g).
244 See Chapter 2, § V(B), supra, for a discussion of joint employment standards.
247 Id. at 151-52.
performed. It has also been held that Hoffman Plastics does not bar undocumented workers from receiving compensatory and punitive damages for retaliation under the FLSA. Still, there remains some uncertainty as to whether courts will extend Hoffman Plastics’ limitations on back pay to other types of remedies in suits brought by undocumented workers. For more information on Hoffman Plastics and advocacy efforts aimed at broadening worker protections for undocumented immigrants, go to the National Employment Law Project website at www.nelp.org.

Sex Workers
Although forced prostitution is not covered by the FLSA since it is considered illegal employment, other types of employment and legal commercial sex work may be covered. Congress intended the FLSA to apply to “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” so the FLSA presumably covers any work, including legal commercial sex work, that violates fair hours and pay standards. For example, legal sex workers, such as exotic dancers, who work immensely irregular hours without a bona fide contract that specifies overtime pay, would have an actionable claim under the FLSA. However, sex workers could be exempted from FLSA coverage if their place of work is considered a “recreational center” that does not operate for more than seven months of the year. Even in the absence of an FLSA claim, victims of sex trafficking have many other causes of action available to them.

Relatives
When an enterprise’s only regular employees are the owner and the owner’s parent, spouse, child, brother, sister, grandchildren, grandparents, and in-laws, it is not a covered enterprise or part of a covered enterprise for purposes of FLSA.

While this exemption may preclude enforcement of the FLSA in cases of servile marriage or where certain family members are trafficked for forced labor, numerous other claims can be brought for both compensatory and punitive damages.

248 In Hoffman Plastics, the Court denied an NLRB claim for “backpay” based work not yet performed, but compensation that the plaintiff would have received had he not been wrongfully terminated. Id. at 148-49. This situation may be distinguished from a plaintiff who seeks “backpay” in the form of payment for labor already performed but never compensated. See Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-03 (W.D. Mich. 2005) (rejecting defendant’s argument that Hoffman Plastics bars an undocumented worker’s claim for backpay under FLSA based on work already performed); Flores v. Albertsons, Inc., No. CV 01-00515 AHM (SHX), 2002 U.S. Dist. LEXIS 6171, at *17-20 (C.D. Cal. Apr. 9, 2002) (same); Liu, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); see also Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 243 (2d Cir. 2006) (dicta indicating that, in FLSA claim for unpaid wages, “the immigration law violation has already occurred. The order does not itself condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers’ past labor without paying for it in accordance with minimum FLSA standards.”).


251 Id. at § 207(f).

252 Id. at § 213(c)(A).

253 Id. at § 203(s)(2).

254 Singh, 214 F. Supp. 2d at 1061.
Domestic Service Workers

The FLSA distinguishes between live-in and non-live-in domestic workers. Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work only during the day. However, the FLSA contains exemptions for domestic service employees who provide “companionship services for individuals who (because of age or infirmity) are unable to care for themselves.” The FLSA regulation interpreting the meaning of “domestic service employment” and therefore the extent of the exclusion includes only companionship services workers who are employed by the person they are providing services for (rather than those employed by a third party agency). The Supreme Court recently held that the 29 C.F.R. § 552.109(a) FLSA regulation in the “Interpretations” section is the controlling interpretation. FLSA regulation 552.109(a) states that even companionship services workers who work for third party agencies are included in “domestic service employment” and therefore exempted from the FLSA.

Still, employers must pay live-in workers the applicable minimum wage rate for all hours worked.

Be sure to check your state’s wage and hour laws as many states do provide overtime relief for live-in domestic workers. For example, California provides time and a half to live-in domestic workers after nine hours worked in a workday and two times the regular pay after nine hours worked on the sixth or seventh day worked in a workweek. New York and New Jersey also give some overtime protections to live-in domestic workers under state law.

The FLSA regulations provide for a special interpretation of calculating hours worked for live-in domestic workers, which differs from the general rule. “In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits.” A copy of this agreement can be used to establish hours worked in the absence of a contemporaneous time record, allowing employers of live-in domestic workers to be exempt from the general FLSA record-keeping requirement. However, the employer must still show that this agreement reflects actual hours worked. The definition of free time for live-in domestic workers is the same as the general rule. “For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable

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255 Workers such as “babysitters employed on a casual basis, companions for the aged and infirm, and domestic workers who reside in their employers’ households” do not enjoy protection under FLSA. 165 A.L.R. Fed. 163; see 29 U.S.C. § 213(b)(21) (2000).

256 “Domestic service employment refers to services of a household nature performed by an employee in or about a private home... (t)he term includes, but is not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis.” 29 C.F.R. § 552.3 (2008).


258 See 29 C.F.R. § 552.3.


260 See 29 C.F.R. § 552.109(a).


263 Note that the “casual babysitting” exception of the FLSA domestic worker coverage is narrowly construed and is intended for teenagers and others not dependent on the income. See, e.g., Topo, 2004 U.S. Dist. LEXIS 4134, at *9-10.

264 29 C.F.R. § 552.102(a) (2008).

265 Id. at § 552.102(b).

266 Id.

267 Id. at § 552.102(a).
the employee to make effective use of the time."

Proving hours worked in domestic worker cases can be difficult since it is often the employer’s word against the employee’s. However, your client can produce evidence of the extent of their work with witnesses or lists of tasks that the employer may have ordered your client to complete. Domestic workers who were caring for children can corroborate their work schedule with the child’s daily schedule.

Farmworkers
Agricultural workers are entitled to the federal minimum wage of $5.15 per hour, with some exceptions. However, they are exempt from the FLSA’s overtime requirements. Keep in mind, however, that the FLSA definition of agriculture is fairly limited. Therefore, many packing shed workers, and any worker changing the raw, natural state of the agricultural product, are eligible for overtime.

Further exemptions apply to agricultural workers less than 16 years of age, particularly if employed by their parents. (See “Children” below.)

Joint employment liability almost always exists when agricultural employers utilize the services of farm labor contractors. In these situations, both the grower and the contractor are responsible for complying with the FLSA.

Agricultural employers must also comply with the Migrant and Seasonal Agricultural Worker Protection Act, which provides farmworkers with additional industry-specific protections. (See § V, “Migrant and Seasonal Agricultural Worker Protection Act.”)

Children
The FLSA provides both added protections and exemptions for children. The FLSA protects against oppressive child labor in three major areas: (1) hour regulation, (2) age limitations, and (3) regulation of hazardous occupations. The FLSA provides that no producer, manufacturer, or dealer shall ship or deliver goods using oppressive child labor.

In addition, “no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce...” can occur when the employer violates the minimum age or hazardous job requirements. The standard can vary greatly depending on the nature of the work (agriculture, non-agriculture or a job deemed particularly hazardous like mining and manufacturing), and whether the child is working for a parent. The largest exemption in child minimum age and hazardous job restrictions occurs when the child is employed by his or her parent or by a person standing in the parent’s place, except in manufacturing or mining occupations. These parental exceptions are particularly loose in the agricultural context. Additional regulations granted to the Secretary of Labor under section

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268 Id.
269 For domestic workers, it can be argued that sleeping with a child is working because the worker is giving the employer the benefit of their services by comforting or tending to the child.
270 Agricultural work is defined as work performed on a farm as an incident to or in conjunction with farming operations. See 29 U.S.C. § 203(f) (2008). The USDOL regulations further refine this definition. See generally 29 C.F.R. § 780, et seq. (2003).
275 Id. at § 212.
276 Id. at § 212(c) (basic child labor guidelines are found in this section).
277 Id. at § 203(l).
278 Id.
212(b) of the FLSA have added some substance to the FLSA guidelines. For example, youth under the age of 14 are not allowed to work any non-agricultural job with the exception of acting or delivering newspapers.\textsuperscript{280}

There are specific guidelines for youth engaged in work experience and career exploration programs.\textsuperscript{281} There is also minimum wage exception for youth. This allows an employer to pay any newly hired employee under 20 years old less than minimum wage.\textsuperscript{282} The pay rate is set at $4.25 for the first 90 consecutive calendar days of employment.\textsuperscript{283}

For details on required certification when employing children, see 29 C.F.R. § 570.5-.12.

**Non-Agriculture**

The minimum age standards in all occupations except agriculture are as follows:

- 16 years old is the general minimum age requirement.\textsuperscript{284}
- Youth who are age 14-16 may work in occupations other than manufacturing or mining when the employment does not overlap with school hours, or otherwise interfere with the child’s schooling or health and well-being.\textsuperscript{285}
- Youth who are age 14 and 15 cannot work more than 3 hours a day or 18 hours a week when school is in session and they cannot work more than 8 hours a day and forty hours a week when school is not in session.\textsuperscript{286}
- Youth who are age 14 and 15 can only work between 7:00 a.m. and 7:00 p.m. during the school year. The hours extend to 9:00 p.m. between June 1 and Labor Day.\textsuperscript{287}
- When the employment is found particularly hazardous by the Secretary of Labor or detrimental to their health and well-being, the youth must be 18 or older.\textsuperscript{288}
- Youth who are age 18 or older are not subject to any restrictions on jobs or hours.\textsuperscript{289}

**Agriculture**

The minimum age requirement for children working in agriculture is generally 16 when the employment is during school hours and the job is within the school district in which the minor is living at the time.\textsuperscript{290} There are major exceptions under agriculture that allow children younger than 12 to work when the employer is the child’s parent or a person standing in place of the parent on a farm owned and operated by this person.\textsuperscript{291} In addition, children under these circumstances are not protected against hazardous occupation as they would be in non-agricultural work. When the agricultural employment takes place outside school hours, the age limit drops to 14, though 12- and 13-year-olds may be employed with written parental consent and a child under 12 may be employed by his or her parent on a farm owned or operated by the parent or on a farm where all employees are exempt from the minimum wage provisions as per FLSA guidelines.\textsuperscript{292}

\textsuperscript{281} See id. at § 570.35.
\textsuperscript{283} id.
\textsuperscript{284} 29 C.F.R. § 570.2(a)(1) (2008).
\textsuperscript{285} id. at § 570.2(a)(1)(i).
\textsuperscript{286} id. at § 570.35.
\textsuperscript{287} id.
\textsuperscript{288} id. at § 570.2(a)(1)(ii).
\textsuperscript{289} id. at § 570.2.
\textsuperscript{290} 29 U.S.C. § 213(c) (2000).
\textsuperscript{291} 29 C.F.R. § 570.2(b)(1)-(2) (2008).
\textsuperscript{292} id.
Child Labor restrictions do not apply to:

- Youth over 14 when the work is not declared hazardous and the employment is outside school hours.\textsuperscript{293}
- Children age 12 or 13 with consent from a parent, or who work on the same farm as a parent, provided the work is outside school hours.\textsuperscript{294}
- Children under the age of 12 when employed by the parent or person standing in place of a parent on a farm owned by this person.
- Youth under 12 employed on a farm are exempt from minimum wage requirements outside school hours with parental consent.\textsuperscript{295}
- Children 10 or 11 working as hand harvest laborers for no more than 8 weeks in a calendar year, subject to USDOL waiver.\textsuperscript{296}
- There is limited protection for children under 16 for hazardous activities.\textsuperscript{297}

\textbf{Trainees}

The U.S. Supreme Court has held that trainees are not employees within the meaning of the FLSA.\textsuperscript{298} However, it is common for employers to misclassify employees as trainees to avoid complying with the FLSA’s minimum wage and overtime requirements.

The USDOL Wage and Hour Division has urged that the following factors be considered in determining whether someone is a trainee or an employee:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; [t]he training is for the benefit of the trainee; [t]he trainees do not displace regular employees, but work under close observation; [t]he employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his or her operations may actually be impeded; the trainees are not necessarily entitled to a job at the completion of the training period; [t]he employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.\textsuperscript{299}

In one human trafficking case, the Court engaged in a very detailed examination of these factors and concluded that the plaintiffs were employees, rather than trainees.\textsuperscript{300}

\textbf{I. Civil Penalties for Child Labor Violations}

FLSA section 16(e)\textsuperscript{301} specifically addresses civil penalties for violations of child labor.

- Each “oppressive child labor” violation, or violation of FLSA sections 12 or 13(c)\textsuperscript{302} is not to exceed $11,000 per employee.\textsuperscript{303}

\begin{itemize}
\item \textsuperscript{293} 29 U.S.C. § 213(c) (2008).
\item \textsuperscript{294} id.
\item \textsuperscript{295} 29 C.F.R. § 570.2(b) (2008).
\item \textsuperscript{296} id. at § 575.1(b)(5).
\item \textsuperscript{297} See id. at § 570.71 (listing particular jobs in agriculture considered hazardous).
\item \textsuperscript{300} See Chellen v. John Pickle Co., 334 F. Supp. 2d 1278, 1294 (N.D. Okla. 2004).
\item \textsuperscript{301} 29 U.S.C. § 216(e) (2008).
\item \textsuperscript{302} id. at 68, 212, 213(c).
\item \textsuperscript{303} The FLSA language outlining how to calculate the damages takes into consideration the available evidence of the violation in conjunction with the size of the business and gravity of harm. 29 U.S.C. § 216(e)(3) (2008); see also 29 C.F.R. § 579.5(a) (2008).
\end{itemize}
• Willful minimum wage and maximum hour violations — FLSA sections 6 and 7 — are $1,100 per violation.305

There is no private right of action for FLSA child labor violations. Therefore, any child labor violations should be reported directly to the USDOL.

J. Enforcement of the Fair Labor Standards Act
The injured worker can bring a claim in federal district court under the FLSA, or file a complaint with the USDOL. The USDOL has its own prosecutors, called solicitors, and may institute an action on behalf of one or more employees in federal court, but only if the employer is unwilling to cooperate. If the USDOL solicitors bring an action in court on the employee's behalf, the employee's right to bring a separate action under the FLSA terminates.306

It is important to keep in mind that the USDOL is charged with enforcing the FLSA and does not necessarily represent the interest of the worker. While the USDOL may be able to obtain a quicker judgment for the employee, a private lawsuit will give your client more control over the direction of his or her case. Be sure to check your state labor code as your state statute may provide for greater wage and hour protections than the FLSA, as well as additional remedies against employer misconduct.

VI. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT307

The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), affords significant protections to migrant and seasonal farmworkers. The AWPA imposes specific requirements for housing conditions, transportation safety and insurance, wage statements, payroll records, working arrangement enforcement, farm labor contractor registration, and disclosure of the terms and conditions of employment. Attorneys with farmworker legal services programs around the country have developed expertise in AWPA litigation. If you are representing a farmworker in a trafficking case and you are not familiar with the AWPA, please contact author Werner for a list of farmworker legal services providers in your area.

VII. TITLE VII308

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employers from discriminating against employees on the basis of any of the following protected categories: race, color, religion, national origin, or sex. The 1978 Pregnancy Discrimination Act amended Title VII to include pregnancy as a protected category.309 Employers may not “fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.”310

305 Id. at § 216(e)(2).
306 Id. at § 216(b).
307 Id. at § 1801 et seq.
308 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2008); Portions of this section were adapted with permission from the LEGAL AID SOCIETY, EMPLOYMENT LAW CENTER, WORKERS’ RIGHTS CLINIC EMPLOYMENT LAW MANUAL, 2003.
310 Id. at § 2000e2.
Title VII violations in the human trafficking context are common, particularly in situations of sexual, racial or national origin harassment and other types of discriminatory treatment. Note that Title VII only applies to employers with fifteen or more employees.311

A. Proving Discrimination
While discrimination in the workplace context arises in many variations, there are at least three discrete theories of proving employment discrimination. To establish a Title VII employment discrimination claim on the basis of race, color, sex, sexual orientation, national origin, age, religion, or disability, one of the following theories may apply: individual disparate treatment, systemic disparate treatment, and disparate impact.

*Individual Disparate Treatment*
Individual disparate treatment occurs when an employer treats an employee in a manner that differs from how other employees are treated on the basis of his or her race, color, religion, sex, or national origin. An individual disparate treatment claim must establish a *prima facie* case by demonstrating the following elements:

- the employee must be a member of a protected class;
- the employee must be either qualified for the job opening or performing satisfactorily in the job;
- an adverse action must have occurred against the employee; and
- evidence of discrimination after the employee was fired, not hired, etc., must be shown.

After the above elements have been established, the burden shifts to the employer to provide a “legitimate, non-discriminatory reason” for the adverse action. If the employer puts forth a legitimate, non-discriminatory reason, the burden shifts back to the employee. The employee must show that the employer’s reason was a “pretext,” which means the employer had a different, unlawful reason for its adverse action. An employee can establish a pretext through direct or indirect evidence.312

*Mixed Motive*
Mixed motive cases occur when the employer acted discriminatorily because of several motivating factors, one of which was the employee’s membership in a protected class. The employee can establish a mixed motive violation by proving that race, color, religion, sex or national origin was a “motivating factor” for any employment practice.313 However, if the employer demonstrates that it would have made the same decision without the “impermissible motivating factor,” the employer can avoid reinstating the employee or paying damages.

*Stray Remarks*
A stray remark has been defined as an ambivalent comment. More specifically, it is a comment by someone lacking the authority to make decisions, or by a decision maker that is unrelated to the actual decision-making process. If an employer makes a single, isolated, discriminatory comment it rarely suffices to establish employment discrimination.314

*Systemic Disparate Treatment*
Systemic disparate treatment arises when an employer discriminates against a worker and tends to similarly discriminate against many people who belong to the same protected class.315 Systemic disparate treatment may occur in the following manner:

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311 Id. at § 2000e.
**Facial Discrimination**

Facial discrimination cases arise when the employer has a policy or employment requirement that clearly discriminates against one group but claims that there is a legitimate reason for the policy. The legitimate reason defense can be met if the employer provides a justification for the policy or shows that the requirement is a “bona fide occupational qualification” or “BFOQ.” To establish this, the employer must show (1) the requirement is “reasonably necessary to the normal operation of the particular business;” and (2) without the requirement, “all or substantially all” of the excluded people would be unable to “safely and efficiently” perform the job, or dealing with people on an individual basis would be “impossible or highly impractical.”

**Pattern and Practice**

Pattern and practice cases occur when an employer has unstated policies that produce a “pattern and practice” of discrimination against a Title VII protected group within the company. Pattern and practice discrimination may be established through the use of statistical evidence illustrating a difference between the composition of the employer’s labor force and that of the “qualified relevant labor market.” Once the employee’s *prima facie* case is established, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the difference in composition between the employer’s labor force and the available labor force. If the employer meets this burden, the employee must show that the employer’s reason is a pretext.

**Disparate Impact**

A claim of disparate impact arises when one group of people is more adversely affected by an employer’s “neutral” employment practice than others. Under disparate impact claims, it is unnecessary to show the employer’s intent to discriminate. Instead, the employee must establish that the employment practice disproportionately has an adverse impact on a protected class, at which point the burden shifts to the employer. The employer must show that the practice is required by a business necessity. However, even if business necessity is shown, the employee can prove a violation if an alternative practice exists that would achieve the employer’s business necessity while having a lesser disparate impact.

**B. Sexual Harassment**

Sexual harassment is a form of sex discrimination in violation of Title VII. Traditionally, courts have recognized two different forms of sexual harassment: *quid pro quo* and “hostile work environment.”

**Quid Pro Quo**

Essentially, *quid pro quo* is a type of sexual harassment that involves adverse employment decisions resulting from an employee’s refusal to accept a supervisor’s demands for sexual favors or to tolerate a sexually charged work environment. The plaintiff’s *prima facie* case must show that he or she suffered a “tangible job action,” which the Supreme Court has defined as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

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317 Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 874-75 (7th Cir. 1994).
318 Griggs v. Duke Power Co., 401 U.S. 424, 431-2 (1971) (stating that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity...[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”).
“Hostile Work Environment”
A plaintiff employee can also establish Title VII liability by showing that he or she was unlawfully subjected to hostile, offensive, or intimidating behavior that is so “severe and pervasive that it alters the conditions of the plaintiff’s employment and creates an abusive working environment.”322 To prove a “hostile work environment” claim, the employee plaintiff must show that he or she was subjected to conduct that was (1) based on sex,323 (2) unwelcome,324 and (3) sufficiently severe or pervasive to alter the condition of plaintiff employee’s employment and create an abusive working environment.325

C. Other Harassment: Race and/or National Origin
Federal law requires employers to provide a work environment free of racial harassment, which may include taking positive steps to redress or abolish the intimidation of employees. Discrimination in violation of Title VII occurs where an employer fails to take reasonable action to eliminate racial harassment. An employee must show that the harassment is pervasive (more than isolated or sporadic events326) in order to establish a Title VII violation. Courts may look to the totality of the circumstances, the gravity of the harm, and the nature of the work environment in determining whether the harassment is sufficiently pervasive to constitute a violation. Other factors the court may consider are the relationship of the employee to the alleged perpetrator, and whether there is evidence of other hostility, such as sexual harassment, in addition to the racial harassment.

“Hostile Work Environment”
A “hostile work environment” has specific meaning and arises when the emotional, psychological, and physical stability of minority employees is adversely impacted by the racial discrimination in the workplace. Liability based on a “hostile work environment” theory may exist without a showing of economic loss to the employee. An employee can generally establish a “hostile work environment” by showing there is a continuous or concerted pattern of harassment by co-employees that remain uninvestigated and unpunished by management.327

323 Sex-based conduct may include, but is not limited to, sexual advances, requests for sexual favors, or other verbal, visual, or physical conduct of a sexual nature. However, a sexual harassment claim based on the creation of a hostile work environment need not have anything to do with sexual advances. See, e.g., Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (“[T]he harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”); Mentor Sav. Bank, (So long as the harassing conduct is based on gender, it violates the law as harassment based on sex, even if the harassment conduct is not in itself sexual). Accordingly, same-sex harassment is actionable under Title VII, regardless of the harasser’s sexual orientation. Oncale, 523 U.S. at 80 (“A trier of fact might reasonably find ... discrimination ... if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”).
324 A complainant may demonstrate that the conduct was unwelcome by showing, among other things, emotional distress, deteriorating job performance, that he or she avoided the harasser, that he or she informed friends or family of the harassment, that he or she complained to the harasser or other company representatives of the harassment, or absence of evidence showing the conduct was welcome or encouraged. The fact that sex-related conduct was “voluntary,” in the sense that the plaintiff employee was not forced to participate against his or her will, is not a defense to a sexual harassment suit. Mentor Sav. Bank, 477 U.S. at 67-68.
325 Id. at 65-69. To show that the harassing conduct was severe or pervasive enough to create an abusive working environment, the plaintiff employee must meet both an (i) objective and (ii) a subjective standard. Harris, 510 U.S. 17, 21 (1993). Under the objective standard, plaintiff employee must show that a reasonable woman would have considered the conduct severe or pervasive. Ellison v. Brady, 924 F.2d 872, 878 (1991) (“[A] female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.”). Or that in consideration of the totality of circumstances the environment was sufficiently hostile or abusive. Harris, 510 U.S. at 22 (listing factors considered in the totality of circumstances test). Under the subjective standard, plaintiff employee needs to show that she actually found the conduct sufficiently severe or pervasive to interfere with the work environment, id. The fact finder must take the plaintiff’s fundamental characteristics into consideration. Conduct by employer does not need to seriously affect an employee’s psychological well-being or lead the employee to suffer injury in order to be actionable under Title VII. Harris, 510 U.S. at 22 (“Title VII comes into play before the harassing conduct leads to a nervous breakdown... So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”).
326 See, e.g., Chelien, 434 F. Supp. 2d at 1106 (in trafficking case, hostile work environment existed where the workplace “was characterized by the severe and pervasive intimidation, ridicule and insult for the ... plaintiffs.”); but see Pierson v. Norcliff Thayer, Inc. 605 F. Supp. 273 (E.D. Mo. 1985) (denying Title VII violation claim where there were four specific instances of racial harassment).
327 Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 41 FEP 721 (7th Cir. 1986) (finding a hostile work environment where there was insufficient remedial action in response to racial jokes told by upper management).
Employer Liability for Behavior of Supervisors, Co-Workers, and Third-Parties

Traditional agency principles determine employer liability for the acts of supervisory employees. Employers are strictly liable for hostile work environment harassment by supervisors. There is no individual liability for supervisors under Title VII. When a non-supervisory co-worker harasses an employee, the employer’s conduct is reviewed for negligence. Once an employer knows or should know of harassment by a co-worker, remedial obligations begin, and the employer is liable for the hostile work environment created by a co-worker unless it takes adequate remedial measures. Employers may also be liable for the harassment of their workers by customers, clients, or personnel of other businesses with which the employer has an official relationship. An employer will be held liable if it has acquiesced to the situation, or simply failed to exercise any control it possessed to stop the harassment. Liability is generally denied when the employer takes appropriate steps to stop the harassment.

D. Retaliation by Employer

It is a violation of Title VII for an employer to retaliate against employees who make Title VII complaints. The plaintiff employee may still be able to assert a successful claim of unlawful retaliation even if the underlying claim of discrimination is found to be without merit. The employee’s conduct will likely be protected if his or her opposition was based on a “reasonable belief” that his or her employer was violating anti-discrimination laws. In addition, the plaintiff (the employee complaining of discrimination) need not be a member of the protected class of people who are being discriminated against.

E. Filing Process and Statute of Limitations

To assert a Title VII claim, the employee must first file a claim with the U.S. Equal Employment Opportunity Commission ("EEOC") to exhaust administrative remedies. The employee must file the discrimination claim with the EEOC within 180 days of the discriminatory act, or within 300 days if the state’s antidiscrimination law proscribes a longer period. In hostile work environment cases, the “continuing violation” doctrine applies. This means that the statute of limitations clock is reset with each new violation, and a charge is timely “so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.” However, the U.S. Supreme Court recently held that in some disparate treatment cases (expressly not hostile work environment cases), the time period to file an EEOC charge runs from the date the first discriminatory act occurred. Stated differently, “a Title VII plaintiff can only file a charge to cover discrete acts that ‘occurred’ within the appropriate time period.” Therefore, a subsequent manifestation of a discriminatory act, such as receiving a paycheck reflecting a discriminatory wage, does not necessarily become its own discriminatory act allowing for a new charging period. The Ledbetter decision and its progeny must be considered by any attorney examining when to file charges of discrimination with the EEOC. The employee should alleges all relevant allegations of discrimination in the administrative claim otherwise such claims may be barred from a later civil complaint for failure to exhaust. The EEOC receives and investigates discrimination charges, makes reasonableness findings and may litigate on behalf of the charg-
ing party. If the EEOC determines that there is no cause for a discrimination finding, the agency will issue a “dismissal without particularized findings” determination and the charging party should request a Right to Sue Letter, which is required before the employee can file suit against the employer in court.336 If the EEOC finds possible discrimination, the agency will informally attempt to negotiate a settlement with the employer. The EEOC may file a civil suit on behalf of the employee if the agency is unable to successfully negotiate an agreement, or it may issue a Right to Sue Letter to the employee authorizing a civil claim to be filed in court. The employee has 90 days to file a lawsuit after receipt of the Right to Sue Letter from the EEOC.337

F. Damages
An employer in violation of Title VII is liable for the employee’s back pay and front pay as well as compensatory and punitive damages and attorneys’ fees and costs.338 However, in trafficking contexts where the worker may have undocumented immigration status, back pay and front pay recovery may be limited.339 Compensatory340 and punitive damages for disparate treatment or intentional discrimination under Title VII are awarded pursuant to the Civil Rights Act of 1991.341 Title VII has damages “caps,” which limit the amount of compensatory and punitive damages that an employee can recover.342

42 U.S.C. § 1981 is an additional discrimination cause of action. Section 1981 prohibits discrimination in the making, performance, modification, and termination of contracts, including enjoyment of all benefits, privileges, terms and conditions of contractual relationships, as well as terms and conditions of employment. The statute covers discrimination only on the basis of race.343 This, in some circumstances, may also be extended to discrimination based on national origin.344

Section 1981 permits recovery of unlimited compensatory and punitive damages. Furthermore, it does not have the procedural filing requirements of Title VII and has a longer statute of limitations.345 It also allows a finding of liability against a defendant in his or her individual or personal capacity, which is not available under Title VII.346 Still, where section 1981 claims are brought arising out of the same facts as a Title VII claim, “[t]he elements of each cause of action have been construed as identical.”347 Section 1981 also allows for attorney’s fees and costs.348

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336 Id. at § 2000e-5(b).
337 See Chapter 3, § V(H), supra (describing the impact of Hoffman Plastics on FLSA coverage for undocumented workers.)
338 Compensatory damages may be available for other costs incurred as a result of the discriminatory act in addition to back pay, front pay and pre-judgment interest, such as medical expenses and emotional distress.
340 The maximum damage awards are: 1) 15-100 employees = $50,000; 2) 101-200 = $100,000; 3) 201-500 = $200,000; 4) 500 + employees = $300,000. Id. at § 1981. Please see the next section on 42 U.S.C. § 1981 for more information.
341 Id. at 1981(b).
342 Chellen, 434 F. Supp. 2d at 1104.
343 Id. at 1103 (“[B]ack pay and lost benefits [could be recovered] for an unlimited period of time.”).
344 Id. at 1107.
345 Id. at 1103 (quoting Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988)).
IX. KU KLUX KLAN ACT OF 1871

A claim may be brought under a provision of federal law emerged out of the Conspiracy Act of 1861 that was amended into its current form in the Ku Klux Klan Act of 1871 for the purpose of enforcing Fourteenth Amendment protections. It provides as follows:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, ... [and] ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The U.S. Supreme Court has found that this provision allows for a private right of action. What constitutes “class-based” discriminatory animus is an area of hot debate in the Courts. In the trafficking context, one court allowed a plaintiff to bring a section 1985(3) claim motivated by defendants’ “desire to deprive Plaintiff [of] her rights to be free from slavery as a direct result of Plaintiff’s being an alien, female, and of African descent.” However, another court found that “recent immigrants, including undocumented persons” was not a “class of persons” subject to the protections of this Act. The Court relied on Third Circuit precedent indicating that the court should examine, inter alia, “the immutability of, or the person’s ‘responsibility’ for, the particular trait.” The Court found that the members of the defined class bear responsibility for their status.

X. INTENTIONAL TORTS AND NEGLIGENCE

Tort claims provide compensatory damages for the distress suffered by the employee, as well as punitive damages meant to punish the employer. The statute of limitations for common law torts in many states is one year. Since some human trafficking cases lead to successful criminal prosecutions, analogous torts may not have to be proven under the doctrine of collateral estoppel. However, the absence of a criminal trial should not deter your client from pursuing tort claims. In civil cases, the burden of proof is a preponderance of the evidence, which is a lower standard to meet than the burden of beyond a reasonable doubt in the criminal context. Please note that tort law is extremely varied depending on jurisdiction. You should consult your jurisdictions application of tort laws. The following are torts that frequently occur in human trafficking situations.

A. Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress (“IIED”) involves:

- extreme and outrageous conduct by the defendant or the defendant’s agent;

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349 Id. at § 1985(3).
354 See Deressa v. Gobena, No. 05 Civ. 1334, 2006 U.S. Dist. LEXIS 8659, at *16-17 (E.D. Va. Feb. 13, 2006). As noted earlier, see Chapter 3, § II(B), supra, Plaintiff in this case also used § 1985(3) as a mechanism to allege a cause of action for violations of the Thirteenth Amendment and 18 U.S.C. § 1584. Id. at *13-14.
356 Id. at 319 (citing Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997)).
357 See Zavala at 319-20.
• intent to cause, or the reckless disregard of causing, emotional distress;
• severe or extreme emotional distress suffered by the plaintiff; and
• actual or proximate cause between the conduct and the distress.\textsuperscript{358}

Most states recognize IIED without requiring the victim to suffer physical manifestations of mental distress. “Extreme and outrageous” conduct is not clearly defined, however, mere rudeness or inflammatory behavior is not sufficient.\textsuperscript{359} The relationship between the plaintiff and the defendant is important. For example, continuous mocking or harassment by an employer toward an employee is more likely to be characterized as outrageous rather than taunting among equals.\textsuperscript{360}

\textbf{B. False Imprisonment}

The following generally are elements of false imprisonment:

• nonconsensual, intentional confinement of the plaintiff;
• no lawful purpose; and
• confinement for an appreciable length of time, no matter how short (can be 15 minutes).\textsuperscript{361}

Confinement can take several different forms: physical barriers; force or threat of immediate force against the plaintiff, his or her family, or others in plaintiff’s immediate presence or property; omission when the defendant has a legal duty to act; or improper assertion of legal authority. If a physical barrier is used to restrain the plaintiff, it must surround the plaintiff in all directions so that there is no reasonable means of escape.\textsuperscript{362}

In the trafficking context, one Court found that the plaintiff had sufficiently pled a false imprisonment claim even though the plaintiff at one point had a key to the residence while her traffickers were abroad. The Court found that the defendants’ “threats of arrest and prosecution and [plaintiff’s] fear of the [defendants] effectively imprisoned her on these occasions.”\textsuperscript{363} In another case, the Court found that the plaintiffs had sufficiently pled false imprisonment claims where defendant Wal-Mart allegedly locked them into their stores at night.\textsuperscript{364} The Court also discussed — without reaching any conclusion — the question of whether threats of deportation themselves can sufficiently support a claim of false imprisonment.\textsuperscript{365} Yet another court found that an individual defendant had falsely imprisoned the plaintiffs through a combination of physical confinement and threats.\textsuperscript{366}

\textbf{C. Assault}

The following are elements of assault:

• act intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and
• reasonable apprehension of such injury by the plaintiff (actual contact not required).\textsuperscript{367}

\textsuperscript{358} See generally Restat 2d of Torts, § 46; Lopez v. City of Chicago, 464 F.3d 711, 720 (7th Cir. 2006).
\textsuperscript{360} See, e.g., Patterson by Patterson v. Xerox Corp., 901 F. Supp. 274, 279 (N.D. Ill. 1995).
\textsuperscript{362} Id.
\textsuperscript{364} See Zavala, 393 F. Supp. 2d at 334-35.
\textsuperscript{365} Id. at 332-35.
\textsuperscript{366} See Chellen, 446 F. Supp. 2d at 1274-75, 1291 (in trafficking case, acknowledging that words and conduct inducing a plaintiff to believe that “resistance or physical attempts to escape... would be useless and futile” are sufficient to constitute false imprisonment).
\textsuperscript{367} See generally Restat 2d of Torts, § 21.
Intent needs to be proven. The defendant must desire or be substantially certain that the plaintiff will apprehend harm or offensive contact.\textsuperscript{368} Furthermore, the plaintiff must actually perceive the harm or offensive contact and the apprehension perceived must be imminent.\textsuperscript{369} Mere words alone do not suffice for an assault claim.\textsuperscript{370}

D. Battery
The following are elements of battery:

- the acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and
- an offensive [or harmful] contact with the person of the other directly or indirectly results.\textsuperscript{371}

Battery is actionable even in trivial physical contacts so long as they are harmful or offensive and without consent.

E. Fraudulent Misrepresentation
The following are elements of fraudulent misrepresentation:

- a misrepresentation (falsity, concealment, or nondisclosure);
- defendant knew of or consciously disregarded the statement’s falsity;
- defendant intended to induce the plaintiff’s action in reliance on the representation;
- plaintiff reasonably relied on the representation to his or her detriment; and
- plaintiff suffered damages.\textsuperscript{372}

The misrepresentation must be of a past or present material fact. Material fact is defined as information of importance to a reasonable person or where the defendant knows that the victim attaches importance to the fact in question. A representation that is technically true but conveyed to deceive a person constitutes a misrepresentation. A misrepresentation also occurs when the defendant has a duty to disclose but does not. In assessing the reasonableness of the plaintiff’s reliance on the misrepresentation, the court will take into account his or her particular qualities as well as the circumstances surrounding the case.

If you are making claims of fraudulent misrepresentation in your Complaint, you should keep in mind the Fed. R. Civ. P. 9(b) requires that such allegations be pled with particularity.\textsuperscript{373}

F. Negligence
Negligence is used when intention cannot be proven. It involves:

- **Duty:** a legally recognized relationship between the parties.
- **Standard of Care:** the required level of expected conduct.
- **Breach of Duty:** failure to meet the standard of care.
- **Cause-in-Fact:** plaintiff’s harm must have the required nexus to the defendant’s breach of duty.
- **Proximate Cause:** there are no policy reasons to relieve the defendant of liability.
- **Damages:** the plaintiff suffered a cognizable injury.\textsuperscript{374}

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\textsuperscript{368} See generally Restat 2d of Torts, § 32.
\textsuperscript{369} See generally Restat 2d of Torts, § 24.
\textsuperscript{370} See generally Restat 2d of Torts, § 31.
\textsuperscript{372} See, e.g., Me. Eye Care Assocs., P.A. v. Gorman, 2008 ME 36, P12 (Me. 2008); Chelten, 446 F. Supp. 2d at 1290.
\textsuperscript{373} See, e.g., Circle Group Internet, Inc. v. Fleshman-Hillard, Inc., 231 F. Supp. 2d 801, 803 (N.D. Ill. 2002) (citing Ackerman v. Nw. Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999)).
\textsuperscript{374} See John L. Diamond et al., Understanding Torts (2d ed. 2002).
G. Negligent Infliction of Emotional Distress
Unlike the tort of intentional infliction of emotional distress, negligent infliction of emotional distress does not require a showing of outrageous conduct as a prima facie element. However, there is authority to the contrary. Basically, negligent infliction of emotional distress involves:

- Defendant should have realized (and was negligent in not realizing) that his or her conduct involved an unreasonable risk of causing emotional distress.
- Distress, if it were caused, might result in illness or bodily harm.
- Requirement of physical injury: Courts have disagreed on whether actionable emotional distress must be accompanied by physical injury, with some holding that observable physical symptoms are required, and others holding that they are not. In some cases, claimants may be required to demonstrate that the physical injuries occurred contemporaneously with or shortly after the incidents causing emotional distress.

H. Trespass to Chattel and Conversion
Trespass to chattel and conversion are two different intentional torts that protect personal property from wrongful interference. In many cases both torts may be applicable.

I. Trespass to Chattel
Trespass to chattel is the intentional interference with the right of possession of personal property. The defendant's acts must either:

- intentionally damage the chattel;
- deprive the possessor of its use for a substantial period of time; or
- totally dispossess the chattel from the victim.

There is no requirement that the defendant act in bad faith or intend to interfere with the rights of others. It is sufficient that the defendant intends to damage or possess a chattel, which is properly possessed by another.

Unlike conversion, the doctrine of transferred intent has traditionally been applied to trespass to chattel.

J. Conversion
The following are elements of conversion:

- There must be an intentional exercise of dominion and control over a chattel.
- This exercise of dominion and control must so seriously interfere with the right of another to control the chattel that the defendant may rightly be required to pay the other the full value of the chattel.

Only very serious harm to the property or other serious interference with the right of control constitutes conversion. Less serious damage or interference may still be considered trespass to chattel.

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376 See Ericson v. City of Meriden, 113 F. Supp. 2d 276, 291 (D. Conn. 2000) (applying Connecticut law) (tort arises only where it is based upon conduct of the defendant that is egregious, outrageous, or done in an inconsiderate, humiliating, or embarrassing manner).
379 Freeman, 719 F. Supp. at 1000 (applying Kansas law).
380 See Diamond et al. at 20-24.
XI. CONTRACT CLAIMS

Victims of human trafficking may have contract claims for breach of written or oral contracts. The award of contract remedies precludes tort remedies in a majority of states, and therefore punitive damages regardless of the willfulness of the breach. It should be noted that contract law differs from state to state.

A. Breach of Written Contract
When there has been a written offer of employment that has been accepted by the trafficked client, and the trafficked person has not been paid the promised salary or given the promised job opportunity, a breach of a written contract is established.\(^{381}\) If the offeror fails to deliver what is promised in the written contract, then the offeree may be entitled to expectation or reliance damages.

B. Breach of Oral Contract
An oral contract is very similar to an implied agreement between the traffickers and the trafficked persons. In order to establish an oral contract, it is necessary to first establish that there was an intent to offer by the traffickers, and second, that the terms of the offer are sufficiently certain and definite. However, the inability to establish that the terms of the offer were “certain” or “definite” does not in itself preclude that an oral contract has been made.\(^{382}\)

C. Statute of Frauds
Generally, an oral contract is void if “by its terms [it] is not to be performed within one year.”\(^{383}\) The statute of frauds bar, however, may be overcome based on the “part performance exception and the doctrine of equitable estoppel.”\(^{384}\) In a trafficking case, the plaintiff defeated the defendants’ summary judgment motion based on a statute of frauds defense. The plaintiff successfully argued that, based on her alleged facts, she would meet the partial performance exception because there was “a fraudulent oral promise by the defendant upon which the plaintiff justifiably relied by engaging in acts that are ‘unequivocally referable’ to the oral promise, resulting in substantial injury to the plaintiff.”\(^{385}\)

D. Breach of the Covenant of Good Faith and Fair Dealing
Within every contract, there is an implied covenant of good faith and fair dealing. This covenant is meant to allow the terms of the contract to be interpreted fairly. Therefore, what constitutes a breach of the covenant depends on the particular terms of the contract. Even though the covenant is essentially an implied contract term, courts have occasionally held that the breach of the implied covenant of good faith and fair dealing can also constitute a tort.\(^{386}\) This allows for tort damages as well as contract damages.

E. Damages
Contract remedies are generally limited to compensatory damages of which the standard measure is expectation damages. Expectation damages are intended to place the victim of the breach in the position they would have been in if the promise had been performed. Future earnings or front pay may be recovered in the event of wrongful discharge and can substitute reinstatement, less any sum, which has been earned or could be earned through the plaintiff’s duty to mitigate damages. As an alternative, reliance damages are based on the non-breaching party’s costs and have the purpose of putting the non-breaching party back into the position they

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\(^{384}\) Id. at *11.

\(^{385}\) Id.

would have been in had the promise never been made.\textsuperscript{387} For example, reliance damages can be losses incurred as a result of the worker’s relocation due to the employer’s false representations regarding the employment.

\section*{XII. QUASI-CONTRACT CLAIMS}

Quasi-contractual obligations are imposed by the law for reasons of justice, as opposed to contractual obligations that are based on an agreement between parties.\textsuperscript{388} Accordingly, the terms of the quasi-contractual obligation are often “determined by what equity and morality appear to require after the parties have come into conflict.”\textsuperscript{389} Quasi-contracts differ from express and implied contracts in that the former develops independent of the intention or promises of the parties and instead depends on the benefit conferred on the breaching party.\textsuperscript{390} Quasi-contracts may give rise to rights in spite of the express refusal of a party.\textsuperscript{391} In fact, “quasi-contract” is somewhat of a misnomer, as it is often a remedy in the form of restitution, rather than a contractual agreement.\textsuperscript{392} Factors that are relevant to the court’s determination of how to restore the parties to the \textit{status quo} include: “the relative fault, the contractual risks assumed by the parties, any unjust enrichment or unjust impoverishment, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party.”\textsuperscript{393}

\subsection*{A. Unjust Enrichment}

Unjust enrichment has been defined as “circumstances which give rise to the obligation of restitution, that is, the receiving and retention of property, money, or benefits which in justice and equity belong to another.”\textsuperscript{394} Under the principle of unjust enrichment, a plaintiff can recover in restitution if (1) the plaintiff has conferred a benefit on the defendant; (2) the plaintiff conferred the benefit with the expectation of being compensated for its value; (3) the plaintiff’s expectation was known or should have been known to the defendant; and (4) allowing the defendant to avoid liability would unjustly enrich the defendant.\textsuperscript{395}

In a recent farmworker trafficking case, the Court denied the defendant’s motion to dismiss the plaintiffs’ unjust enrichment claim.\textsuperscript{396} Of note, the Court indicated that the defendant’s claim that he paid sub-contractors for the plaintiffs’ labor would not necessarily defeat an unjust enrichment claim, even if true.\textsuperscript{397}

\subsection*{B. Quantum Meruit}

\textit{Quantum meruit} is a theory of recovery in the form of restitution.\textsuperscript{398} The principle of \textit{quantum meruit} has been defined as a “recovery in which one party to a contract sues the other, not on the contract itself, but on an implied promise to pay for so much as the party suing has done. If one party refuses to perform his part, the other may rescind and sue on a \textit{quantum meruit}.”\textsuperscript{399} Generally, recovery in \textit{quantum meruit} requires the following elements:

\begin{itemize}
  \item [387] ATACS Corp. v. Trans World Commc’ns, Inc., 155 F.3d 659, 669 (3d Cir. 1998) (“Where a court cannot measure lost profits with certainty, contract law protects an injured party’s reliance interest by seeking to achieve the position that it would have obtained had the contract never been made, usually through the recovery of expenditures actually made in performance or in anticipation of performance.”).
  \item [388] \textit{Restatement (Second) Of Contracts} § 4 cmt. b (1981).
  \item [389] \textsc{Arthur Linton Corbin et al., Corbin On Contracts} § 1.20 (Matthew Bender & Co. 2004).
  \item [390] \textit{Restatement}, supra note 556.
  \item [391] Corbin, supra note 557.
  \item [392] \textit{Restatement}, supra note 556.
  \item [393] Corbin, supra note 557.
  \item [394] \textsc{Ballentine’s Law Dictionary} (3d ed. 1969).
  \item [395] \textsc{Eisenberg}, supra note 493, at s. 312.
  \item [397] \textit{id}.
  \item [398] \textit{Restatement}, supra note 556, at § 370 cmt. a.
  \item [399] \textsc{The Law Dictionary} (Anderson Publ’g Co. 2002).
\end{itemize}
1) the performance of services in good faith,
2) the acceptance of the services by the person to whom they are rendered,
3) an expectation of compensation therefore, and
4) a determination of the reasonable value of the services rendered.400

XIII. OTHER STATE STATUTORY CLAIMS

It is imperative to research your state statutes for additional claims that may provide relief to your trafficked client. For example, in Maryland, courts have discretionary authority to award treble damages for wage and hour violations.401 Connecticut law gives double damages for minimum wage, late payment, and other wage violations.402 In California, an employee may be entitled to double damages if induced to move based on a misrepresentation regarding the terms of employment.403 In addition, under section 17200 of the California Business and Professional Code, an unlawful, unfair, or fraudulent business act or practice can be challenged in court by any member of the public that may have been deceived. Remedies include restitution and disgorgement of wrongfully gained profits.404

CHAPTER 4
DAMAGES

I. BACKGROUND
Damages are perhaps the most important aspect of the trafficked plaintiff’s case. Whether received through a settlement or jury verdict, damages represent the final object of relief that plaintiffs are seeking through the lawsuit. Obtaining damages signify closure to the civil litigation and provide trafficking victims with the economic resources to move toward self-sufficiency.

II. PROCEDURE
A few general procedural rules apply to damages. First, the burden of proving the trafficked plaintiff’s claims in civil cases also applies to proving damages. Generally, the plaintiff must prove by a preponderance of evidence that she has suffered and will in the future suffer the losses for which he or she seeks relief. In some jurisdictions, a claim for punitive damages may require a more stringent standard.

Second, the “single judgment rule” requires a one-time recovery for each claim brought in the civil case. This rule prevents subsequent litigation for prospective harms resulting from injuries claimed in the original lawsuit. Thus, both past and anticipated future losses for injuries should be pled at the same time.

Third, the damage award may take the form of a lump sum or divided into periodic payments. Lump sum awards require that predicted future losses are folded into one damage award along with past losses. Attorneys should carefully calculate their award recommendation to account for their clients’ future economic needs and upon receipt of a lump sum award, advise their clients to invest wisely to generate favorable interest rates. The technicalities of calculating future damages to present day market values are described in the section on “Compensatory Damages.”

The alternative recommended by some tort reformers is a judgment requiring periodic payments. Such payments can be adjusted over time to accommodate changing facts in the amount of losses suffered by the plaintiff, such as fluctuating medical bills. There are increased administrative costs associated with resolving disputes over the amount of the periodic payments and lump sum awards are far more common.

Periodic payments may also take the form of a structured settlement. This is a voluntary agreement between parties in which the plaintiff agrees to receive periodic payments over time. The structured settlement relieves the plaintiff of the management responsibility of investing the lump sum award and diminishes the possibility that the lump sum award is exhausted within a few years. However, with a structured settlement, the plaintiff will not control the distribution of money and if administered through an annuity company, annuities may not be indexed to current inflation rates.¹

III. TYPES OF DAMAGES
The following section focuses on compensatory and punitive damages, which comprise the majority, if not all, of the trafficked plaintiff’s damage award. Other types of damages are also briefly mentioned.

A. Compensatory Damages
Compensatory damages are awarded as compensation, indemnity, or restitution for harm and are meant to restore the plaintiff back to his or her position before the injury occurred. There are two types of compensatory damages: economic and non-economic, also known as special damages or general damages, respectively. Economic or special damages consist of a plaintiff’s out-of-pocket losses proximately resulting from the defendant’s misconduct. Economic damages are theoretically tangible monetary losses most often including medical expenses and lost earnings. Non-economic or general damages are for a plaintiff’s pain and suffering, loss of enjoyment of life, and other similar intangible losses.

Compensatory: Economic Damages
Any actual losses flowing directly from the plaintiff’s injury that can be tangibly quantified are recoverable as economic damages. This includes, but is not limited to, lost earnings; medical expenses for physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; transportation; temporary housing costs; and child care expenses. To corroborate evidence of these losses, all receipts and affidavits attesting to these expenditures should be collected and recorded.

i. Lost Wages
The bulk of a trafficking victim’s economic damages will consist of past and future lost wages.

The most common formula for calculating lost wages is the minimum wage and overtime standard set forth by the FLSA or the applicable state labor code. However, a prevailing wage standard may also be applied where the work involved, under normal circumstances, was entitled to a higher than minimum wage rate. For illegitimate or illegal work, such as prostitution, a court may adopt an alternative formula to compensate the victims based on the amount that the defendants profited off the forced labor or the lost income potential of the victims during the period of the forced labor.

Past wages are calculated by tabulating the hours worked and multiplying the number of hours with the wage and overtime rate. Other employer violations of federal or state labor law, such as failure to provide rest and meal breaks, accrue monetary penalties that can also be counted toward a plaintiff’s actual damages.

Future wages may be awarded where the plaintiff’s injury reduces his or her ability to perform his or her job, or renders him or her unemployed. For trafficking victims, it can be argued that the harm of trafficking impairs the future earning potential the victims would have enjoyed had they remained in their countries of origin or had they entered the United States through appropriate channels. Thus, because of the trafficking, the victims’ possibility of employment is hindered due to their unstable immigration status, and little to no social support within the United States.

ii. Calculating Future Losses
If a trafficked plaintiff is claiming future losses, whether based on lost earning power or prospective medical expenses, the calculation of such losses should be adjusted to the plaintiff’s life expectancy, work life expectancy, and/or the expected duration of the plaintiff’s injuries. In addition, the total amount of future losses must be discounted to present day value to factor in inflation and earned interest. Thus, the amount of future damages that a trafficked plaintiff is awarded today must comprise a lesser total dollar amount to account for prudent investing that would earn interest or appreciate in value over time.

With respect to discounting future wage loss to present day value, courts apply one of two methods: “total offset” or “real interest.” The “total offset” method applies the same inflation
rate for both general inflation and wage inflation. The rationale behind this is that it achieves the same if not greater accuracy as assigning an inflation rate factor, while producing more predictable awards since juries won't be burdened with complex formulas. Opponents to this method believe that the total offset method incorrectly assumes that price and wage inflation cancel each other out. Therefore, the U.S. Supreme Court in *Jones & Laughlin Steel Corp. v. Pfeifer* supported the “real interest” method, identifying the following elements to calculate future wage loss to present value: (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate discount rate, reflecting the safest available investment. The Court endorsed the real interest rate as the appropriate discount rate for a damage award, a number between 1% and 3%. Ultimately, the approach taken in a given case will depend on that jurisdiction’s precedent and the arguments of each party’s attorneys and economic experts.

**Compensatory: Non-Economic Damages**

Non-economic damages primarily consist of pain and suffering, intended to compensate the plaintiff for the physical pain and mental suffering he or she has suffered as a result of his or her injuries. Physical pain is defined as the sensory pain experienced by the plaintiff from his or her injuries and from treatment of those injuries. Mental suffering includes the mental anguish resulting from physical injuries as well as non-physically induced emotional distress. Examples of emotional distress include worry, grief, anxiety, depression, and despair. Emotional distress also includes psychiatric disorders resulting from the defendant’s misconduct, such as Post-Traumatic Stress Disorder (PTSD). Many trafficked plaintiffs suffer from PTSD, triggered by the trauma of the trafficking experience, resulting in various symptoms, such as insomnia, memory difficulties, and feelings of fear and panic. This type of emotional harm is compensable. A plaintiff may establish evidence of pain and suffering through his or her own testimony as well as through the testimony of witnesses, such as medical and mental health practitioners and experts.

Courts have tended to avoid the use of well-defined guidelines to aid jurors in calculating the amount of pain and suffering damages. Some commentators have argued that the absence of clear guidelines has produced arbitrary and unpredictable awards for equally severe injuries. Some courts allow attorneys to make pain and suffering award recommendations, which greatly influence juries. Therefore, presenting a clear and predictable formula for calculating damages may play a key role in how much the jury awards the trafficked plaintiff.

One approach to the calculation of pain and suffering damages is the “per diem” method. This method places a daily monetary amount on the plaintiff’s suffering and multiplies that amount by the number of days that the plaintiff has been injured and will remain injured in the future. Some courts have rejected the per diem method, including the Supreme Court of California, which characterized this method as mere conjecture and an excessive measure of damages. Analysis of prior awards in similar cases may also provide some guidance on the determination of pain and suffering damages. Finally, attorneys should be aware that many states have attempted to alleviate the unpredictability of damage awards through statutory reforms, such as caps on

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6 Id. at 537–38.
7 Id. at 548.
10 Id. at 785.
12 Id. at 782.
pain and suffering damages. Attorneys should verify whether such a cap exists in their jurisdiction and calculate damages accordingly.

B. Punitive Damages
Punitive damages are awarded to punish and deter egregious conduct. Traditionally, only the most outrageous intentional conduct warranted the application of punitive damages. Now, many states have expanded the award of punitive damages for a range of misconduct. For example, in California, a plaintiff may recover punitive damages where the defendant is found “guilty of oppression, fraud, or malice, express or implied.” In a similar vein, Oregon allows punitive damages “to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future.” Though states vary in their standards for punitive damages, generally all states require behavior more egregious than negligence.

Procedure
The assessment of punitive awards calls for specific procedural rules. Some courts and legislatures have increased the burden of proving punitive damages from a preponderance standard to a clear and convincing standard and in some states, proof beyond a reasonable doubt. Some states have also implemented bifurcated proceedings to determine whether defendants are liable for punitive damages. In a bifurcated system, there are two trial segments. Defendants must first be found to have committed a tort or other injury and the compensatory damages assessed against them. Only then is the jury to consider punitive damages. Finally, many states have enacted statutory caps to limit the amount of punitive awards.

Ratios
In making recommendations for the amount of punitive damages, it is worth noting that the U.S. Supreme Court has provided certain parameters to prevent overly excessive punitive awards. The Gore guideposts include the reprehensibility of the defendant’s conduct, the ratio of punitive damages to actual and potential compensatory damages, and sanctions for comparable conduct. In State Farm Insurance Company v. Cambell, the Court specified the second factor, holding that the relationship between punitive and compensatory damages should be a single digit ratio. Thus, a punitive award nine times greater than the compensatory award may be considered excessive and an unconstitutional violation of a defendant’s due process rights. Influenced by the Gore decision, many state courts apply the principal that punitive damages should bear a “reasonable relationship” to compensatory damages and sometimes even provide a specific ratio of punitive to compensatory damages. Though the Gore guideposts do not provide an exact formula for ascertaining the correct amount of punitive damages, they are nonetheless helpful to gauge whether an attorney’s estimate is within the scope of what is a “legitimate” award.

Defendant’s Wealth
In many states, including California, the defendant’s wealth is also factor in determining the amount of a punitive damage award. Considering the defendant’s wealth facilitates achieving the optimal level of deterrence—that is, the amount of punitive damages that discourages the defendant’s future wrongful conduct,

20 CAL. CIV. CODE § 3295 (d); N.C. GEN. STAT. § 1D-30.
22 Id. at 575.
while not being overly burdensome. The plaintiff may have the burden of establishing the defendant’s financial condition and providing “the entire financial picture” of the defendant, including assets and liabilities, in order to justify a punitive award. For a trafficked plaintiff, establishing the defendant’s “entire financial picture” is difficult to accomplish where the wealth and debt of traffickers is hidden and unidentifiable. In other states, however, the defendant’s wealth is not considered essential in the determination of a punitive award and may only be considered if the defendant appeals the punitive judgment. Attorneys should therefore, consult the rules of their jurisdiction to strategize the calculation and granting of punitive awards to their trafficked clients.

**Vicarious Liability for Punitive Damages**

In many trafficking cases, plaintiffs seek to impose punitive damages on third party employers whose employees served as the primary agents for the trafficking violations. There are various jurisdictional approaches to this issue. Some courts allow claims for punitive damages to flow to employers for the misconduct of their employees based on a vicarious liability theory.

Other states implement a more stringent standard. For example, in California, an employer is liable for punitive damages based on the actions of an employee if “the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of other or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice.” With respect to corporate employers, California law further requires that the “advance knowledge” and “conscious disregard” be on the part of the corporation’s “officer, director, or managing agent.”

Still, other states follow the Second Restatement, which states that punitive damages can be awarded against “a master or other principal because of an act by an agent,” if:

- A) the principal or managerial agent authorized the doing and the manner of the act, or
- B) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- C) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- D) the principal or a managerial agent of the principal ratified or approved the act.

**C. Nominal Damages**

Nominal damages (e.g., $1) are symbolic damages to establish the rights of the plaintiff and/or to clarify that defendant committed the wrongful act. Nominal damages are usually awarded when the violation is established but no actual harm occurred or was proven with certainty.

**D. Injunctive and Other Equitable Relief**

Prohibitory injunctions order the defendant to refrain from certain activities while mandatory injunctions order the defendant to perform a particular act. Other types of equitable relief include restitutionary remedies, such as a constructive trust or equitable lien.

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26 Id. at 914-15.
27 Id. at 916.
28 Id. at 915-17.
30 Cal. Civil Code § 3294(b).
31 Restatement (Second) of Torts, § 909 (1965).
E. Liquidated Damages
Liquidated damages are the amount predetermined by the parties to a contract as the total compensation to an injured party should the other party breach the contract. Liquidated damages may also be set by statute, as with the FLSA, to remedy a breach of that statute.

F. Statutory Damages
Some state and federal labor and civil rights statutes allow for an award of statutory damages. This is usually a fixed amount (e.g., $1,000), or a maximum amount (e.g., up to $1,000) that either is automatically awarded, or that may be awarded instead of actual damages where actual damages are difficult to quantify.

G. Pre-Judgment Interest
In several circuits, pre-judgment interest is available on back pay awards if liquidated damages are not awarded. Courts differ on how to calculate prejudgment interest. Some courts base pre-judgment interest rate calculations on federal post-judgment interest rates calculated from the date the judgment is entered, “at a rate equal to the weekly average one-year constant maturity treasury yield.” Other courts have calculated the pre-judgment interest rate based on the prime rate from the date of injury to the date of judgment. Yet other courts utilize the state pre-judgment interest rate.

H. Attorneys’ Fees and Costs
The costs of litigation and the prevailing party’s reasonable attorneys’ fees may be awarded.

IV. INSURANCE

A. Collateral Source Rule
The traditional collateral source rule provides that payments received by the plaintiff for his or her injuries, from other sources, such as health insurance, public benefits, or charity, are not admissible in a civil action to reduce the defendant’s obligation to pay damages. Thus, a plaintiff is still entitled to the full amount of compensation from a liable defendant, regardless of the compensation the plaintiff may have obtained from “collateral sources.” The rule is intended to prevent an unfair windfall to the defendant for the plaintiff’s prudence in obtaining health insurance and/or the goodwill of charity in assisting the plaintiff’s needs. Approximately half of the states have eliminated the rule or restricted its application for specific claims, mostly in the context of medical malpractice and claims against public entities. Generally, the traditional rule will apply to trafficked plaintiffs receiving benefits and donations for their injuries — such compensation will NOT offset the amount of damages assessed against the defendant. However, damages against the defendant will be offset by the defendant’s payment of direct benefits to the plaintiff, intended as compensation for the plaintiff’s injuries.

32 Some appellate courts have held that pre-judgment interest for back pay awards under the FLSA is mandatory, see Usery v. Associated Drugs, Inc., 538 F.2d 1191, 1194 (5th Cir. 1976); McClanahan v. Mathews, 440 F.2d 320, 326 (6th Cir. 1971), or should be presumed to be appropriate, see Brock v. Richardson, 812 F.2d 121, 126–27 (3d Cir. 1987); Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986); Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 57-58 (2d Cir. 1984); Brennan v. Maxey’s Yamaha, Inc., 513 F.2d 179, 183 (8th Cir. 1975); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (4th Cir. 1969) (finding district court’s denial of pre-judgment interest was not an abuse of discretion). But see Clougherty v. James Vernor Co., 187 F.2d 288, 293–94 (6th Cir. 1951), cert. denied, 342 U.S. 814 (1951) (denying pre-judgment interest).


34 See, e.g., Cement Div., Nat’l Gypsum Co. v. City of Milwaukee, 144 F.3d 1111, 1114-15 (7th Cir. 1998) (finding the prime rate appropriate for calculation of pre-judgment interest); Donovan v. Dairy Farmers of Am., 53 F. Supp. 2d 194, 197-98 (N.D.N.Y. 1999) (awarding prejudgment interest from the date of the injury).

B. Homeowner’s Insurance as an Additional Source of Recovery

If a defendant trafficker owns a home, his or her homeowner’s insurance policy may be a source of recovery for the trafficked plaintiff. Homeowner’s insurance policies generally include both first-party and third-party liability provisions. These policies protect the policyholder against damage to the home, as well as injuries to third parties resulting from conduct in which the policyholder is found to be at fault. The personal liability provision in homeowner’s insurance policies generally extends injuries that occur both within and outside of the home. Homeowner’s insurance, in some cases, may provide up to $500,000 in coverage, providing trafficked plaintiffs with a deep pocket, protection against defendants declaring bankruptcy, and protection against defendants depleting their assets.

The key to triggering coverage of a trafficker’s homeowner’s insurance policy is to plead claims that are explicitly enumerated in the policy itself. The claim most often found in these policies is “negligence,” providing protection for accidental injuries to third parties that occur within the home and injuries caused by the policyholder’s unintentional conduct outside the home. However, some policies also protect against “false imprisonment,” and “invasion of privacy.” Early discovery of the trafficker’s insurance policy will determine the range of claims and the extent of the trafficker’s personal liability coverage.

If the policy does indeed cover a claimed injury, the trafficked plaintiff’s attorney should ensure that defense counsel has provided the complaint to the insurer. It may be possible at this point to settle with the insurer within the monetary limits of the policy coverage. If a settlement cannot be reached, litigation against both the trafficker and the insurer is a possibility.

V. TAX CONSEQUENCES

Damage awards received by trafficked plaintiffs will have tax consequences. For example, damages granted for lost wages are treated as income and therefore, taxable earnings. Punitive damages are also considered taxable gross income.

The tax treatment of compensatory damages for personal injuries was traditionally separated into two categories, physical injuries and non-physical injuries. Compensatory damages for physical injuries enjoyed tax exemption pursuant to United States Revenue Code section 104 (a), while emotional distress damages received no tax benefit. However, a recent D.C. Circuit case, *Marrita Murphy and Daniel J. Leveille v. Internal Revenue Service and United States of America*, held section 104 (a)(2) unconstitutional insofar as it allowed the taxation of compensatory damages for a non-physical injury that was unrelated to lost wages or earnings. The D.C. Circuit ruled that the complainant was owed the taxes that she paid on her damage award plus applicable interest. Thus, this opinion indicates some movement toward expanding tax exemption to pure emotional distress damages, which would benefit trafficked plaintiffs who suffered tremendous emotional harm, but not physical injury.

Tax rules are complex. To learn more about how tax regulations will impact the damage award in a trafficking case, it is imperative to seek the advice of a tax expert.

VI. PUBLIC BENEFITS

Depending on the amount of the damage award received by the trafficked plaintiff, government benefits he or she is receiving, such as health insurance, food stamps, and low-income housing may be affected.

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In general, tort payments, including worker’s compensation, are not exempt from the calculation of eligibility for government benefits unless they are codified as exempt in benefits’ or other related statute. For example, tort compensation relating to federal Holocaust Reparations is exempt from the calculation of eligibility for some public benefits. A worthy pursuit for those in any state would be to lobby for the legislative codification of the refugee and government benefits of those receiving tort payments from civil human trafficking cases.

Two important features of the damage award will impact a trafficked plaintiff’s eligibility for public benefits: the method of payment and the amount of damages. For example, small periodic payments of a damage award may preserve the trafficked plaintiff’s eligibility for certain benefits. However, it may be in the interest of the plaintiff to receive a larger lump sum award, forego benefits for a period of time, and reapply for them when he or she is in need. To strategize the continued receipt of benefits in light of a damage award, consult public benefits attorneys. The Western Center on Law and Poverty (www.wclp.org) provides a general manual on how to approach public benefits issues.
Identification and Legal Advocacy for Trafficking Survivors


PREPARED BY
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**Preface**

The NY Anti-Trafficking Network\(^1\) is a coalition of diverse legal and social service providers in New York State and surrounding regions dedicated to ending human trafficking and coordinating resources to provide services to trafficked persons. The Network’s Legal Subcommittee advocates on policy issues, advises on technical legal issues, and works toward educating the attorneys on the problem of human trafficking in its many manifestations. The Legal Subcommittee drafted this manual to provide guidance to lawyers on issues that arise in the context of representing trafficking survivors. The manual is designed for practitioners who are familiar with basic legal terms and concepts, to offer some insight into the process. It is not meant to be an exhaustive source of the law.\(^2\)

This manual is focused on the T visa, which was established by the Trafficking Victims Protection Act of 2000 (TVPA) and put into effect by immigration regulations published in January 2002. The T visa provides immigration relief to foreign nationals trafficked into the United States. If favorably adjudicated, it grants the survivor permission to remain within the U.S. and to obtain employment authorization for three years. At the end of the three years, or when the investigation is complete, the survivor is eligible to petition for permanent residency. This manual discusses the background of the T visa, suggests points to consider in evaluating a client’s eligibility for the T visa, evaluates the statute and the regulations, and offers step-by-step instruction on preparing a T application for consideration by the U.S. Citizenship & Immigration Service.

This manual is not meant to provide instruction on every aspect of representing survivors, or to take the place of direct legal advice, advocacy, and a practitioner’s own research and evaluation of the survivor’s case. Nor does this manual address in detail other avenues of immigration relief that may be available to trafficking survivors. These other avenues may include, *inter alia*: asylum, a petition under the Violence Against Women Act (VAWA), the U visa, and petitions for Special Immigrant Juvenile Status. We also encourage practitioners to be creative in exploring other possibilities for immigration relief on behalf of survivors.

Please access our website at [www.ny-anti-trafficking.com](http://www.ny-anti-trafficking.com) for updates and research on trafficking related issues.

\(^1\) The network was originally convened as the NYC Service Network for Trafficked Persons. The name of the network was changed to reflect the broad scope of work performed by the various members of the network.

Part A: Is The T Visa Appropriate For Your Client?

I. Introduction

Human trafficking is a contemporary manifestation of slavery and organized crime affecting men, women, and children worldwide. Violations of human rights are “both a cause and consequence of trafficking in persons.” The global problem of trafficking manifests itself in many forms as traffickers develop increasingly sophisticated methods to entrap individuals in modern-day slavery. To lure their victims, traffickers use false businesses and schemes, such as educational and work programs, matchmaking companies, mail-order bride companies, maid and domestic servant schemes, and illicit foreign adoptions. Often believing these opportunities to be legitimate, victims are then trafficked into sweatshops, agricultural labor, panhandling, the sex industry, and domestic servitude, to name a few.

Often trafficking crimes appear similar to alien smuggling and irregular migration, but are distinguishable by the nature of the associated human rights violations. Trafficking also encompasses labor law violations, gender-based crimes, and a myriad of other illegal activities. The Center for the Study of Intelligence characterized trafficking in persons generally as the use of force and deception to transfer the victim into circumstances of extreme exploitation. As defined by the Trafficking Victims Protection Act (TVPA) of 2000 and the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 and 2005 “trafficking” refers to “severe forms of trafficking in persons,” meaning:

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5 O’Neill Richard, supra note 3, at v.

6 Id. More specifically, the President’s Interagency Counsel on Women (which was established to ensure the implementation of the Platform for Action of the 1995 UN Fourth World Conference on Women, and coordinates international and domestic policy to develop policies and programs for the advancement of women) formulated the following definition: “Trafficking is all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons; within national or across international borders; through force coercion, fraud deception; to place persons in situations of slavery or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage.”


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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

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.\(^{10}\)

In January 2002, regulations were issued to elaborate on this statutory definition in order to provide law enforcement officials and immigration officers with a greater understanding of the new classification for victims of severe trafficking in persons and eligibility requirements for trafficking (T) visas. In December 2003, the TVPRA was signed into law. It was followed by the 2005 reauthorization in January 2006. Both reauthorizations provided broader protection to trafficking victims. For example, under these reauthorizations, statements of cooperation from state and local law enforcement should be considered for purposes of the Law Enforcement Agency\(^{11}\) attestation,\(^{12,13}\) a “trauma” exception was made for the requirement to cooperate,\(^{14}\) and T status and benefits was extended from a total of three years to four years.\(^{15}\) As of the drafting of this manual, additional legislative changes are being considered by Congress in the form of the 2007 Reauthorization.\(^{16}\)

As mentioned above, because of the range of crimes that trafficking encompasses, persons who are trafficked may come into contact with a number of different law enforcement agencies. For instance, if a child is trafficked into agricultural work, they may come to the attention of local law enforcement or social services, the Department of Labor, U.S. Citizenship & Immigration Services, Immigration and Customs Enforcement, or the Federal Bureau of Investigation.

\(^{10}\) In order to be eligible to apply for a T visa the primary applicant must meet this definition of “severe forms of trafficking in persons” trafficking. 8 CFR § 214.11(a).

\(^{11}\) 8 C.F.R. § 214.11(a). ‘LEA’ refers to any federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons. Qualified LEAs include, but are not limited to the offices of the Department of Justice, the United States Attorneys, the Civil Rights and Criminal Divisions, the FBI, the USCIS, the ICE, the United States Marshals Service, and the Diplomatic Security Service of the Department State.


\(^{13}\) This is the official “Law Enforcement Agency” attestation, also referred to as the “LEA” endorsement.


\(^{16}\) Currently, Congress is engaged in the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007. The U.S. Senate is pending passage of Senate Bill S. 3061 that expands protections for trafficked persons. The U.S. House of Representatives has passed a slightly differing version as HR 3887. Once Congress agrees on one bill and it is passed in both Houses there will be additional protections for trafficked persons. Please consider these future additions when working with trafficked persons starting in 2009.
The agencies most likely to come into contact with trafficked persons on a regular basis are U.S. Citizenship and Immigration Services (USCIS) or Immigration and Customs Enforcement (ICE). ICE investigates trafficking cases and assists with trafficking victims, while USCIS in Vermont adjudicates T visa petitions.

The TVPA and the TVPRAs respond to the international problem through a multi-pronged approach:

- the apprehension and prosecutions of traffickers;
- increased sentencing for traffickers;
- protection and assistance for recognized victims of trafficking the same as those available to refugees through the Office of Refugee Resettlement (ORR); Department of Health and Human Services;
- allowing victims assisting law enforcement to remain in the country during the course of the criminal investigation (“continued presence”); and
- providing victims with an opportunity to regularize their status in the U.S. to T nonimmigrant status, and later adjust their status to permanent residency (green card).

The purpose of this manual is to provide guidance on the last prong; namely, assisting victims with issues concerning their immigration status. While the most immediate form of immigration relief for a trafficking victim is the issuance of “continued presence,” the process for continued presence must be initiated by an LEA. T non-immigrant status, on the other hand, may be self-petitioned by the victim by filing Form I-914, Application for T non-immigrant status directly with the USCIS Vermont Service Center (VSC).

A. Initial Considerations in Case Evaluation

1. Immigration Status

Given the circumstances surrounding their entrance into the United States, victims of severe forms of trafficking usually have issues with the validity of their immigration status. The most common issues include the following:

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17 As of March 1, 2003, the Immigration and Naturalization Service (“INS”) ceased to exist, and the functions previously assigned to INS became part of the Department of Homeland Security (DHS). Within DHS, the functions of INS were divided into three separate agencies (also known as ‘legacy INS’). USCIS provides services and benefits to individual foreign nationals and employers; Customs and Border Protection (CBP) polices the nation’s borders and inspects visitors to the United States; and ICE is responsible for investigation, detention, and removal of unlawfully present foreign nationals has been assigned to the Bureau of Immigration and Customs Enforcement (ICE).

18 In order to be eligible for benefits, trafficking victims 18 years of age and older must be certified by the Office of Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services (HHS). Children are not required to cooperate with law enforcement in order to receive benefits.
entering the U.S. without passing through a border post or port of entry (known as “entry without inspection” or “EWI”). This may frequently be the case with individuals “smuggled in.”

entering on a tourist visa (B1/B2) and engaging in unauthorized employment. This is considered a violation of that particular status;

entering on a tourist visa (B1/B2) but overstaying the authorized period of stay on the I-94 Departure Record. Once an individual overstays the I-94 card by even one day, they are considered “unlawfully present.” There are serious and permanent consequences associated with unlawful presence;

entering on a fraudulent passport or using another’s passport. This constitutes visa fraud, and does not confer a valid non-immigrant status. However, if the individual did not overstay the I-94 (even though fraudulently issued) he or she is not considered to be unlawfully present.

entering the U.S. in a status valid for employment (such as H-1B – temporary worker, A-3 - domestic employees of foreign government official, or G-5 - domestic employees for representatives to international organizations) or for family reunification (K, V visas).

The validity of a T applicant’s immigration status is important because if an applicant is not in valid status, and he or she is being brought to the attention of USCIS or ICE, the applicant could be issued a Notice to Appear (NTA), and removal (deportation) proceedings may be commenced.

Another important consideration with violations of status or unlawful presence is that it may interfere with the T application, or if not at the time of T processing, may even interfere with future immigrant benefits (such as obtaining legal permanent resident status, the “green card”). However, for T visa purposes, trafficking survivors are not considered “unlawfully present” if they demonstrate that the severe form of trafficking “was at least one central reason for the alien’s unlawful presence in the United States.”

A waiver of inadmissibility may remedy status violations and are granted at the discretion of the USCIS. To request a waiver of “inadmissibility” on the above grounds, form I-192 and

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19 While being “smuggled” into the U.S. does not necessarily equate to being a victim of trafficking, it does not preclude it either.

20 Once an individual is “unlawfully present” all valid visas in his/her passport are automatically cancelled. Any future visas can only be obtained in the home country. Individuals who are unlawfully present for 180 days and leave the U.S. are barred for three (3) years from any U.S. immigrant or non-immigrant benefit. Individuals who are unlawfully present for a year or more and leave the U.S. are barred for ten (10) years from any U.S. immigrant or non-immigrant benefit. Therefore, even if an individual is issued a T visa, travel outside the U.S. may not be advised.

accompanying fee should be filed concurrently with the I-914.\textsuperscript{22} Note there is a separate filing fee for this application, and as of the drafting of this manual, there was no fee waiver available for the I-192.\textsuperscript{23}

2. **Liability for Criminal Behavior**

Another frequent issue that arises is the T applicant’s participation in criminal activity, albeit usually involuntary. Traffickers exert extreme control over trafficking victims and often require them to commit criminal acts. While this is recognized as part of the phenomena of trafficking, it is critical that liability for such acts does not interfere with the relief available to trafficked persons under the TVPA. In protecting your client from criminal prosecution, consider the following:

- When approaching law enforcement to discuss cooperation, attorneys should ask prosecutors for limited use or proffer agreements. Such agreements protect your client against his or her own statements, except for perjured statements. The goal is to protect your client from criminal or removal proceedings. Be aware that investigative agents may not offer proffer agreements.

- Attorneys and advocates should be wary of any prior arrests or convictions that may come back and haunt your client. If a victim was arrested, especially for a prostitution-related offense, it is critical to engage in aggressive advocacy that avoids a conviction, even if it is a low-level offense. As noted above, a criminal conviction may impact the client’s ability to stay in the United States and/or obtain legal permanent residency. PRACTICE POINT: ICE and USCIS will take into consideration if the conviction was caused by, or incident to, the victimization. However, it is better to advocate for an appropriate disposition.

- Another issue to consider with respect to the criminal justice process is the timing of a T visa application. The trafficker’s defense attorney could subpoena a victim’s application, claiming that it contains potentially exculpatory information or is inconsistent with other statements. Prosecutors are required to turn over potentially exculpatory evidence to the defense. In an effort to cooperate with law enforcement and the prosecution of the traffickers, it may be of assistance to wait until after a prosecution is complete before submitting a T visa application. Because this delay in filing the T application may delay your client’s eligibility for ORR benefits, attorneys and advocates should request law enforcement to issue “continued presence,” which would enable your client to obtain employment authorization and other ORR benefits. However, the decision to delay submission of the T application is in the best interest of your client, notwithstanding law enforcement’s needs, should be made on a carefully considered case-by-case basis.

\textsuperscript{22} This is outlined in more detail in Part B.

\textsuperscript{23} USCIS fee changes effective July 30, 2007 eliminated the I-192 from eligibility for a fee waiver.
3. **Privilege**

The attorney-client privilege is an established principle of law that protects communications between attorneys and their clients, when such communication is for the purpose of requesting or receiving legal advice. This privilege encourages openness and honesty between attorneys and their clients by prohibiting attorneys from revealing (and being forced to reveal) attorney/client communications. The privilege belongs to the client, meaning that only the client may waive the privilege to give consent to reveal the protected communications. However, certain situations may “break” the privilege, even if the client did not have the intention to reveal the communications. This includes the presence of a third party in attorney-client communication.

In the T application context, the presence of a social worker in the interview process or throughout the representation may break privilege. Once privilege is broken, the communication may no longer be kept private, and defense attorneys or prosecutors may be able to access clients’ statements. Limited exceptions to this rule include where the social worker, or other assistant, is acting solely in the context of an interpreter or translator, or where the social worker is there solely to facilitate the provision of legal services.

Generally speaking, communications between a lawyer and her client made in the presence of a known third party are not privileged. The theory is that such communications could not have been intended to remain confidential. Nevertheless, in circumstances where a client can demonstrate that she had a reasonable expectation of confidentiality and the communications were “made to [or in the presence of] agents of an attorney...hired to assist in the rendition of legal services,” the attorney-client privilege is not broken. This holds even where such communications were made entirely outside the presence of the attorney so long as the communications were made to the third party in order to facilitate the attorney’s representation of her client.

The federal courts have applied the privilege to diverse professionals working with attorneys including “a psychiatrist assisting a lawyer in forming a defense.” However, it is

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24 We are grateful to Dechert LLP for researching and evaluating this important, yet complex issue. This section provides only a cursory review of the memoranda provided to us by Dechert LLP. These memoranda are available for review at [www.ny-anti-trafficking.com](http://www.ny-anti-trafficking.com).

25 See, e.g., United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976). Although such “exceptions” may not break the privilege, it is extremely important that where a social worker is playing such a role, his or her function is fully documented as limited to that role. Should the social worker’s role go beyond translating or facilitating the provision of legal services, it may blur the line, making the privilege easier to pierce. Moreover, such exceptions are not absolute, and both the attorney and social worker should ensure that any communications are made in a setting most conducive to protecting the communications.


28 Note that this privilege applies to both the testimony and records of the third party. See e.g., Federal Trade Commission v. TRW, Inc., 628 F.2d 207, 212 (D.C.Cir. 1980)(citing United States v. Kovel, 296 F.2d 918 (2d Cir.1961)) (Finding the reports prepared by a third party privileged where report prepared at request of attorney and “the purpose of the report was to put in usable form information obtained from the client.”).

29 Occidental Chemical Corp. v. OHM Remediation Services Corp.,175 F.R.D. 431, 437 (W.D.N.Y. 1997).
important to remember that this jurisprudence protects communications made to an attorney or on behalf of the services provided by an attorney, it does not extend beyond the scope of representation provided by an attorney.

A separate question is whether there is a privilege protecting communications between a social worker and a client made pursuant to providing other services, such as counseling, assisting with housing, medical assistance, et cetera. This is not as well established in the law. In very broad terms, the issue seems to turn on the professional level of the social worker, i.e. licensure or certification, the expectations of the client as to confidentiality of the communications, and the purpose of the communications. For example, the Supreme Court recognizes “the ability to communicate freely without the fear of public discourse [as] the key to successful treatment” in psychotherapy and clinical social workers. However, it is not clear how far this privilege extends. Moreover, in state courts, privilege is adjudicated under state law, and each state has different rules regarding this matter. Therefore, social workers and social services organizations need to take every precaution to protect clients’ communications, and/or to advise clients that such communications may not be confidential.

4. “Smuggled In” Versus “Trafficked In”

Many victims of trafficking are brought into the United States without going through border points of inspection. Basically, they are “smuggled” into the U.S. However, there are individuals who are smuggled into the U.S. because they are fearful of crossing the border lawfully, or do not have a valid visa to enter the U.S. and they nevertheless want to enter the country, or need to enter to escape persecution. Their interaction with the smuggler is limited and usually involves a transaction of entry for payment.

While many seek better lives in the U.S., those who are smuggled in may not be encompassed in the definition of trafficking, which usually involves an on-going relationship with the facilitator or one of the facilitator’s networks. Therefore, being “smuggled” into the U.S. does not necessarily equate to being a victim of a severe form of trafficking for T visa purposes. However, it does not necessarily preclude it either, and advocates should explore whether the smugglers engaged in any behavior that would make them “traffickers” and whether your client meets any of the requirements for the T visa.

5. “Labor Exploitation” Versus “Trafficking”

While most trafficking cases do involve some form of labor exploitation, labor exploitation does not always rise to the level of trafficking. Labor exploitation involves extremely low wages,

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31 As of this writing, Dechert LLP has researched social worker privilege in New York, New Jersey, Florida, Texas, and Arizona, available at www.ny-anti-trafficking.com/publications.html.

32 Legal Aid Foundation of Los Angeles (LAFLA) has also done substantial research on the social worker privilege issue. Their website is www.lafla.org.
usually below minimum wage, long hours, poor working conditions, lack of avenues of redress, and may be linked to various forms of mistreatment of immigrants. A situation becomes “trafficking” when it involves the use of force, fraud or coercion that creates a climate of fear preventing the individual from leaving the situation. It is important to screen individuals presenting with labor exploitation claims for trafficking.

**B. Continued Presence and Certification**

Recognizing that trafficking cases require extensive, and often lengthy, investigation by multiple law enforcement agencies, the TVPA created two remedies for trafficking victims to ensure their well-being from the time of discovery through case resolution. This includes ‘continued presence’ and the ‘T’ non-immigrant status, the latter of which will be discussed in more detail in the section below. Both of these remedies give the trafficked person access to services such as shelter and medical care, services that are absolutely necessary to their survival. However, continued presence is a more immediate form of relief, optimally taking only a few weeks to process.

Continued presence ensures law enforcement of the victim/witness’ availability to participate in the prosecution of the traffickers. If the witness is no longer in the country or is convicted of a crime, continued presence may be terminated. It is important to recognize that eligibility for continued presence does not require an imminent prosecution, nor that a victim actually rendered assistance to law enforcement. Rather, recognizing the immediacy of the victim’s needs and the stop-gap capability of continued presence, Congress worded the statute so that the victim may only be a potential witness:

> Federal law enforcement officials may permit an alien individual’s continued presence in the United States, if, after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible….(emphasis added).

It is clear from the language of the regulations that any trafficking victim that was cooperative with law enforcement should be eligible for continued presence, even if they are not ultimately selected as a witness.

As stipulated by the regulation, only LEAs may initiate the process. However, state or local law enforcement can partner with a federal law enforcement agent in their investigation, requesting that the federal agent apply for continued presence on behalf of the victim. Continued presence

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33 TVPA §107(C)(3) “Federal law enforcement officials may permit an alien individual’s continued presence in the United States, if, after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible…..” See also 28 CFR 1100.35.

34 8 CFR §214.11.

35 28 CFR 1100.35.
does not require the victim to make a formal statement, and in fact, prosecutors often do not want victims to make such statements during an investigation if there is going to be a criminal trial. Also for this reason, law enforcement may be unwilling to provide the endorsement for the T status until the criminal trial is over or the investigation is concluded.

In practice, a grant of continued presence is issued for up to a one year increment, and may be extended. Continued presence in and of itself does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted. Such forms may include parole, deferred action, voluntary departure or stay of a final removal order. However, “documentation from the Service granting continued presence...will be considered as primary evidence that the applicant has been the victim of a severe form of trafficking in persons” unless such status has been revoked.\footnote{8 CFR § 214.11(f)(2).}

Once continued presence has been granted, ORR generates a letter for adults “certifying” that the individual is recognized as a victim of a severe form of trafficking, or for children that they are eligible for services as victims of a severe form of human trafficking.\footnote{This certification does not guarantee approval of a T non-immigrant status, as such status also requires evidence of cooperation with reasonable requests from law enforcement.} At this point, victims are eligible for an Employment Authorization Document (EAD). The EAD is usually issued shortly after grant of continued presence, at which point a Social Security card can be obtained.\footnote{Employment may begin immediately upon receipt of the EAD, it is not necessary to receive the Social Security number. As a practice point, it may be difficult to obtain the card with just the EAD. Advocates may want to pursue obtaining a passport or copy of a birth certificate from the consulate of the client’s country of origin.}

In addition to an EAD, victims may choose between public benefits or a Match-Grant program. A refugee resettlement agency can assist with both. For those who do not have the language or other skills to obtain immediate employment, or for those who are still traumatized from their experience, public benefits that include food stamps, cash assistance, Medicaid, and SSI may also be selected. These are the same benefits offered to those who enter the U.S. as refugees or who are granted asylum. Under federal rules, benefits are generally available for nine months, but various state implementation of these benefits by various agencies may allow for a longer period.

In the alternative, victims may instead elect to enter into a Match-Grant program. A Match-Grant program is a three-month intensive program that may include English as a Second Language (ESL), job training and skills, computer training, or other benefits. Either Match-Grant or refugee benefits must be elected within 30 days of issuance of the ORR certification letter. If benefits are not elected during this period, they are not allowed to reapply. However, other public benefits may still be an option at any time depending on the victim meeting eligibility standards, which may vary state by state.
II. Qualifying for T Visa Status: Regulatory Elements

It is difficult both to identify a trafficked person, and to determine when such a person qualifies for the T visa. As discussed in the section on smuggling, advocates must be attuned to the particulars of their client’s situation as most do not self-identify as trafficked persons. Often, it is helpful to determine why they originally came to this country, how they got here, and what has happened to them since. Many trafficking cases may initially present as domestic violence, sexual abuse, or labor law violations. If an advocate is aware of the client’s legal remedies, however, they may be able to more fully assess the client’s situation. The annexed suggested questions at the end of Part B may be of assistance in an initial evaluation.\(^{39}\)

Particularly challenging are cases that involve child victims. By definition, a trafficked child has already undergone an incredible trauma, repeatedly recognized in the various examples cited in the Conference Report.\(^{40}\) As with other child victims of trauma, coming forward to law enforcement about their situation is complex and emotionally difficult if not handled in a sensitive manner. Often, the child victim was trafficked by a relative or trusted adult and may not want to get this person “in trouble” despite the abuse that the child has suffered. The TVPRA recognized this in the providing that children under 18 years old need not demonstrate that they have been willing to comply with any reasonable request for assistance in the investigation or prosecution of trafficking.\(^{41}\)

Since trafficked persons suffer such extreme types of abuse, it might seem that they would be open to discussing their experiences in order to receive help. In fact, the opposite is true—trafficked persons are often reticent about discussing their situation or admitting to having been victims of coercion. It can take multiple meetings with a client over a period of months to obtain information that clarifies the situation to determine if he or she is a candidate for a T visa.

Practice Points for interviewing a potential T visa applicant:

- **Body language is key:** Especially in an initial meeting, a client may be telling you far more with his or her body language (looking down, not engaging in eye contact, lack of affect/disengaged demeanor, or fidgeting with hair or jewelry) than through verbal communication. It is important to observe the client’s body language as a way to build communication. For more guidance on this issue, please see the SWP/NYANA screening tool in the resources section of this manual.

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\(^{39}\) Prepared by Christa Stewart, Esq., formerly Director of Legal Services, The Door.


\(^{41}\) New Classification for Victims of Severe Forms of Trafficking in Persons, 67 Fed. Reg. 4784, 4785 (Jan. 31, 2002) (codified at 8 C.F.R. Parts 103, et al.). “Children who have not yet attained the age of 15 at the time of application are exempt from the requirement to comply with law enforcement requests for assistance in order to establish eligibility.” This was changed to include all children under the age of 18. TVPRA § 4(b)(1)(a).
- **Do not overwhelm the client**: Trafficking cases are complex and they often involve numerous law enforcement and non-governmental agencies. It is helpful to keep an initial meeting to less than one hour, and if necessary to facilitate the provision of legal services, have a case manager or social worker accompany the client to the meeting.  

- During this initial meeting, review:
  
  - why the client has been referred to you for representation;
  - the definition of trafficking, under the TVPRA; and
  - the different individuals and agencies that may be involved in the client’s case.

It may be helpful to show the client the *SWP Diagram of a Trafficking Case*, attached in Resources.

For guidance on subsequent meetings please see *SWP Human Trafficking Intake Guide* attached at Resources.

### A. T Visa Eligibility

Upon identifying an individual as a possible victim of trafficking, the practitioner should evaluate the individual’s eligibility for the T visa. All T visa applications are currently adjudicated within the VAWA/T/U Visa Unit at the VSC. Over the years, VSC has provided insight into the adjudication process and guidance on the types of documentation they look for in adjudicating petitions. This guidance has been incorporated into the practice points noted in the sections below.  

In order to be eligible for the T visa, each applicant must demonstrate that he or she:

- is or has been a victim of a severe form of trafficking in person;
- is physically present in the United States due to trafficking;  
- has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons (if they are over 18); and
- would suffer extreme hardship involving unusual and severe harm if removed from the United States.

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42 Refer to section on privilege.

43 VSC Hotline for VAWA/T/U petitions is (802) 527-4888.

44 This includes American Samoa and the Commonwealth of the Northern Mariana Islands.

45 TVPA § 107(C), 8 CFR 214.11(b).
Additionally, the applicant must also demonstrate that he or she

- has not committed a severe form of trafficking in persons offense; and

- is not inadmissible under INA § 212.46

Upon a finding by USCIS that the applicant has made a *bona fide* application for a T visa, ORR will issue a certification or eligibility letter as it does when continued presence is granted. However, an applicant is only entitled to obtain such certification and benefits once. If applicant received such benefits pursuant to a grant of continued presence, he or she will not later be eligible for such benefits even if USCIS issues a notice confirming that the petition is *bona fide*. In this situation, applicants will only receive additional benefits should the T visa petition be approved.

If USCIS does not issue a *bona fide* notice, applicant will only be able to obtain benefits upon approval of T status. This will most likely occur when adjudication of the *bona fide* standard is concurrent with the adjudication of the T visa.

**B. Definition: Victim of a Severe Form of Trafficking**

Under the TVPRA, victims of both sex trafficking and labor trafficking may be eligible for relief. According to the TVPA, victims of “severe forms of trafficking in persons” include:

- **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

- 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.47

The component terms are defined by the regulations as follows:

- **Sex trafficking**: the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act;48

- **Coercion**: threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an

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46 Waivers of certain inadmissibility grounds are available for T visa applicants. A request for a waiver can be made by filing form I-192. However, as of the drafting of the manual, there was a non-waivable filing fee of $545.

47 TVPA § 103(8), 8 CFR § 213.11(a) (emphasis added). In order to be eligible to apply for a T visa the primary applicant must meet this definition of trafficking.

48 8 CFR § 214.11(a). Where as a “commercial sex act” is any sex on account of which anything of value is given to or received by any person.
act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process;\textsuperscript{49}

- **Debt bondage**: the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or the services of a person under the debtor’s control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not appropriately limited and defined;\textsuperscript{50}

- **Involuntary servitude**: a condition of servitude induced by means of any scheme, plan or pattern intended to cause a person to believe that, if the person did not enter into or continue in such a condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of legal process;\textsuperscript{51} and

- **Peonage**: status or condition of involuntary servitude based upon real or alleged indebtedness.\textsuperscript{52}

In order to establish that your client is a victim of a severe form of trafficking in persons, he or she must either submit\textsuperscript{53} an endorsement from a law enforcement agency on Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victims of Trafficking in Persons,\textsuperscript{54} or sufficient credible secondary evidence, describing efforts to cooperate with law enforcement, as well as the nature and scope of any force, fraud, or coercion used against the victim.\textsuperscript{55} This may include, inter alia, evidence that the USCIS has granted the alien’s continued presence in the United States as a victim of trafficking.\textsuperscript{56}

T visa determinations will be made under the “all credible and relevant evidence” standard.\textsuperscript{57} Therefore, your client should first attempt to obtain an LEA endorsement or ICE evidence of

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} Id.  This definition adopts the holding in United States v. Kozminski, 487 U.S. 931, 952 (1988).

\textsuperscript{52} Id.


\textsuperscript{54} 8 CFR § 214.11(f)(1).

\textsuperscript{55} 8 CFR § 214.11(f)(3).

\textsuperscript{56} 8 CFR § 214.11(f)(2).

\textsuperscript{57} 8 CFR § 214.11(f)(3).
status as a trafficking victim. This evidence carries significant weight in T visa determinations as agency endorsements are considered “primary evidence” and are strongly encouraged.\textsuperscript{58}

In compelling cases, however, secondary evidence may be sufficient. Secondary evidence may be presented in the form of a personal statement and supporting documents. This evidence should demonstrate that applicant fits the TVPA definition of a victim of a severe form of trafficking in persons. Any credible evidence of victimization and cooperation should be included. Such evidence may include, but is not limited to:

- a grant of continued presence or ORR certification;
- a description of what the person has done to report the crime to an LEA;
- a statement indicating whether similar records for the time and place of the crime are available; and
- any evidence that the applicant made “good faith attempts” to obtain the LEA endorsement and a description of those efforts.\textsuperscript{59}

A detailed affidavit from the applicant must be included with the petition, and must describe in depth the circumstances of the trafficking. Suggested issues that should be addressed in the affidavit are outlined in Part B.

In addition to the applicant’s affidavit, a psychological evaluation is often helpful to clarify underlying issues regarding the client’s motivation for either taking or failing to take certain actions. Psychological evaluators may unearth critical information that a client neglects to tell his or her attorney. This is because frequently a client is too ashamed to disclose such information to the attorney, but which comes out in the safer space created with a counselor.

Finally, note that a minor involved in prostitution or commercial sex act who is under the age of 18 at the \textit{time of filing} the T visa application is considered a victim of a severe form of trafficking. This means that the applicant does not need to identify a trafficker in his or her affidavit, and is not required to cooperate with law enforcement.

\textsuperscript{58} 8 CFR § 214.11 (f)(2).

\textsuperscript{59} 8 CFR § 214.11(f)(3). \textit{See also VAWA Manual, supra note 47, at 5.} Fax a request for an investigation to the U.S. Department of Justice Civil Right’s Division Criminal Section Trafficking Unit at (202) 401-5487 and retain a copy of the fax confirmation sheet for the T visa application.
C. Physically Present

Your client must demonstrate physical presence in the U.S., American Samoa, or Northern Mariana Islands on account of trafficking.\(^60\) As an emerging area of law, there is no clear guidance on what it means to be present “on account of trafficking.” The current understanding is that an applicant is considered present on account of trafficking if he or she is currently held or recently liberated from trafficking situations. An applicant does not need to be trafficked to the U.S. in order to meet this requirement. Physical presence may include situations in which the applicant has been in the U.S. for a period of time and then subsequently trafficked in the U.S.

If a victim has fled or been liberated from a trafficking situation, he or she must establish that there was no “clear chance to leave” the United States in the interim, in light of individual circumstances such as trauma, injury, fear, lack of monetary resources or documentation, \textit{et cetera}. A victim may also be permitted to remain for purposes of assisting law enforcement. If a victim leaves and returns to the United States, he or she may no longer be eligible unless they can establish that the return was the result of continued victimization by traffickers or a new incident of trafficking.\(^61\)

Applicant must be physically present in the U.S. "on account of" trafficking. If the applicant has made trips abroad, including a brief visit home for family/safety reasons, he or she will need to document that their return to the U.S. is related to the trafficking. Any departures from the US should be addressed in the affidavit. Once again, a psychological evaluation may be useful to uncover and explain the client’s underlying reasons for leaving the country and then returning, as well as the client’s state of mind and level of fear while he or she was outside the U.S.

D. Complied With Any Reasonable Request To Assist Law Enforcement and the Trauma Exception

Adult applicants must cooperate with any reasonable requests for assistance from LEAs and prosecutors in actions against human traffickers.\(^62\) LEA refers to any federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons. Qualified LEAs include, but are not limited to, the offices of the Department of Justice, the United States Attorneys, the Civil Rights and Criminal Divisions, the FBI, USCIS, ICE, United States Marshals Service, and the Diplomatic Security Service of the Department of State.\(^63\)

\(^60\) 8 CFR § 214.11(g).

\(^61\) 8 CFR § 214.11(g)(3).

\(^62\) Victims of trafficking under the age of 18 do not have to meet this requirement.

\(^63\) 8 CFR § 214.11(a).
State and local law enforcement agencies are not currently included within the regulatory definition of an LEA for purposes of T visas. However, statements from state or local law enforcement documenting the applicant’s compliance with reasonable requests for assistance are considered valid secondary evidence. In some cases, states that have passed anti-trafficking legislation mandate state and local law enforcement agencies to provide such statements to support the client’s application for a T visa.

It is usually best to wait until a criminal case is complete before filing a T visa application. The filing or approval of a T visa application may be a factor that the defense uses against a client/witness, or they may use the victim’s statements from the T visa application. If the client must have an application filed before the criminal case is over (because of age or derivative issues), the T application may be filed without an LEA, but secondary evidence of cooperation must be included.

If the client has cooperated with ICE, and especially if he or she has Continued Presence, the ICE Agent involved in the client’s case will have created an “A file” on the client. When the VSC adjudicates the client’s application, they will need the “A file.” In the application’s cover letter, include the name, jurisdiction and telephone numbers for the ICE Agent (in bold format.) In addition, call the ICE Agent to have him or her send the A file to VSC.

To qualify for a T visa, the applicant must either report the crime or have responded to inquiries from an LEA. The only exception to this is if the applicant qualifies under the trauma exception. In fact, the TVPRA of 2005 made it unreasonable for law enforcement to request a trafficking survivor to assist in the investigation or prosecution of a trafficking crime if the Secretary of Homeland Security determines he or she is unable to cooperate “due to psychological or physical trauma.” An applicant who is unable to cooperate with law enforcement because of psychological or physical trauma is exempt from the LEA endorsement.

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64 VAWA Manual, supra note 47. As note above, while the TVPRA expanded the definition of qualified LEAs to include state and local law enforcement, USCIS is not currently implementing this section of the law.

65 While the TVPRA of 2003 permits LEA endorsement to come from state or local law enforcement officials, current policy as announced by U.S. Citizenship & Immigration Services Associate Director of Operations William Yates in an April 15, 2004 memorandum is that this provision must wait for further guidance to be in effect. TVPRA of 2003 § 4(b)(2).

66 New York’s anti-trafficking law, for instance, states: “Upon the request of a human trafficking victim or a representative of a human trafficking victim, the state or local law enforcement agency or district attorney’s office shall provide the victim with the United States Citizenship and Immigration Service (USCIS) Form I-914 Supplement B Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.” N.Y. Soc. Serv. Law § 483-dd (2008). Meanwhile, California’s anti-trafficking law states: “Within 15 business days of the first encounter of a victim of human trafficking, victim pursuant to Section 236.1, law enforcement agencies shall provide brief letters that satisfy the following Law Enforcement Agency Endorsement (LEA) regulations as found in Section 214.11 (f)(1) of Chapter 8 of the Code of Federal Regulations,” Cal. Penal Code § 236.2 (a) (2008), or state law enforcement agencies must “provide the victim with a letter explaining the grounds of the denial of the LEA.” Cal. Penal Code § 236.2 (c).

Evidence from mental health and medical professionals should be submitted to support a claim of psychological or physical trauma. There is, however, no set standard. Absent exceptional circumstances, it is reasonable for an LEA to ask of a victim of a severe form of trafficking in persons similar things it asks of other comparably situated crime victims. The legislative goals of prevention, prosecution, and the protection of other potential victims may outweigh your individual client’s concerns.

If the applicant has not had contact with an LEA regarding the trafficking situation, he or she is required to do so promptly under the regulations. However, prior to contacting law enforcement, applicants need to be made aware of possible ramifications, such as issuance of a Notice to Appear (NTA) before an immigration judge, and appropriate strategies to deal with such ramifications should be discussed. The applicant may contact the Department of Justice, Civil Rights Division, Trafficking in Persons and Worker Exploitation Task Force complaint hotline, at (888) 428-7581, and fax a request for an investigation to the Department of Justice Civil Rights Division Trafficking Unit, at (202) 401-5487, to file a complaint and be referred to an LEA, or contact a local federal LEA directly. Unfortunately, since the Department of Justice is not responsive to every call, advocates should document every attempt and every effort to contact law enforcement.

If law enforcement does not respond to the client’s report of the crime, does not follow through with a client’s efforts to cooperate, or simply will not provide the I-914B, it is imperative to document the client’s efforts to cooperate. This is considered “secondary evidence” of cooperation, and must include:

- detailed statements in the applicant’s affidavit explaining each and every attempt to cooperate, including dates, places, and names/positions of law enforcement contacted. It should also note why I-914B is unavailable; and
- good faith attempts to obtain the I-914B, including what efforts the applicant undertook to accomplish these attempts. Evidence of efforts to obtain the I-914B should be attested to by the client, not by the attorney.

Other evidence may include:

- a copy of attorney’s log of telephone calls, faxes, and emails to law enforcement (including time/date stamp) or memoranda to the file documenting meetings or conversations with law enforcement;
- affirmation by attorney of efforts to cooperate; and
- if cooperation was with state or local law enforcement, provide a detailed letter describing contact with client, the conversations, et cetera.

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69 8 CFR § 214.11(f)(4).
NOTE: General assertions from an attorney are not considered to be evidence for law enforcement purposes. Therefore, relevant copies of letters, e-mail, or any other documentation of the attempted communication with the law enforcement agency, as well as responses from law enforcement, should accompany the statement from the attorney. It is important to note that photocopies of an email submitted generically to law enforcement would not be sufficient.

Ultimately it is the USCIS, not the LEA, that determines whether or not a request for assistance is reasonable for the T visa determination purposes. In making such a determination, the Service takes into account the “totality of the circumstances” including, but not limited to:

- general law enforcement, prosecutorial, and judicial practices;
- the nature of the victimization;
- the specific circumstances of the victim;
- including fear, severe trauma (both mental and physical); and
- the age and maturity of young victims.\(^{70}\)

In light of these requirements, on behalf of your client, you should contact law enforcement if it appears that they will be eligible for the T visa, and to determine how your client can assist law enforcement in anyway that does not put them in direct danger, or that will not result in severe emotional trauma.

**E. Suffer Extreme Hardship Upon Removal Involving Unusual and Severe Harm**

Unlike other types of immigration relief, a T visa applicant must establish “extreme hardship involving unusual and severe harm upon removal,” as opposed to “extreme hardship.” This elevated standard requires the consideration of an aggregate of factors, which are defined by the regulations. These include, but are not limited to:

- the applicant’s age and personal circumstances;
- serious physical or mental illness of the applicant that requires medical or psychological attention not reasonably available in the foreign country;
- the physical and psychological consequences of the trafficking activity;
- the impact on the applicant of loss of access to U.S. courts and criminal justice system for purposes such as protection of the applicant and criminal and civil redress for the acts of trafficking;

\(^{70}\) 8 CFR § 214.11(a).
the reasonable expectation that laws, social practices, or customs in the applicant’s country would penalize the applicant severely for having been the victim of trafficking;

- the likelihood of re-victimization and foreign authorities’ ability and willingness to protect the applicant;

- the likelihood that the trafficker or others acting on his or her behalf would severely harm the applicant; and

- the likelihood that the applicant’s individual safety would be seriously threatened by the existence of civil unrest or armed conflict, as demonstrated by a designation of, Temporary Protected Status under INA § 244 or the granting of other relevant protections.\(^{71}\)

Factors relating to extreme hardship need not be related to the trafficking experience. Therefore, if a client has medical or other issues that cannot properly be addressed in his or her country of origin, such issues should be made clear in the application. While economic need is not considered relevant for extreme hardship consideration, if economic issues are likely to lead to a client being re-trafficked upon his or her return to the country of origin, that is a relevant concern.\(^{72}\)

The T visa application requires evidence of these factors. Examples of evidence which may be used to demonstrate hardship include:

- a detailed declaration from the victim, declarations or statements from witnesses;

- law enforcement reports, including the LEA endorsement, photographs, medical records, reports and records from counselors or therapists; and

- reports from Non-Governmental Organizations (NGO), government and international agencies, and individuals regarding the current conditions in the home country\(^{73}\) and the protection or lack of protection likely to be afforded the applicant in the home country.\(^{74}\)

\(^{71}\) 8 CFR § 214.11(i).

\(^{72}\) Id.


\(^{74}\) VAWA Manual, supra note 44.
III. Special Considerations

A. If Your Client is a Child

If your client is a child, he or she may not be required to establish all of the aforementioned factors in order to be eligible for the T visa.

1. Establishing Coercion

Children under the age of 18 trafficked for commercial sex purposes do not have as high of an evidentiary burden. As previously mentioned, victims of “severe forms of trafficking in persons” include:

- 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
- 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.75

Accordingly, a child under the age of 18 who has been a victim of sex trafficking is not required to show evidence that he or she was induced by force, fraud, or coercion.76 However, a child under the age of 18 who is recruited for labor trafficking or other services is required to show inducement through force, fraud, or coercion as indicated earlier in this document.

2. Reasonable Request to Assist LEAs

Another T visa eligibility factor affected by age is the requirement to assist law enforcement and in the prosecution of traffickers. Children under 18 are not required to assist law enforcement.77 Regardless of the purpose for which the victim was recruited, a child age 18 and older can be required to comply with all reasonable requests. The age, maturity, and individual circumstances of each victim may be considered to determine the reasonableness in “the totality of the circumstances.”78

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75 TVPA § 103(8).
76 8 CFR § 214.11(f).
77 8 CFR § 214.11(d)(vi).
3. **Hardship Upon Removal**

The age of a child may be taken into account when making determinations of hardship.\(^79\) Again, children are recognized as being in a special circumstance since it is understood that they are not in control of their situation, nor are they legally recognized as being able to consent to a contractual relationship. The trauma faced by children can be exacerbated if appropriate interventions are not available in the home country, or if the family played a part in their trafficking. ORR has a mandate to provide care and appropriate placement, including shelter, for trafficked children.

Children’s advocates have also urged that three fundamental principles should guide agency decision-making involving victims of trafficking:

1. The best interest of the child standard;
2. The placement of the child in the least restrictive setting; and
3. The child’s need for permanence.\(^80\)

Evidence offered to establish “severe hardship involving unusual and severe harm” upon removal for children should incorporate these principles. Special attention should be given to the treatment of, and benefits available to, victimized children in the country of origin. Country specific stigmatization of street children, orphans, and sexually abused children also may be compelling factors to consider.

4. **Benefits**

In order to receive humanitarian benefits, similar to those available to refugees, victims age 18 and older must be certified by ORR. As noted above, this letter is issued either pursuant to a grant of continued presence, recognition by USCIS that a T application is *bona fide*, or approval of the T visa. If a child has not applied for the T visa, he or she must obtain a letter from an LEA confirming that he or she is a victim of a severe form of trafficking. Children under 18 are then issued eligibility letters.\(^81\) This present system seems unduly burdensome, particularly as

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\(^79\) 8 CFR § 214.11(i)(1)(i).

\(^80\) See Letter to Anne Veysey, Recommendation for T Implementation in Relation To Children, Lutheran Immigration and Refugee Service, September 7, 2001; Also based on conversation between Christa Stewart, Director of Legal Services, The Door, and Antoinette Aqui, Program Analyst - Trafficking, ORR, November 19, 2004.

B. Derivative Family Members

1. General Application

A T visa applicant over 21 can include as derivative applicants his or her spouse and unmarried children under the age of 21. A T visa applicant under 21 at the time of filing may include the spouse, children, parents, and unmarried siblings under the age of 18. An I-914, Supplement A, must be included for each derivative family member, and included with the Supplement A should be documentation of the derivative’s relationship to the principal applicant, including birth and/or marriage certificates. If represented by counsel, a separate G-28 should also be included.

A T visa applicant or holder may choose to apply for derivative family members later. If they do not include the derivatives in their initial application, they must refile the I-914 form along with an I-914A for each family member. It is not necessary to include all of the attachments. You should include a copy of the T approval notice and explain in a cover letter that they are now applying for derivative family members. T visa holders can apply for their derivatives at any time during the duration of their status. However, once they adjust their status to permanent resident, they must follow the regular family petitioning process.

There are currently no filing fees for derivatives who apply in the United States. However, derivatives that live abroad may need to pay a biometric fee at the consular post. Derivatives presently in the U.S. are eligible to apply for employment authorization, while derivatives abroad may apply for employment authorization after they enter the U.S. in derivative T status. Derivatives do not need to establish extreme hardship.

Family members implicated in the trafficking scheme may not apply for derivative status. If there are concerns of such involvement, the derivative application must demonstrate that he or she did not commit the trafficking against the applicant which forms the basis of the applicant’s T visa application. In addition, as with the applicant, advocates should examine whether

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82 Id.

83 8 CFR § 214.11(o)(1).

84 The ability of unmarried siblings under 18 years of age to apply was added by TVPRA of 2003 § 4(h), which has not yet been codified.

85 Please check www.uscis.gov for the most up-to-date filing fees. Biometrics fees may vary by country or consular post, and may be waived in certain circumstances.


derivative applicants face inadmissibility issues, such as unlawful presence, issues around unlawful entry, or prior criminal convictions. If such is the case, it may be necessary to file form I-192 and relevant fees to request a waiver of inadmissibility.

2. **Consular Processing of the T Visa**

Derivatives living abroad will need a valid passport or a waiver of the passport requirement in order to enter the U.S. in T status. Such applicants will undergo a detailed interview at the appropriate consular post. The derivative should not be asked about the underlying trafficking of their family member and is not required to know the details of their relative’s experience. The only relevant questions should be to confirm the relationship with the principal applicant. If there are questions about the veracity of a derivative blood relationship to the principal applicant, the consular post may require a DNA test.

**Practice point:** When the derivative application is approved, email a copy to the U.S. Embassy or consulate that has jurisdiction. Include the approval notice, G-28, current address and telephone number for the derivatives. Request the scheduling of an appointment to process the derivative’s visa. Consular email addresses can be found at www.usembassy.gov.

In addition, the International Organization for Migration (IOM) may be able to assist with the travel logistics to bring derivatives to the U.S.

3. **Derivative Children**

Derivative children may need the consent of both parents in order to obtain a valid passport in their home country. Obtaining passports for children of trafficked persons can pose a number of obstacles. This is particularly the case when the trafficked person is not in contact with the child’s second parent, or if the second parent is abusive. Many times, the second parent is the trafficker, and this may necessitate legal proceedings in the home country to obtain a passport for the child. In addition, custody of derivative children may need to be addressed before the child can lawfully be brought to the U.S. If the second parent has parental rights over the child, then his or her parental rights might have to be severed through the courts in the home country before the child can be brought to the U.S.

Issues relating to passports and custody may significantly delay, or in some cases preclude, issuance of a T visa to the derivative child. This is because the consulate will not issue the visa once the principal applicant’s period of T status has expired. The maximum amount of time an individual can be in T status is four years. If custody or other proceedings take longer, the child may have to wait for the principal applicant to become a permanent resident before they can enter the U.S.
C. Representing Trafficking Victims in Immigration Court

An applicant in removal or deportation proceedings poses special challenges. The applicant must inform USCIS if he or she intends to apply for a T visa. The Immigration Judge (IJ) must agree to stay the court’s master calendar to allow sufficient time for the adjudication of the T visa. This may necessitate educating both the IJ and the trial attorney about the T visa and convincing them that the applicant is eligible. If they agree, both the IJ and the trial attorney should be provided with copies of the T visa application and all supporting documentation.

If the application is approved, the IJ may terminate the proceedings or alternatively, administratively close the proceedings. This would allow the applicant to apply for adjustment of status with USCIS. If the applicant had a final order of removal or deportation from the past, an approved T visa will cancel the final ordered by operation of law as of the date of the approval. If, however, the T visa application is denied, the stay of the final order is deemed lifted as of the date of the denial, without regard to whether the applicant appeals the decision.

Practice Point: The length of time it takes to adjudicate a T visa should be a factor in discussing an application with a detained client. He or she can continue to be detained for a period of months or even years with this process.

IV. After Issuance of T Status

A. Employment Authorization

The Employment Authorization Document (EAD) issued to the T recipient should be for the full three year period, allowing for a one year extensions. If the EAD is not granted for the full period, an extension can be filed along with Forms I-765 and G-28 (if represented by counsel), two passport photos, and appropriate filing fee (or fee waiver). Eligibility classification for the T status holder should be indicated under (a)(16).

Derivatives of T status holders can also obtain work authorization. Form I-765 should be submitted with the I-914 Supplement A. Also included should be Form G-28 (if represented by counsel), two passport photos, and appropriate filing fee (or fee waiver) should be submitted. Eligibility classification for the derivatives of T status holders should indicate I(25).

89 8 CFR § 214.11(d)(8).
90 Id.
91 8 CFR § 214.11(d)(9).
92 Id.
93 8 CFR § 214.11(l)(4) noting that “the Service will provide the alien with an Employment Authorization Document incident to that status, which shall extend concurrently with the duration of the alien’s T-1 non-immigrant status” (emphasis added).
B. Travel Overseas

T status holders can only travel using Advanced Parole. Advanced Parole is a travel document that eliminates the need for a visa stamp in the passport. Instructions for submitting the advance parole application are included within the text of the T approval notice. These instructions note that all T status based advanced parole petitions should be filed at the VSC. An application for advanced parole is made by submitting form I-131 accompanied by form G-28, if represented by counsel, two passport photos, and appropriate filing fee (or fee waiver).

Overseas travel raises a number of concerns, and advocates may want to err on the side of caution given the serious consequences at issue, and consider advising clients against overseas travel:

- If the T holder accrued “unlawful presence,” departure from the U.S. may trigger a three or ten year bar to future immigration benefits in the U.S. Note that a T holder’s prior unlawful presence will not preclude him or her from receiving advance parole, nor will it impede his or her re-entry into the U.S. However, when the T holder applies for adjustment of status, the adjustment may be denied, the T holder issued an NTA, and possibly removed from the U.S.

- In order to be eligible to “adjust status to a permanent resident” following three years in T status, the T holder must demonstrate continuous physical presence in the U.S. According to the TVPA, “an alien shall be considered to have maintained continues physical presence . . . if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days.”

- If the T holder returns to the country from which they were trafficked, it may undermine the hardship concerns that will be revisited when the adjustment of status is adjudicated.

C. Adjustment of Status to Permanent Residency

Those approved for T-1 can adjust their status to that of permanent resident (“LPR” or “green card”) by filing Form I-485, Form G-325, with all supporting documents to the T Visa Unit at the VSC. As long as the applicant applies, those in derivative T status may also apply to adjust their status. Up to 5,000 principal T visa holders may be adjusted to permanent residents each year. However, to date, USCIS has not promulgated regulations implementing the adjustment

94 This section is based on a series of emails between Mie Lewis, attorney, Asian Pacific Islander Legal Outreach, and Rebecca Story, associate general counsel, Department of Justice dated July 30, 2004 and August 2, 2004.

95 Discussed at length in Part A, section I.b.1 “Immigration Status.”

96 INA § 212(a)(9)(B).


99 INA § 245(l).

100 INA § 245(l)(4).
of status provisions, and as a result, none of the adjustment of status petitions on behalf of T holders have been adjudicated.

The statutory provisions for a T visa holder to adjust status are if he or she

- was physically present in the United States in T status or physically present in the U.S. during the investigation and prosecution of the trafficking case and the Attorney General indicates that the processes is complete;

- is of good moral character; and

- has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or would suffer extreme hardship involving unusual and severe harm if removed.  

According to INA § 245(l)(3), an alien shall be considered to have failed to maintain continuous physical presence if he or she has departed the U.S. for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

Please note that there is a very small window for filing for adjustment of status. Although T status can be extended for up to four years, applications for adjustment of status must be submitted within the 90 day period immediately preceding the third anniversary of the T visa approval or when the investigation is complete, whichever is earlier. USCIS may notify T visa holders that they are eligible for adjustment of status, but this has not actually occurred. The burden is on the applicant to apply for adjustment in a timely fashion.

Regardless of whether the notice is issued, if T holders do not file for the adjustment of status during that window, their status will be terminated. As such, it is imperative that advocates and T holders do not rely solely on USCIS’ issuance of such notice, but carefully track these dates as well.

Once the adjustment of status is properly filed, the T holder will be considered as continuing in T status, including continuing eligibility for employment authorization.

We have been filing for adjustment of status immediately after the grant of a T visa if there never was an investigation. We have also filed after a grant of a T visa when the investigation is

101 INA § 245(l)(1).
102 8 CFR § 214.11(p)(1). See also § 821 of TVPRA 2005, which amends the Act to allow status for up to four years.
103 8 CFR § 214.11(p)(2).
104 Although, if such notice was not given, one could argue that USCIS failed to meet their own regulatory standards.
105 8 CFR 214.11(p)(2).
complete. To date, these applications have been accepted and remain pending. Employment authorizations can then be issued under the category of adjustment pending. However, this leaves T visa holders who have exceeded the four years of T status with no proof of their status.

V. Industries Where Victims are Predominantly Found

Provided below are examples of industries that are most commonly associated with trafficking victims. This is in no way a comprehensive list, but merely a reference tool as well as a possible flag for identifying potential victims. For each of these categories, please note a brief fact pattern to provide further guidance in the identification process.

A. Factory Workers

One of the most well-known trafficking cases is the following. At the Korean-owned Daewoosa factory in American Samoa, 251 Vietnamese “guest workers” – more than 90 percent of them women – were held for nearly two years, under conditions of indentured servitude sewing clothing for J.C. Penney, Sears and Target. The labels read, “Made in the USA” since American Samoa is a U.S. territory. However, the women were not even paid the already very low $2.60 an hour minimum wage in Samoa. The women were beaten, sexually harassed, threatened with deportation and imprisonment, starved, forced to work 12 to 18 hours a day, seven days a week when rush orders came in, and to live in crowded rat-infested dormitories. The U.S. Department of Labor has assessed the Daewoosa factory a total of $604,225 in back wages and fines.

B. Migrant Workers

Pedro came to the U.S. on an H-2A visa to work as a fruit harvester for a large farm-labor contractor. When he was recruited, the company said that he would receive the federal-mandated rate of pay for farm workers (which is higher than the minimum wage), housing, and transportation. Although he was a monolingual Spanish speaker, he had to sign a contract that was written in English. Upon arriving in the U.S., the contractor took his passport and other identification documents; the contractor explained that they needed to do this since other workers had walked off the job. Pedro worked 12 hours a day, seven days a week. He was not paid even the minimum wage, and he was not paid in a timely manner. He was not allowed to take meal breaks, and passed out on at least four occasions during work hours from dehydration. He was not allowed to see a doctor and instead was told to return to work. Pedro slept in a trailer with nine other men, and had to do his laundry in the sink. As an H-2A visa holder, he was legally bound to this contracting company or he would have to return to Guatemala. Pedro felt like he had little recourse to complain about the working conditions.

C. Domestic Workers

Ami was brought to the U.S. from India to work as a nanny for a family in New York. She was promised a wage four times greater than what she would earn in India. She was told that she would be treated like a family member. When Ami arrived, she was required to work 15-17 hours a day, cooking, cleaning, and doing laundry for the entire family, as well as childcare. She
was forced to sleep on the floor and her documents were withheld. She was told that if she went
outside without permission or telling her employers when she would be back, she would be
arrested on the spot. For three years of work, she was never paid.

When Ami finally asked to leave the house to attend church, which she had been denied for three
years, she was thrown out of the family home. An Indian nanny in the building helped her find a
place to stay. However, Ami was worried about her legal status, and that she would be deported
since she no longer had a valid visa. With the help of a community-based organization whose
members spoke her language, Ami reported her traffickers to the police, the FBI, and to DOJ.
After numerous calls to law enforcement advocating the merits of the case, DOJ was interested in
investigating the case, and decided to interview Ami to evaluate the case and determine if she
might be a credible witness.

D. Household Employees of Diplomats

Teresa was a young woman working as a nanny in her home country in Latin America. The
family she worked for were diplomats, and when the husband was posted to the United States, the
family asked her to accompany them in the same capacity. Teresa was reluctant to leave her
home and her own family, but her employers promised her education, English lessons, and
increased wages. On this basis, Teresa agreed and came to the United States. Once here, she was
required to sleep on the kitchen floor, to work fourteen hour days, was paid only rarely and far
less than what was agreed, and was not allowed to leave the apartment. She was also continually
verbally abused and threatened with deportation if she complained. A friend of the employer’s
witnessed the situation, and contacted ICE who rescued Teresa from the situation, and referred
her to a social service agency. However, since the traffickers were diplomats, no prosecution was
ever pursued because of diplomatic immunity. Moreover, the ICE agents involved in the
“rescue” were reluctant to provide the LEA certification, but did so after continuous requests.
Teresa is now resettled in the U.S. in T status.

E. Restaurant Workers

When Li was sixteen, a man came to his village recruiting young men for jobs in the U.S. He
told Li that he could make a lot of money to send home to his parents. Since Li’s parents were
going older and there were no jobs available in the village, Li decided to take this opportunity.
His parents scraped together their savings to pay the man. Li was advised that he would then
have to pay a balance of $20,000 after he arrived.

Li traveled with six other young men. He was given travel documents to pass through
checkpoints in Korea and Canada, but after he cleared each of the checkpoints the papers were
taken away. Once he arrived in Canada, Li was held in captivity for twenty days where he was
deprived of food, threatened, and interrogated about his extended family. When he finally
reached the U.S., he was allowed to live with his uncle in San Francisco. However, he was
forced to work seven days a week, fourteen hours a day for the traffickers, who kept most of his
salary. In addition, the traffickers often asked him to perform criminal activity, and threatened
his family if he does not agree. Recently, the traffickers threatened his parents in China.
F. Sex Workers

Susanna and Penelope are two adolescent girls who were trafficked into the United States from a South American country and forced into sex work. The trafficker lured them to the U.S. by claiming he could get them jobs. He also told one of the girls that he would reunite her with her mother, who was already in the U.S. The trafficker created personal relationships with these girls, thus earning their trust. For example, he told Susanna and her family that he wanted to marry her, and acted as a boyfriend, while he created a platonic “older brother” friendship with Penelope. Ultimately, he sexually assaulted both girls and forced them to work against their will in a brothel. Susanna and Penelope were resourceful enough to escape from him one night, and made contact with the local police. Both were under the age of 18, meaning that they were not required to cooperate with a reasonable request from law enforcement in order to qualify for a T visa. However, they are now choosing to cooperate with law enforcement in the prosecution of their trafficker.
Part B: Preparing The T Nonimmigrant Visa Application Package

I. The Basics of the Application

Victims of severe trafficking may apply directly to the USCIS for T status. While the TVPA recognizes trafficking protection as a humanitarian type of immigration status, it is classified as a non-immigrant visa. A petition is made by submitting Form I-914 (with Form G-28 designating the representative or counsel) along with supporting documentation to the VSC. If filing a fee waiver, that request should be filed concurrently with the I-914.

The basic application package should include:

- Biometric filing fee or fee waiver request (form EOIR-26 is acceptable for fee waiver);
- three passport photographs of the applicant;
- duly signed and executed Form I-914;
- duly signed and executed form G-28 (on blue paper);
- duly signed and executed Form I-192, waiver of inadmissibility (if appropriate);
- evidence supporting the claim (including a personal statement/affidavit);
- country condition reports and any other objective evidence supporting the claim;

106 U.S. Citizenship and Immigration Services, Vermont Service Center, 75 Lower Welden Street, St. Albans, VT 05479-0001. “T Visa Application” should also be written in bold on the application package.

107 These forms can be downloaded off the internet, available at www.uscis.gov. It is important to use the most current version of the forms, which are updated often.

108 See 8 CFR § 214.11(d)(2).

109 USCIS filing fees are subject to change, so the biometric fee should be verified before submitting. If the incorrect fee is submitted, USCIS will reject the application. As of the date of this manual’s publication, the biometric fee is $80.00 per individual between the ages of 14 and 79. Biometrics include fingerprinting to facilitate background checks. The biometrics fee may be waived. Applicants are notified of the time and location for the fingerprinting at the Application Support Center (ASC).

110 Standards for the photographs can be found at www.travel.state.gov/passport/pptphotos/composition_checklist.html.
II. Preparing and Drafting the T Visa Application Package

A. Completing the Forms

1. The G-28

The G-28 is the notice of appearance that an attorney or representative of a religious, charitable, social service, or similar organization is designated as the representative on behalf of a person involved in a matter before the USCIS. There is no filing fee associated with the G-28, but USCIS prefers that it is on light blue paper so it stands out.

2. The I-914

Part A. Purpose

Generally check the first box “I’m filing an application for T-1 nonimmigrant status, and have not previously filed for such status.”

Part B. General Information

- Be sure to answer each question correctly. Verify with actual documents when filling out this form. Do not assume same or similar data from other applicants.
- Make sure to put dates in the U.S. format (Month/Day/Year) as opposed to the European format (Day/Month/Year) followed by many countries.
- **Safe Mailing Address:** This is the address to which USCIS will send notifications. It is a good idea to include the advocate’s address to ensure that the case is properly processed.

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111 8 CFR § 214.11(d)(2)(vii).

112 “T VISA APPLICATION” should be noted in red marker in the upper right-hand corner of the first page of the cover letter to make sure that the packet is properly routed by the USCIS mailroom.
Date and Place of Last Entry into U.S. should be taken from the current I-94 card, or stamp in the passport. If neither passport nor I-94 is available, make an estimate and note on the form that it is an estimate.

Passport Information: If passport is not available, write “N/A.”

Current USCIS status

- Check client’s current I-94 card (this will usually be a white card stapled into the passport). It is the I-94, and NOT the visa stamp in the passport, that denotes status and authorizes length of stay. The individual’s status is noted by a letter (usually “B-1 or B-2” or “A-3” or “G-5”) and the expiration of that status is noted below.

- If the client has been granted Continued Presence (evidenced by the ORR Certification Letter), the status is likely “Deferred Action” or “Public Interest Parole.”

- If the client has not yet been granted Continued Presence and does not have an I-94 because he or she crossed the border without inspection, note “EWI” (for Entered Without Inspection) and consult an immigration attorney with trafficking experience before filing.

- If the client entered and the status has since expired, and has not yet been granted Continued Presence, write status type and date of expiry.

Part C. Details Related to T Nonimmigrant Status

Q1, 3, 4. Check all boxes “Yes.”

Q2. If you do not have an LEA endorsement from a federal agency on form I-914 Supplement B, check “No” and attach secondary evidence of cooperation with law enforcement. If I-914 Supplement B is enclosed, or if you were advised that such LEA endorsement would be sent to USCIS, check “Yes” and list the information in response to Question 5. A Federal Law Enforcement Agency (such as the USCIS/ICE, FBI, DOL, or DOJ Civil Rights Division) must be contacted prior to submitting the T application.

Q6. Applicant is Under 18 as of the date of filing the application.

Filing a petition for someone who is not eligible could result in a “Notice to Appear” (NTA) before an immigration judge (IJ) and subsequent removal (deportation) from the United States.

Form I-192 should be filed to waive any and all grounds of inadmissibility.

Id.
Q7. Note if there was compliance with requests for investigation or prosecution.

Q8. First Visit to the U.S. Include all entries to the U.S., even if prior visits were made unlawfully, but consult an immigration attorney prior to filing if applicant has made prior unlawful entries.

Q9. Entry on Account of Trafficking. Check “Yes.”

Q10. Employment Authorization. Check “Yes.” No additional form or fee is required.

Q11. Applying for Eligible Family Members. Answer “Yes” if a Supplement A for a spouse, child(ren), and/or parent(s) is included. If there are no qualified family members, or if the applicant will file for them at a later time, check “No.”

Part D. Processing Information

These questions are to determine “admissibility,” a legal standard required for all foreign nationals applying for a legal status to enter or extend their stay in the U.S. It is also very important to the ultimate “green card” application. Be sure to answer truthfully to each question, especially questions about criminal conduct in the U.S. If the answer to ANY of the questions is “Yes,” the applicant will have to file an I-192 Waiver.116

Q1. Criminal History. This may include prostitution, even if it was forced. You may want to check the immigration regulations and statutes to make sure that the applicant’s admission to a criminal act does not permanently bar immigration benefits.


Q3, 10, 11, 12, 13, 15. Answering yes to these questions should not bar T visa issuance, but consult an immigration attorney to make sure that the applicant is eligible for a waiver. Filing an application for someone who is not eligible could result in he or she being placed in “deportation” or “removal proceedings” before an immigration judge.

Q4, 5, 6, 7, 8, 9, 14. If the applicant answers “Yes” to any of these questions, a I-192 waiver may be more difficult to obtain. The specific circumstance surrounding the issue should be carefully evaluated, and an attorney or advocate with expertise in the field should be consulted. Answering “Yes” to these questions can seriously compromise eligibility for the T visa.

116 Fee waiver and RFE issue
Part E. Information about Family Members

Include information about the spouse and/or child(ren), even those that applicant is not currently seeking to bring in. Applicants who are under 21 years old can also include their parents and unmarried siblings under 18 years of age on the date that T application is submitted. Form I-914, Supplement A and appropriate fee should be included for those qualifying family members who will join applicant.

Part F. Attestation and Release

Signature by the applicant certifying that everything is true and correct under penalty of perjury, and that the applicant understands that the USCIS can and will use the information in the application against the traffickers and share this information with other government agencies.

Part G. Certification

Should be completed by attorney or advocate who assisted in the preparation of the petition. This is a normal part of any immigration petition or application.

3. The I-914, Supplement A

Note: A separate Supplement A and filing fee must be included for each family member being sponsored. A separate G-28 should also be included to ensure the attorney or advocate receives notification. Derivatives who are applying from outside the U.S., will undergo an interview at the appropriate consular post. However, they are not required to know the substance of the underlying T visa application. Attorneys should examine whether derivative applicants face inadmissibility issues, such as unlawful presence, issues around unlawful entry, or prior criminal convictions.

Part A. Relationship

Check the appropriate relationship. Note that parents and unmarried siblings under the age of 18 can only be included if the applicant is under 21 at the time of filing. Note that the form has yet not been amended to include unmarried siblings.

Part B. Information about the main applicant.

If the Supplement A is filed together with the original I-914, check “Submitted” for the last question in this section. Otherwise, check the relevant box and include appropriate evidence of that status.

Part C. Information about Derivative Applicant

Be sure to answer all questions. Answer “None” or “N/A,” but do not leave blanks. The questions regarding ‘Immigration Proceedings’ refers to Deportation or Removal
Proceedings, only. Check “Yes” only if the Family Member has been ordered to appear before an Immigration Judge in the U.S.

Part D. Processing Information

As with Part D on the Form I-914, these questions are to determine “admissibility.” Be sure to answer truthfully to each question. *If the answer to any question is “Yes,” consult an immigration attorney to determine eligibility for a waiver and/or risk of deportation or removal.*

Part E. Attestation and Release

This is the same as Part F on the Form I-914. If the family member is in the U.S., he or she should sign. If the family member is NOT in the U.S., only the applicant needs to sign.

Part F. Certification

The same as Part G on Form I-914.

Application for Employment Authorization:

Derivatives of T status are eligible for employment authorization when they are inside the U.S. To obtain employment authorization, derivatives must file form I-765 accompanied by form G-28, if represented by counsel, two passport photos, appropriate filing fee, and indicate on the form I-765 eligibility under (c)(25). Such employment authorization should last for the duration of the T-1 nonimmigrant status.\(^{117}\) File for derivatives after they arrive in the U.S. if they were not present at the time of the initial application with the Vermont T Visa Unit. If they are present in the U.S. at the time of the initial application, an I-765 for the derivative can be sent in at the same time as the I-914.

4. The I-914, Supplement B

- This is the official “Law Enforcement Attestation,” also referred to as the “LEA” endorsement. If included with the application, it can serve as the primary evidence for all elements, except extreme hardship.

- The LEA endorsement must be from a qualified federal agency.\(^{118}\) At present, it cannot be from state or local law enforcement\(^{119}\) (although such documentation may be credible “secondary evidence”).

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\(^{117}\) 8 CFR § 214.11(o)(10).

\(^{118}\) 8 CFR § 214.11(e). Qualified federal agencies include, but are not limited to, the offices of the Department of Justice, the United States Attorneys, the Civil Rights and Criminal Divisions, FBI, USCIS, ICE, the United States Marshals Service, and the Diplomatic Security Service of the Department State.
Keep close track of all attempts to obtain the LEA endorsement - including phone and fax log, email copies, and letters.

In pursuing the LEA endorsement, attorneys/advocates may want to draft the LEA endorsement to ensure that it addresses all of the legal elements directly. This can be an extremely powerful document if it provides thorough and complete information and is free from contradictions.

5. **The I-192**

It may be necessary to file this form if any of the answers were “Yes” to Form I-914, part D. However, because there is a non-waiveable filing fee of $545 for each applicant, and because this fee is often unobtainable for many victims, VSC has agreed to preliminarily review the application to determine if an I-192 is necessary.

If VSC determines that the I-192 should be filed, it will send the attorney of record (as evidenced by the G-28) a Request for Evidence (RFE). The RFE will provide a specific timeframe during which the I-192 must be submitted. If an I-192 is requested, note that two copies per applicant should be included.

**Completing the form**

Q1-6. are self-explanatory.

Q7. **Desired Port of Entry into U.S.** Enter “Vermont Service Center” and the city of the nearest District Office. For example: “VSC/New York, NY”

Q8. Means of Transportation. Enter “N/A.”

Q9. **Proposed Date of Entry.** Enter the date on which you are filling out the form.

Q10. **Approximate Length of Stay in the U.S.** Enter “Indefinite.”

Q11. **My Purpose for Entering the U.S.** This will most likely be either:

   “To serve as a witness in a criminal trafficking case.” or

   “To cooperate with law enforcement against traffickers.”

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119 As noted in Part A, the TVPRA does provide that LEA endorsements may be submitted by state or local law enforcement officials. However, current policy as announced by U.S. Citizenship & Immigration Services Associate Director of Operations William Yates in an April 15, 2004 memorandum is that this provision must wait for further guidance to be in effect.

120 Even though the applicant may be physically in the United States, in order to permit them to be “entered” into a legitimate status, the I-192 must be filed.
Q12. I Believe I May be Inadmissible. List the issues to which applicant answered “Yes” to in Part D of the I-914. Consult someone with expertise in this area to make sure the ground is eligible for a waiver.\footnote{Trafficking survivors are not considered “unlawfully present” if they demonstrate that the severe form of trafficking “was at least one central reason for the alien’s unlawful presence in the United States.” 8 U.S.C. § 1182 (a)(9)(B)(iii)(V) (2006).} The most common may be:

- “Receipt of public benefits as a Certified Trafficking Victim;”
- “Entered the U.S. on a fraudulent visa;”
- “Since entering the U.S. I violated my non-immigrant status;;”
- “I was forced to work as a prostitute;”
- “I entered the U.S. without inspection;” and
- “I was arrested for [prostitution] as a result of my trafficking situation.”

Q13. This question is asking if the applicant has filed this form before. For most, if not all, the answer will be “have not previously filed.” If the applicant has never applied to enter the U.S. before, the answer is certainly “have not previously filed.”

Q14. The applicant should sign and date the form.

Q15. Should be completed by attorney or advocate who assisted in the preparation of the petition. This is a normal part of any immigration petition or application.

6. EOIR-26A “Fee Waiver Request”

- Fee waivers are available at the sole discretion of the USCIS.\footnote{See 28 CFR § 103.7(c) (2003).}

- Form EOIR-26A (which is normally filed with the immigration court under the “Executive Office of Immigration Review” can be used for this purpose).\footnote{Available at www.usdoj.gov/eoir/formslist.htm.} Make a note in the cover letter that the filing fee waiver request is made pursuant to 8 CFR 103.7(c)(1).\footnote{This is not a required form, and an affidavit by the applicant is also acceptable.}

- The fee waiver lists the applicant’s assets, income, and expenses, to show that the applicant does not have sufficient funds to pay the application fee.\footnote{Gail Pendleton, National Immigration Project, Practice Pointers on Filling with VSC, Feb. 27, 2002.}
Applying for a fee waiver will not prejudice the applicant.

Only one fee waiver needs to be filed to cover all applications submitted together.

7. **Photographs and Filing Fees**

- Applicant must include three passport photographs, with name and A# (if available) on the back of each photo in pencil.

- Biometric fee of $80 and any other fees that are not being waived should also include applicant’s name. Fees can be paid with check or money order.\(^{126}\)

- If applying for relative(s), a Form I-914 Supplement A (and Form I-765 if the relative is already in the U.S.) must be completed for each relative, including three passport photographs of the relative and the $80 biometric fee (for relatives aged 14-79).

- The name of the relative should be written on the back of each photo in pencil or felt-tipped pen.

**B. Preparing The Supporting Documentation\(^{127}\)**

1. **Personal Statement/Affidavit**

Applicant should submit a detailed personal statement or affidavit. Make sure that each element is directly addressed:

- Victim of a “severe form of trafficking”\(^{128}\)
  
  - State that he or she is a victim of a severe form of trafficking;
  
  - Discuss the circumstances surrounding the victimization;
  
  - Were they in control of passport and other identification;
  
  - Were they free to leave;
  
  - Were they threatened with deportation/removed or police involvement;
  
  - Were they physically or psychologically threatened; and

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\(^{126}\) It is helpful to pay by check, because the cancelled check will have applicant’s case number on it and is also proof of filing if USCIS misplaces the file.

\(^{127}\) Samples of supporting documents may be available on Boat People SOS’ and the National Immigration Project’s websites.

\(^{128}\) 8 CFR § 214.11(f).
Encourage a chronological, personal account of the victimization considering the elements and factors used to determine if this was appropriate for T visa submission.

Physically Present Due to Trafficking

- Date, place, manner, and purpose of entry;
- Explain current presence on account of victimization;
- Show absence of a clear chance to leave, in light of circumstances including trauma, injury, lack of resources, or seizure of travel documents; and
- Letter from NGO or clinical social worker affidavit may be helpful to describe situation, trauma experienced, et cetera. Particularly from NGOs located in applicant’s home country.

Complied with any reasonable request for assistance from an LEA

- State compliance with requests and cite LEA endorsement;
- Name the responsible LEA;
- Indicate whether specific records of the crime are available;
- If no LEA certification then explain why it does not exist or is unavailable, such as an attorney affirmation, secondary evidence noted below, or affidavits;
- Detail good faith attempts to obtain an LEA endorsement, and note corroborating documentation;
- Secondary evidence may include court documents, police reports, trial transcripts, and affidavits from affiliated agencies. Consider also using documentation from state or local police, or District Attorney’s office. While they cannot submit the LEA endorsement, such documentation can certainly be used as a strong basis for credible secondary evidence; and

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129 8 CFR § 214.11(g).
130 8 CFR § 214.11(h).
If no LEA endorsement due to age, provide evidence that applicant is under 18 years of age and therefore not required to comply.\textsuperscript{132}

Extreme hardship involving unusual and serve harm upon removal\textsuperscript{133}

\begin{itemize}
  \item State age and personal circumstances;
  \item Physical or mental illness requiring medical attention not otherwise available in the home country;
  \item Nature and extent of the medical and psychological consequences of the victimization;
  \item Is applicant undergoing a course of counseling here that would be disrupted, and may not be available and/or acceptable in home country;
  \item Impact of the loss of access to the US civil and criminal justice system for purposes relating to legal issues arising from the victimization;
  \item Laws, social practices or customs of the home country which might penalize the Principal for having been a trafficking victim;
  \item Likelihood of re-victimization and the need, ability, or willingness of home country authorities to protect the Principal; and
  \item Likelihood that the Principal’s safety would be seriously threatened by civil unrest or armed conflict in home country designated for Temporary Protected Status (TPS) or Deferred Enforced Departure.
\end{itemize}

Make sure to review the completed Personal Statement at least once with the applicant after it has been prepared and edited. If possible, provide the applicant with a translation of the document (if the applicant is not fluent in English). If a written translation is not possible, orally translate the Personal Statement, giving the applicant the chance to make edits and corrections.

2. \textit{Prepare Summary of Law, Memorandum of Law, or Brief}

It is helpful to include a brief or memorandum to detail the legal basis for the petition, substantiating the grounds that support the evidentiary criteria.

\textsuperscript{132} 8 CFR § 214.11(h)(3).

\textsuperscript{133} 8 CFR § 214.11(i).
**Statement of Facts:** Begin with a brief reiteration of the factual basis of the claim, that includes how the individual was trafficked in and his or her victimization in the United States.

**Argument:** Note how the facts specifically support each element:

- is physically present in the United States, American Samoa or the Commonwealth of the Northern Mariana Islands as a result of trafficking;
- is a victim of a severe form of trafficking in persons;
- for the purpose of a commercial sex act, which act was either induced by force, fraud, coercion, or occurred when the applicant had not reached 18 years of age;
- for the purpose of labor or services induced by force, fraud, or coercion for the purpose of subjecting the applicant to involuntary servitude, peonage, debt bondage, or slavery;
  - **Sex trafficking:** the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act;
  - **Coercion:** threats of serious harm to or physical restraint against any person; any scheme intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process;
  - **Debt bondage:** the status of a debtor arising from the debtor’s pledge of his or her personal services or the services of a person under the debtor’s control as a security for debt, if the value of those services is not applied to satisfy the debt or if the length and nature of the services are not appropriately limited and defined;
  - **Involuntary servitude:** a condition of servitude induced by causing a person to believe that the person or another would be seriously harmed, physically restrained, or subjected to abuse or threatened abuse of legal process if the person did not enter into or remain in the servitude; or
  - **peonage:** status or condition of involuntary servitude based upon real or alleged indebtedness.
- would suffer extreme hardship involving unusual and severe harm upon removal; and
  - The applicant’s age and personal circumstances;
  - Serious physical or mental illness of the applicant that requires medical or psychological attention not reasonably available in the foreign country;
  - The physical and psychological consequences of the trafficking activity;
o The impact on the applicant of loss of access to U.S. courts and criminal justice system for purposes such as protection of the applicant and criminal and civil redress for the acts of trafficking;

o The impact on the applicant of interruption of counseling and other types of services;

o The reasonable expectation that laws, social practices, or customs in the applicant’s country would penalize the applicant severely for having been the victim of trafficking;

o The likelihood of re-victimization and foreign authorities’ ability and willingness to protect the applicant;

o The likelihood that the trafficker or others acting on his or her behalf would severely harm the applicant; and

o The likelihood that the applicant’s individual safety would be seriously threatened by the existence of civil unrest or armed conflict, as demonstrated by a designation of Temporary Protected Status under INA § 244 or the granting of other relevant protections.

134 has complied with any reasonable request for assistance in the investigation and prosecution of acts of trafficking in persons, unless the applicant is less than 18 years old.

3. Prepare/Organize the Exhibits

Note: The VSC wants a COMPLETE copy of each exhibit. Double-sided copies ARE acceptable to reduce bulk. Regular copies are acceptable, it is not necessary to have notarized or certified copies of documents. Translations must be provided of all documents that are not in English. The translation must include a statement of accuracy by the translator, but does not need to be notarized. When including a translation, put the translation on TOP of the original so that the Adjudicator sees the English version first.

The following is a suggested order for submitting the documents to USCIS:

1. USCIS forms and filing fees, or fee waiver. If a G-28 is submitted it should be on top and printed blue paper.

134 “Children who have not yet attained the age of 15 at the time of application are exempt from the requirement to comply with law enforcement requests for assistance in order to establish eligibility.” 8 CFR 214.11(h). Please note that while the TVPRA changed this age to 18, that regulations have not yet been amended to reflect this change.
2. Personal Exhibits. These exhibits should come first.
   a. Personal Statement of the Applicant. This will ALWAYS be the first exhibit;
   b. Marriage Certificate of the Applicant. If applicant is filing for his or her spouse and/or child(ren), a copy of the Marriage Certificate/Birth Certificates, and a translation, must be included. If either the applicant or his or her spouse was previously married, include proof of the termination of all previous marriages (death certificate or divorce decree and translation); and
   c. Birth Certificates. You must prove the relationship for any derivative family members being added to the application. For children, a copy of the child’s birth certificate must be included. For parents, the applicant’s birth certificate must be included. If both parents are not listed on the birth certificate, add the parent’s marriage certificate.

3. General Exhibits. Following the personal exhibits are the corroborating exhibits that prove the elements required for a T visa. Try to submit at least one document, in addition to the Personal Statement, that addresses each element. Examples of general exhibits may be:
   a. witness affidavits;
   b. trial transcripts;
   c. court documents;
   d. police reports;
   e. news articles;
   f. travel receipts and documents; and
   g. country condition reports.

4. The Supplement B. According to the T Visa Regulations, the Supplement B prepared by the LEA investigating/prosecuting the crime serves as primary evidence for all elements except extreme hardship. Some advocates have drafted the Supplement B for the LEA to ensure that it addresses all of the legal elements directly. This can be an extremely powerful document if it provides thorough and complete information and is free from contradictions.
5. Highlight key portions. VSC requests that the key portions of the exhibits are highlighted, especially within the longer documents. VSC Adjudicators have told advocates that this assists them greatly in identifying the important sections.\(^{135}\)

4. **Prepare Cover Letter**

The cover letter indexes the documents included with the application, providing a roadmap for the adjudicator. While the brief or memorandum will detail the legal basis for the petition, the cover letter lists the documents that substantiate the claim. It is helpful to add a summary of each exhibit with an explanation of how it addresses one of the required elements. Add key quotations to bolster your point.

5. **Assemble the Application**

- Put everything in this order (top to bottom):
  1. Cover letter printed on your agency’s letterhead;
  2. G-28 (if applicable);
  3. Fee Waiver Affidavit (EOIR-26 may be used);
  4. I-914 with applicant’s photos and check/money order stapled to the lower left-hand corner. Make sure that the staple does NOT go through the face of the applicant’s photos;
  5. I-914 Supplement A and I-765 (if applicable) for each family member. Staple the three photos to the upper right-hand corner of the Supplement A and make sure the staple does not go through the face on the photos; and
  6. Exhibits in order, tabbed or divided with colored paper.

- **Make two copies of the complete packet.** Give one to the applicant and keep one for your files.

- **Hole punch and fasten the original application.** Use a two-hole punch and punch through the top of the pages. Fasten the entire packet with an Acco two-hole fastener.

6. **Mail the Application**

Write “T VISA” with a fat, red marker on the front of the envelope. Send it Certified, Return Receipt Requested so that you will have proof that the USCIS received it and so that

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\(^{135}\) Pendleton, *supra* note 19.
you will be able to track the application if it is misrouted by the USCIS mailroom to this address:

United States Citizenship & Immigration Services  
Vermont Service Center  
Attn:  T Visa Unit  
75 Lower Welden Street  
St. Albans, VT  05479-0001

7. Follow Up

Keep track of the status of the application compare with others to make sure that nothing has gone wrong with the filing.

You should receive receipts within four weeks. There will be one receipt for the I-914 and one for an I-765 employment authorization (even though you didn’t file this form you get a receipt because it was built-in to the I-914). You will also get receipts for each derivative application. You can track your receipt numbers at www.uscis.gov as well as sign up for email updates at that website. At this time, it is taking anywhere from three months to more than a year for a decision on a T visa. If you do not receive receipts or there are errors, you can call (802) 527-4888 to leave a message with the T visa unit. You should also consider writing to them to correct any errors. This number should not be used for case status inquiries and should only be used by the attorney or representative.

Important Dates:

- Date on HHS Certification Letter, applicant only has 30 days from issuance of this letter to elect benefits;
- Date of filing;
- Date on the Receipt Notice. Receipt Notices and a Biometric/Fingerprint Appointment should arrive within three weeks of filing;
- Date on the Bona Fide/Prima Facie Determination letter;
- Date on any Request for Additional Evidence;
- Date on the Approval Notice. T status is granted for three years. Ninety days before the three years expires, a T alien must file for adjustment of status to permanent residency, or such legal status in the U.S. will be terminated;\textsuperscript{136}
- Date of interview for family members; and
- Date of approval of family members.

\textsuperscript{136} 8 CFR § 214.11(p)(2).
III. Sample Questions for Legal Assessment

Important: This form is intended as a guide for legal practitioners.

Recruitment

- What were you told about the kind of job/situation that was offered to you?
- Who offered you the job?
- How much money was promised to you and by whom?
- Did you sign a contract? If yes, where is it?
- What were the terms of the contract?
- What kind of visa or other documents were promised to you?
- Was anyone paid to bring you to the U.S.?
- Were you sold? Were you kidnapped?

Migration

- How were you brought to the U.S.? Were you informed of this method before you left?
- Were you in any other countries prior to your arrival here?
- Who organized your travel?
- Who accompanied you?
- If there were other people, do you know what happened to them?
- Were you always in possession of your documents? If no, who took them and how long did they keep them?
- Were you told what to say to immigration officials?
- Was a fee paid to organize your travels?
Arrival

- Where did you stay upon arrival?
- What happened to your documents and belongings upon arrival?
- How soon were you told to begin work?

Working Conditions

- What was the type of work you were expected to do?
- Were the conditions and type of work the same as what you expected/ were told?
- What were the hours/days of your work?
- What was the pay? Were you paid the amount you agreed to?
- Were you living and working at the same place? Could you leave?
- Were you expected to pay off a loan of any kind (i.e. debt bondage)?
- Do you owe money to your employer or anyone else?
- Were you allowed time off? Allowed to rest if sick?
- Were you allowed to communicate with family members? Friends? Other workers?
- Were you able to attend religious, cultural, or educational programs?
- Were you able to quit work and work somewhere else?

Safety and Risk

Were you threatened with harm at any time (before you left, in transit, upon arrival)?
Have you experienced…

- Physical coercion such as:
  - physical violence
  - threats of violence
  - torture/beatings
  - sexual abuse, harassment
- isolation/imprisonment/incarceration
- denial of medical care
- denial of food, clothes, or other necessities
- other

- Psychological coercion such as:
  - deceit
  - threats of violence against you or your family, friends?
  - abuse of others in front of you
  - threats to report you to authorities, arrange deportation
  - verbal abuse, degrading remarks
  - speaking in a language you didn’t understand
  - threat of isolation
  - other

- Are you currently fearful for your own, or anyone else’s, safety?
- Do you know the current location of the traffickers?
- What would happen to you if you were to return home?
Immigration Relief for Crime Victims:
The U Visa Manual

March 2010

Prepared by the NYATN Legal Subcommittee:

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The New York Anti-Trafficking Network has provided direct services to over 450 survivors of human trafficking (NYATN), including most of the major trafficking cases prosecuted in New York City, and advocated on issues of trafficking in persons since 2002. As the first network in New York to engage in advocacy on issues relating to trafficked persons in New York, the NYATN aims to bring together the voices of those who have first-hand experience of the injustices of human trafficking, who work consistently to meet the needs of trafficked persons, and who advocate for a more humane and responsive policy towards trafficked persons. Our membership includes many organizations and individuals advocating on behalf of survivors of trafficking and other forms of violence.

The NYATN is a group of diverse service providers and advocates in New York dedicated to ending human trafficking and coordinating resources for trafficked persons. It seeks to establish dialogue and discuss service options in a range of cases and enable cross-communication regarding each agency's work with trafficked persons. We provide direct services to trafficked persons; technical assistance to attorneys, case managers, and other service providers who work with trafficked persons; train law enforcement and non-governmental organizations on issues relating to trafficking in persons; outreach in communities to provide resources and information on trafficking in persons; and engage in policy advocacy on these issues.

NYATN members played a key role in the passage of the New York Anti-Trafficking law as well as reauthorizations of the federal Trafficking Victims Protection Act. We continually advocate for legislation that promotes the rights of trafficked persons at the state and federal levels.

The New York Anti-Trafficking Network is guided by the following principles:

- Recognizing that sustainable change and improved response to trafficked persons requires increased capacity of network partners working in concert to support trafficked persons.
- Developing new ways of working together to deliver services, share information, identify resources, and advocate, is pivotal to an effective response to trafficked persons.
- Educating service providers, law enforcement, governmental entities and the general public is critical to reaching trafficked persons.

Also see http://nyatn.wordpress.com for additional information, events and resources including our Identification and Legal Advocacy for Trafficking Survivors manual which can be downloaded from our website.

For more information contact a NYATN Steering Committee Member or visit us at http://nyatn.wordpress.com.
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Introduction

The U visa was established under the Trafficking Victims Protection Act of 2000 (TVPA), and was subsequently reauthorized in 2003, 2005, and 2008 (Trafficking Victims Protection Reauthorization Act, or TVPRA). It was created as humanitarian relief for a vulnerable population, most of which do not have lawful status in the United States. It provides legal status to victims of certain serious crimes who have suffered substantial physical or mental harm and can document cooperation with law enforcement. If favorably adjudicated, the U visa grants permission to remain and work in the U.S. for up to four years, and allows beneficiaries to eventually apply for permanent resident status.

The U visa is a new and somewhat untested visa classification. After its initial passage, it languished due to a lack of implementing Federal Regulations. In the absence of regulations, United States Citizenship & Immigration Services (USCIS) offered “interim relief” to those who established prima facie eligibility for the U visa classification. As the name suggests, interim relief is only a temporary fix, offering no long term benefits. For permanent benefits, those holding interim status were required to re-apply for U status following publication of the interim final rule seven years later. While the interim final rule went into effect on October 17, 2007, a majority of the U petitions continued to be held in abeyance pending clarification on filing fees associated with waiving grounds of inadmissibility for the visa (Form I-192). This was later clarified by regulations that came into effect on January 12, 2009. As a result, most petitions for U status first began to be adjudicated in January 2009.

Congress allocated 10,000 U visas to be issued each year, not including spouses and other derivative family members. Once the annual cap of 10,000 is reached, applicants for U status will be placed on a waitlist and will be issued deferred action, the same benefit that was offered under interim relief. As with interim relief, those on the waitlist are eligible to receive employment authorization and deferred action status for U derivatives.

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4 8 CFR § 103.7(c)(5)(iii); 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. Pursuant to 8 CFR 103.7(c)(5) fee waiver requests will now be accepted by applicants for T or U nonimmigrant status.
5 8 CFR § 214.14(d)(1).
6 8 CFR § 214.14(d)(2).
7 Id.
Like the T visa manual, this manual aims to provide guidance to lawyers on issues that arise in the context of representing U visa applicants. It is designed for practitioners who are familiar with basic immigration terms and legal concepts. The manual is not meant to be an exhaustive source of the law; it is not meant to provide instruction on every aspect of representation, nor is it meant to take the place of direct legal advice, advocacy, or a practitioner’s own research and evaluation of the case. It also does not address in detail other avenues of immigration relief that may be available to crime victims. Practitioners should always consider other avenues for status or relief, such as asylum, a petition under the Violence Against Women Act (VAWA), the T visa, petitions for Special Immigrant Juvenile Status (SIJS), Cancellation of Removal, and other family- and employment-based petitions. We encourage practitioners to be creative in exploring other possibilities for immigration relief on behalf of victims.


9 An excellent source of relevant legal documents can be found at www.asistaonline.org. Also, materials can be found on the probono.net/ny/family website (registration is free) in the library under immigration, which is available at: http://www.probono.net/ny/family/library/folder.21203-Immigration.
Part A: Determining if U Visa Is Appropriate for Your Client

I. What is a U Visa?

The U visa is a nonimmigrant status that, according to the statute, may be available when:

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of the following qualifying crimes or substantially similar criminal activity:

- 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
- Murder, manslaughter
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury
- Attempt, conspiracy, or solicitation to commit any of the above

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning the criminal activity;

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10 INA § 101(a)(15)(U)(i); 8 USC § 1101(a)(15)(U)(i).
(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to USCIS, or to other Federal, State, or local authorities investigating or prosecuting the criminal activity; and

(IV) the criminal activity violated the laws of the U.S. or occurred in the U.S. (including in Indian country and military institutions) or the territories and possessions of the U.S.

In general, the U visa is meant to protect a vulnerable population from being targeted for crimes, by providing those who cooperate with law enforcement the ability to remain lawfully in the U.S. and eventually gain permanent residency.

A. Benefits

- U visa nonimmigrant legal status for four years, which may, under certain circumstances, be extended.\(^{12}\)

- Opportunity to seek permanent residency (“green card”) after three years in U status.\(^{13}\)

- Employment authorization for the principal applicant.\(^{14}\)

  - Living in the U.S.

    - For the principal applicant applying in the U.S., USCIS will automatically issue an initial Employment Authorization Document (EAD) to applicants granted U-1 nonimmigrant status.

    - Applicants with a pending, bona fide application for U status may also be eligible for an EAD. However, as of the drafting of this manual, USCIS had not issued a bona fide standard.\(^{15}\)

  - Living Outside the U.S.

\(^{12}\) 8 CFR § 214.14(g).
\(^{13}\) INA § 245(m), 8 USC § 1255(m).
\(^{14}\) 8 CFR § 214.14(c)(7).
- Principal applicants who apply from outside the U.S. will not be issued an EAD until the applicant has been granted U status. After admission, the applicant may receive an initial EAD upon request.

- Derivative status for family members.\(^{16}\)
  - If petitioner is under 21, then spouse, children, parents (only if petitioner is unmarried) and siblings under 18 at the time of filing I-918 (not time of interim filing) can apply for derivative status.
  - If petitioner is over 21, then spouse and children can apply for derivative status.
  - Derivatives may apply for EAD either as part of the initial submission, or after receiving U status.

- Eligibility for certain public benefits.

- Travel outside the U.S., but note potential risks.\(^{17}\)

**B. Initial Considerations in Case Evaluation**

1. **Immigration Status**

Applicants for U status may have problems with the validity of their immigration status. The most common issues include the following:

- Entering the U.S. without passing through a border post or port of entry (known as “entry without inspection” or “EWI”);

- Entering on a tourist visa (B1/B2) and engaging in unauthorized employment. This is considered a violation of that particular status;

- Entering on a tourist visa (B1/B2) but overstaying the authorized period of stay on the I-94 Departure Record. Once an individual overstay the I-94 card by even one day, they are considered “unlawfully present.” There are serious and permanent consequences associated with unlawful presence;\(^{18}\)

- Entering on a fraudulent passport or using another person’s passport. This constitutes visa fraud, and does not confer a valid nonimmigrant status.

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\(^{16}\) 8 CFR § 214.14(f).

\(^{17}\) See Section IV, “After Issuance of U Status,” Part B “Travel Overseas.”

\(^{18}\) INA § 212(a)(9)(B)(i).
However, if the individual did not overstay the I-94 (even though fraudulently issued), s/he is not considered to be unlawfully present.

The validity of a U applicant’s status is important because if an applicant is not in valid status, and s/he is being brought to the attention of USCIS or Immigration & Customs Enforcement (ICE), the applicant could be issued a Notice to Appear (NTA) at Immigration Court, and removal (deportation) proceedings may be commenced.

Another important consideration with violations of status or unlawful presence is that it may interfere not only with the U application, but also with the applicant’s eligibility for future immigrant benefits (such as obtaining legal permanent resident status – the “green card”). A waiver of “inadmissibility” may remedy these status violations and are granted at the discretion of the USCIS. To request a waiver of inadmissibility on the above grounds, Form I-192 and the accompanying fee (or request for fee waiver) should be filed concurrently with the I-918.

2. **Liability for Criminal Behavior**

All criminal acts, even minor ones, should be disclosed to the attorney and the applicant should provide certificates of disposition for each act and/or a certificate of good conduct. If the applicant is not sure of this history, a good place to start is the Federal Bureau of Investigations (FBI), which will provide a copy of the applicant’s ‘rap sheet’ for informational purposes. Complete information on requesting an FBI Identification Record can be found at http://www.fbi.gov/hq/cjisd/fprequest.htm.

Attorneys and advocates should be wary of any prior arrests or convictions that may come back to haunt the client. If the applicant was arrested, it is critical to engage in aggressive advocacy that avoids a conviction, even if it involves only a low-level offense. As noted above, a criminal conviction may impact the client’s ability to stay in the U.S. and/or obtain legal permanent residency. ICE and USCIS will take into consideration if the conviction was caused by, or incident to, the victimization. However, it is better to advocate for an appropriate disposition.

3. **Privilege**

The attorney-client privilege is an established principle of law that protects communications between attorneys and their clients, when such communication is for the purpose of requesting or receiving legal advice. This privilege encourages openness and honesty between attorneys and their clients by prohibiting attorneys from revealing (and being forced to reveal) attorney/client communications. The privilege belongs to the client, meaning that only the client may waive the privilege to give consent to reveal the protected communications. However, certain situations

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19 This is outlined in more detail in Part B.

20 We are grateful to Dechert LLP for researching and evaluating this important, yet complex issue. This section provides only a cursory review of the memoranda provided to us by Dechert LLP. These memoranda are available for review at www.ny-anti-trafficking.com, under the publications link.
may “break” the privilege, even if the client did not have the intention to reveal the communications. This includes the presence of a third party in attorney-client communication.

In the U visa application context, the presence of a social worker in the interview process or throughout the representation may break privilege. Once privilege is broken, the communication may no longer be kept private, and defense attorneys or prosecutors may be able to access the client’s statements. Limited exceptions to this rule include where the social worker, or other assistant, is acting solely in the context of an interpreter or translator, or where the social worker is there solely to facilitate the provision of legal services.21

Generally speaking, communications between a lawyer and her client made in the presence of a known third party are not privileged. The theory is that such communications could not have been intended to remain confidential.22 Nevertheless, in circumstances where a client can demonstrate that she had a reasonable expectation of confidentiality and the communications were “made to [or in the presence of] agents of an attorney ... hired to assist in the rendition of legal services,” the attorney-client privilege is not broken.23 This holds even where such communications were made entirely outside the presence of the attorney so long as the communications were made to the third party in order to facilitate the attorney’s representation of her client.24 The federal courts have applied the privilege to diverse professionals working with attorneys, including “a psychiatrist assisting a lawyer in forming a defense.”25 However, it is important to remember that this jurisprudence protects communications made to an attorney or on behalf of the services provided by an attorney; it does not extend beyond the scope of representation provided by an attorney.

A separate question is whether there is a privilege protecting communications between a social worker and a client made pursuant to providing other services, such as counseling, assisting with housing, medical assistance, et cetera. This is not as well-established in the law. In very broad terms, the issue seems to turn on the professional level of the social worker, i.e. licensure or certification, the expectations of the client as to confidentiality of the communications, and the purpose of the communications. For example, the Supreme Court recognizes “the ability to

21 See e.g., United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976). Although such “exceptions” may not break the privilege, it is extremely important that where a social worker is playing such a role, his or her function is fully documented as limited to that role. Should the social worker’s role go beyond translating or facilitating the provision of legal services, it may blur the line, making the privilege easier to pierce. Moreover, such exceptions are not absolute, and both the attorney and social worker should ensure that any communications are made in a setting most conducive to protecting the communications.


24 Note that this privilege applies to both the testimony and records of the third party. See e.g., Federal Trade Commission v. TRW, Inc., 628 F.2d 207, 212 (D.C. Cir. 1980)(citing United States v. Kovel, 296 F.2d 918 (2d Cir. N.Y. 1961)) (Finding the reports prepared by a third party privileged where report was prepared at request of attorney and “the purpose of the report was to put in usable form information obtained from the client”).

communicate freely without the fear of public discourse [as] the key to successful treatment” in psychotherapy and clinical social workers.26 However, it is not clear how far this privilege extends. Moreover, in state courts, privilege is adjudicated under state law, and each state has different rules regarding this matter.27 Therefore, social workers and social services organizations need to take every precaution to protect clients’ communications, and/or to advise clients that such communications may not be confidential.28

C. Legal Assessment

1. Screening Clients

The following are some suggested questions that may facilitate initial screening and evaluation of potential U applicants. These questions were drafted to elicit information relevant to the regulatory criteria, but are not exhaustive. Practitioners should be mindful of their client’s specific circumstances, and to direct their questions accordingly.

i. Background Immigration Information

- When did you enter the U.S.? List every place, date, and type of entry.
- For each time that you entered the U.S., did you enter with a valid passport and visa? Check passport and I-94 card.
- If you did not enter with a valid passport and visa, did you have any contact with an official, immigration, or other agent, during the entry?
  - Were you detained?
  - Were your fingerprints or photograph taken?
  - Did you claim to be someone else?
  - Did you claim to be a U.S. Citizen?
- Have you filed any immigration papers? If so, do you have a copy of those papers?
- Have you ever been ordered removed, excluded, or deported from the U.S.?  

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27 As of this writing, Dechert LLP has researched social worker privilege in New York, New Jersey, Florida, Texas, and Arizona. This research is available at www.anti-nyc-trafficking.com under the link to publications.
28 Legal Aid Foundation of Los Angeles (LAFLA) has also done substantial research on the social worker privilege issue. Information can be found on their website at www.lafla.org.
ii. Information on Crime

- Do you know the perpetrator? If so, how?
- Name of perpetrator/abuser, if known;
- Information on where perpetrator/abuser is residing, if known;
- Provide details of the crime (when, where, what occurred);

iii. Cooperation with Certifying Agency\textsuperscript{29}

- Have you spoken to law enforcement about this crime?
- Did you assist law enforcement in their investigation?
- Do you have contact information/address for the law enforcement official with whom you spoke?

iv. Harm Suffered

- Are you experiencing any lasting physical or mental effects as a result of the crime? Do you have any medical conditions that have worsened since the crime?
- Have you spoken to a therapist, case manager, or counselor about the harm you have suffered?
- Are there any other effects that you have suffered as a result of the crime that you can describe?\textsuperscript{30}
- Can you provide medical reports?

v. Inadmissibility and Good Moral Character

- Have you ever been arrested, including any time you were detained by immigration?

\textsuperscript{29} Under 8 CFR § 214.14(a)(2), the term “Certifying Agency” is defined broadly to include any authority “that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity.” Common examples include, but are not limited to local, State and Federal law enforcement, prosecutors, judges, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

\textsuperscript{30} Many types of evidence may be available to support the harm suffered by a victim of a crime. Evidence could include official medical reports, formal statements by a case manager or counselor attesting to the harm suffered, and letters of support by people close to the victim, including neighbors, family, and employers.
The U Visa Manual

- Detailed information about circumstances of each arrest/conviction;
- Have you ever used drugs?
- Have you ever helped someone cross the border without a visa?
- Have you ever pretended to be a U.S. citizen?
- Do you have a disease, such as tuberculosis, which could be considered a public health concern?

2. **Choosing a Remedy**

Many victims of crime have a history of abuse that may or may not be related to the most recent crime committed against them. Based on this history, the applicant may have different options for types of relief under U.S. immigration law. During the initial screening, it is important to pay attention to any red flags in the story, and to ask questions beyond the specific crime the client is reporting. Asking basic questions about a person’s family history, life in their home country, arrival into the U.S., and conditions under which they have lived in the U.S. will provide a more complete picture of the individual’s options for relief.

A chart outlining some options to consider is at A11, and may include the following:

i. **Violence Against Women Act (VAWA)**

The Violence Against Women Act (VAWA) was passed to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault, and stalking in the U.S. Under VAWA, victims of domestic abuse may apply for permanent resident status. A petition under VAWA basically requires the following:

- The perpetrator/abuser is a U.S. Citizen or Lawful Permanent Resident;
- The perpetrator/abuser is a spouse, parent, or, in the case of the elderly, a U.S. Citizen child;
- The abuse committed amounted to battery or extreme cruelty.

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31 A chart, “Basic Comparison of U Visa, VAWA Self-petitions, T Visas, and Asylum,” is included with these materials and outlines some options to consider when choosing a remedy for your client.


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A VAWA petition may be more advantageous because:

- U visa applicants have a 3-year continuous presence requirement before they can apply for lawful permanent residency.
- U visa recipients can only obtain lawful permanent residency if they can prove humanitarian need, family unity, or public interest.\(^{33}\) VAWA self-petitioners can obtain lawful permanent residency once a visa becomes available.
- U visa applicants have to rely on the I-918 Supplement B certification from law enforcement. VAWA applicants may self-petition and prove their entitlement to the remedy without any mandatory cooperation from law enforcement.

ii. Asylum

Asylum is a form of protection that may be an option for those who have suffered, or are likely to suffer, persecution in their home country. Often, victims of violence in their home country will have experiences of violence during their travel to the U.S., or following their arrival in the U.S. A client may initially present as a potential U-visa holder, but careful questioning regarding his/her history may also demonstrate eligibility for asylum.

The rules surrounding an application for asylum can be complicated and require a great deal of documentation. To be eligible for asylum, a person must be in the U.S. and meet the definition of a refugee.\(^{34}\) Under this definition, a person must have been persecuted, or fear the possibility of persecution if returned to their home country, on account of their race, religion, nationality, membership in a particular social group, or political opinion.

General points regarding eligibility for asylum:

- An application must be submitted within one year of arrival in the U.S., or within one year of expiry of lawful status. If an application is not timely submitted, an applicant must show “either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing the application…”\(^{35}\) (emphasis added).
- The persecution suffered by the applicant may be at the hands of the government, or an entity that the government is unable or unwilling to control.\(^{36}\)

\(^{33}\) 8 CFR § 245.24(b)(6).
\(^{34}\) A refugee is defined as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A), 8 USCS § 1101(a)(42)(A).
\(^{35}\) INA § 208(a)(2)(B), (D).
\(^{36}\) Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007).
An applicant may be eligible for asylum if persecuted because of the persecutor’s erroneous belief that they held an unpopular political opinion, religious view, or were members of a particular social group. While substantial case law supports the idea of persecution based on an “imputed” ground, it is important to document these cases thoroughly and be creative in the argument in favor of granting their application.

An asylum petition may be more advantageous because:

- The asylum application, while burdensome, may be preferred because it does not require applicant cooperation with, or certification by, law enforcement.
- An asylee is able to apply for lawful permanent residency one year after their asylee status was approved, while a U visa holder must wait three years.

iii. T Visa

The T visa was initially created by the Trafficking Victims Protection Act (TVPA) of 2000 and further defined in subsequent reauthorizations. Under the TVPA, a person is eligible to apply for a T visa if s/he is a survivor of a severe form of trafficking. In many instances, a trafficking survivor may also have been a victim of another crime. Depending on the severity of the trafficking situation and the identity of the trafficker, the survivor may be more willing to report another crime to law enforcement, and apply for the U visa in lieu of the T visa.

However, it is not necessary to choose between filing for a T visa and filing for a U visa; it may even make sense to file both types of petitions so that USCIS may review the facts under both standards. If it turns out that the applicant is eligible for both the U visa and the T visa, USCIS will probably ask that one petition be withdrawn since a foreign national can only hold one nonimmigrant status at a time. In making this type of decision, practitioners may want to consider the benefits available under each visa category.

Important considerations in deciding between the T visa and the U visa are:

- Those in T status are eligible for more public benefits than those in U status. Applicants approved for T status receive a Certification Letter from the Department of Health and Human Services, given them access to benefits.
- Those in T status are eligible to adjust status to permanent residence before three years if they document that the investigation and prosecution against the trafficker is complete.
- A T visa holder must only be “willing to cooperate” with a law enforcement investigation or prosecution against the trafficker.

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37 T Visa Manual, supra n. 8.
### Basic Comparison of U Visa, VAWA Self-petitions, T Visas, and Asylum

The purpose of this chart is to provide a general comparison of the possible options for humanitarian forms of immigration relief for crime victims. It is not meant to be exhaustive, or to replace a complete of the case specifics. Note that an applicant may apply for more than one relief at a time, but can only hold one status at a time. Please refer to the actual law and regulations when making a determination for your client.

<table>
<thead>
<tr>
<th></th>
<th>U Visa</th>
<th>VAWA Self-petition</th>
<th>T Visa</th>
<th>Asylum</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Qualifying Criminal Activity</strong></td>
<td>Must be a victim or the attempted victim of one of the enumerated crimes.</td>
<td>Battering or extreme cruelty; Labor or sex trafficking</td>
<td>Persecution or well-founded fear of persecution based upon one of five factors.</td>
<td></td>
</tr>
<tr>
<td><strong>Does crime have to have happened inside the U.S.?</strong></td>
<td>Yes, or U.S. territories and possessions</td>
<td>Yes, or U.S. territories and possessions</td>
<td>Yes. Must be physical present on account of trafficking</td>
<td>No, events occurred in country of nationality or last country of residence.</td>
</tr>
<tr>
<td><strong>Cooperation with law enforcement required?</strong></td>
<td>Yes</td>
<td>No</td>
<td>Must demonstrate reasonable efforts to cooperate</td>
<td>No</td>
</tr>
<tr>
<td><strong>Familial relationship to abuser?</strong></td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Timeframe to apply</strong></td>
<td>Within 180 days of the certification</td>
<td>No limit, unless qualifying relationship is terminated, abuser deported, or children aging out.</td>
<td>Must demonstrate physically present in U.S. on account of trafficking.</td>
<td>Within one year of expiry of lawful status, unless country conditions changed or extraordinary circumstances can be documented.</td>
</tr>
<tr>
<td><strong>Extreme hardship upon removal?</strong></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td><strong>Derivatives which can be included?</strong></td>
<td>May include spouse children, parents, and siblings depending on the principal’s age when the victimization occurred.</td>
<td>Children under 21.</td>
<td>May include spouse children, parents, and siblings depending on the principal's age when the victimization occurred.</td>
<td>Spouses and children under 21.</td>
</tr>
<tr>
<td><strong>Point at which application for permanent residency, aka a green card?</strong></td>
<td>Can apply after 3 years in U status.</td>
<td>Immediately if married to or formerly married to a USC.</td>
<td>After T visa if investigation complete. Otherwise, after 3 years in T visa status.</td>
<td>Can apply after one year in asylee status</td>
</tr>
</tbody>
</table>
II. Elements of a U Visa

In order to qualify for the U visa, a person must establish the following:

A. Information about Criminal Activity

The applicant must possess information about the criminal activity of which s/he has been a direct or indirect victim. It must be established that the criminal activity either violated the laws of the U.S. or occurred within the U.S., its territories, or possessions. The U visa is available to victims who have suffered from any of the following qualifying crimes or substantially similar criminal activity: \(^{39}\)

- 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
- Murder, manslaughter
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury
- Attempt, conspiracy, or solicitation to commit any of the above

It is important to note that this list is not exhaustive, and practitioners should advocate if their client is a victim of ‘substantially similar’ crimes, particularly those that target vulnerable immigrant populations. \(^{40}\)

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\(^{39}\) 8 USC § 1101(a)(15)(U)(iii); 8 CFR § 214.14(a)(9).

B. ‘Direct’ or ‘Indirect’ Victim of the Crime

Both direct and indirect victims are eligible to apply for U status. A direct victim is a person who has suffered direct harm or who is directly or proximately harmed as a result of the commission of a criminal activity.

USCIS also has the discretion to consider bystanders as direct victims, if they suffered unusually severe harm as a result of having witnessed the criminal activity. The example given in the comments to the interim final rule was of a woman who miscarries after witnessing such activity.\textsuperscript{41} Another example of a bystander-victim is a witness who suffers a heart attack after witnessing a murder.

An indirect victim may include any of the following:

- Qualifying family members of murder victims, manslaughter victims, and victims who are incapacitated or incompetent;\textsuperscript{42}
- \textbf{Practice Pointer:} During a Vermont Service Center (VSC) USCIS Stakeholder’s Meeting, VSC stated that parents of sexually abused U.S. Citizen children qualify as indirect victims of someone who is incompetent/incapacitated. VSC recommends completing the I-918 listing the parent as the victim.\textsuperscript{43} In these situations, it is not clear if the substantial harm must only be to the U.S. Citizen child, or if it must also be to the parent. The affidavit should address all the harm suffered by the family.

- \textbf{Example:} In May 2009, Ms. OH’s five-year old U.S. Citizen son, J, told her that he was molested by a neighbor, Mr. ID. Ms. OH immediately took J to the hospital and the police were called. Based on Ms. OH’s statements, Mr. ID was arrested and charged with predatory sexual assault and endangering the welfare of a child. Mr. ID’s spouse was angry with Ms. OH, and continued to harass her in the building. Ms. OH and J had to move to another neighborhood, where J is seeing a counselor at his new school. Ms. OH is eligible to petition for a U visa based on her minor U.S. Citizen son's victimization of a qualifying crime, her cooperation with the police and the District Attorney's office, and the substantial harm her son suffered as a result of the crime.

\textsuperscript{41} USCIS Interim Final Rule, 72 Fed. Reg. 53014 (2007), \textit{supra} n. 3.
\textsuperscript{42} 8 CFR § 214.14(a)(14)(i).
\textsuperscript{43} AILA VSC Liaison Committee’s Minutes of VSC Stakeholders Meeting (August 20, 2009) available at \texttt{www.aila.org}. AILA InfoNet Doc. No. 09090265. (Posted 9/2/09).
“Next friend”\textsuperscript{44} a person who appears in a lawsuit to act for the benefit of an immigrant victim:

- who is incapacitated, incompetent, or under the age of 16, and
- who has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity.

Note: The next friend is not a party to the legal proceeding and is not appointed as a guardian.\textsuperscript{45}

An indirect victim can also qualify for a U visa as a victim of witness tampering, obstruction of justice, or perjury, if the perpetrator committed the offense:

- to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity committed against the direct or indirect victim, or
- to further the perpetrator’s abuse, exploitation of, or undue control over the U Visa applicant through manipulation of the legal system.\textsuperscript{46}

\section*{C. Cooperation with Law Enforcement}

Eligibility for U nonimmigrant status requires certification that the applicant was helpful, is being helpful, or is likely to be helpful in the criminal investigation or prosecution of the crime.\textsuperscript{47} The applicant must obtain a “U Nonimmigrant Status Certification,” on Form I-918, Supplement B, from a federal, state or local law enforcement official, or a judge investigating or prosecuting the criminal activity.\textsuperscript{48}

Although not required by the statute, federal regulations require the applicant to continue to cooperate in the investigation or prosecution even after receipt of U status. The applicant must not refuse or fail to provide information and assistance “reasonably requested.”\textsuperscript{49}

Under the interim final rule, authorization to issue certification is limited to “the head of the certifying agency, or any person(s) in a supervisory role who has been specifically

\textsuperscript{44} 8 CFR § 214.14(a)(7).
\textsuperscript{45} Id.
\textsuperscript{46} 8 CFR § 214.14(a)(14)(ii)(B). Petitions have been filed on the basis of perjury for an applicant who was the victim of immigration fraud. The perpetrator knowingly filed incorrect immigration forms for thousands of people, and applicant was one of the first people to come forward and report the perpetrator to the authorities.
\textsuperscript{47} 8 USC § 1101 (a)(15)(U)(i)(III).
\textsuperscript{48} 8 CFR § 214.14(c)(2)(i); Form I-918, Supplement B is discussed in Part B.
\textsuperscript{49} 8 CFR § 214.14(b)(3).
Immigration Relief for Crime Victims
designated by the head of the certifying agency.”^50 Examples of agencies and certifying
officials at those agencies include the following:

- Investigating agency;
  - Local police department
  - U.S. Marshal
  - Victim witness coordinator, Federal Bureau of Investigation
  - Victim witness coordinator, Immigration and Customs Enforcement
  - Federal or state Department of Labor
  - Equal Employment Opportunity Commission
- Federal Administration for Children and Families or state or local equivalent;
- Prosecutor;
  - District Attorney
  - State Attorney General
  - Victim witness coordinator, U.S. Attorney
- Federal, state, or local judge.

Some agencies may not have a designated signatory. In fact, some agencies may lack
understanding about U visas and the role of certification. In such a situation, it is
important for advocates to collaborate with the agency to establish a protocol and
procedures to certify cooperating victims.

Practice Pointer: The applicant may cooperate with several agencies in the
investigation and prosecution of a qualifying crime. Talk to the official with whom
the applicant has had the most contact, and advocate to that official’s agency that
certification would most properly come from them. If the agency does not have a
designated signatory or is unaware of U visas, you should be prepared to educate
them on the law, the needs of the victim as a cooperating witness, and the importance
of certification.

D. Substantial Physical or Mental Abuse

The applicant must document substantial physical or mental abuse as a result of being a
victim of an enumerated crime or substantially similar criminal activity.^51 The
regulations define physical or mental abuse as “injury or harm to the victim’s physical

^50 8 CFR § 214.14(c)(2)(i).
person, or harm or impairment of the emotional or psychological soundness of the victim.”

The term “substantial” is used in both the definition of severity of the injury to the victim and the severity of the abuse inflicted by the perpetrator. The regulations indicate “no single factor is a prerequisite to establish that the abuse suffered was substantial.” A series of acts taken together may constitute substantial physical or mental abuse, even when no single act alone rises to that level. Some examples include:

**Example #1:** An applicant who was assaulted and held at gunpoint, and beaten with a blunt object. He sustained injuries that left him hospitalized for a week and had to go to physical therapy for three months. He continues to have back pain and was forced to quit his job as a delivery worker. He has trouble sleeping at night because of his pain and nightmares from the incident.

**Example #2:** An applicant who was a victim of domestic violence, abused over period of two years. She did not report this abuse to the authorities or seek medical assistance until she left her partner. She filed a disorderly conduct report with the police. She has trouble holding on to a job for longer than a few months, has difficulties with concentrating on tasks, and exhibits signs of depression.

**Example #3:** An applicant who was stalked by her ex-boyfriend for more than six months. He sat in a car outside her house three or four nights a week, called her office and hung up on her and her coworkers on a daily basis, and sent unsolicited letters, gifts, and emails to her constantly. He told her that they were destined for each other and no one can come between them. He followed her when she tried to go out on dates. She developed a fear of being alone at night because she constantly feels watched. She moved in with her parents and had two deadbolt locks installed at each of the entrances.

The petition should include an explanation/documentation of how the applicant suffered substantial injury both subjectively and objectively. The applicant’s own statement is critical to establishing the subjective nature of the injury, and may include issues pertaining to that applicant’s particular vulnerability. The regulations state that aggravation of preexisting conditions will be considered. Moreover, it is not necessary to support the subjective elements with a professional evaluation. The victim’s statement in his or her own words outlining the injury that resulted from the criminal activity may be sufficient.

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52 8 CFR § 214.14(a)(8).
53 8 CFR § 214.14(b)(1).
54 *Id.*
56 8 CFR § 214.14(b)(1).
If there are medical reports, they may certainly be included as they provide useful objective evidence of physical injuries and harm. If the applicant seeks counseling, consider including a psychological evaluation. A description of how the physical and mental abuse constitutes substantial harm as defined by the regulations should be addressed in the application cover letter.

E. Admissible to the U.S.

The applicant must be admissible for nonimmigrant status to obtain U visa status. “Admissibility” is the legal standard for all foreign nationals applying for a legal status to either enter or extend their stay in the U.S. 57 Common grounds of inadmissibility include:

- Entry without inspection
- Criminal convictions
- Unlawful presence
- Previously lying to federal immigration authorities (i.e., submitting applications with false information or presenting false documents)
- Unlawful voting
- Claiming to be a U.S. Citizen

Many, but not all, grounds of inadmissibility may be waived at USCIS’s discretion. Those seeking a waiver must file Form I-192 with accompanying fee or request for a fee waiver. In adjudicating the waiver, USCIS will balance the adverse factors of inadmissibility against the social and humanitarian considerations presented. 58 If the inadmissibility is based on violent or dangerous crime, then the Department of Homeland Security (DHS) will exercise favorable discretion only in extraordinary circumstances. 59

- **Practice Pointer:** In the affidavit, outline the circumstances that warrant favorable exercise of discretion, such as reasons the applicant wants to stay in/enter the U.S. and any sympathetic factors that explain the issue giving rise to the inadmissibility.

57 INA § 212; 8 USC § 1182.  
58 8 CFR § 212.17(b)(1).  
59 8 CFR § 212.17(b)(2).
III. Special Considerations

A. U Interim Relief

Approximately 7,000 individuals received provisional – or interim – relief prior to the release of U visa regulations. With no regulatory guidance, these applications tracked the language of the statute, and would include a letter from law enforcement documenting cooperation, the applicant’s biographic information, a copy of the passport information page, documentation that the applicant was a victim of qualifying criminal activity, and documentation of the harm suffered. Based on the presentation of a prima facie case, USCIS would generally grant deferred action status, which qualified the applicant for employment authorization.

While those with U interim relief were required to apply for U status by April 14, 2008, on December 18, 2009 USCIS extended that deadline to February 1, 2010. USCIS notified those individuals potentially affected by termination of interim relief status on November 9, 2009, advising them of this change. U interim relief recipients who miss this new deadline may qualify even after February 1, 2010 if they can establish exceptional circumstances for failing to meet the deadline. Exceptional circumstances may include the applicant’s incapacitation or incompetence during the relevant time period. Consult an immigration attorney immediately, as the period of time from the filing deadline to the time of application for full U status may trigger inadmissibility issues.

Those granted U interim relief are exempt from providing a newly executed Form I-918, Supplement B certification, and if approved, the U status will be retroactive to the date of initial interim relief approval.

B. Derivative Family Members

Certain family members may accompany or follow to join the U principal applicant, whether in the United States or overseas. Family members are considered “qualified” as derivatives depending on their relationship to the principal, the age of the principal at the time of filing, and the age of the derivative. U principals over 21 years of age at the time of filing may include as derivative applicants their spouse and unmarried children under the age of 21. Applicants under 21 years of age at the time of filing may include

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62 An eligible qualifying member will be admitted in one of the following U nonimmigrant statuses; U-2 spouse, U-3 child, U-4 parent of a U-1 holder who is a child under 21 years of age, or U-5 unmarried sibling under the age of 18. 8 CFR § 214.14(f).
their spouse, children, parents, and unmarried siblings under the age of 18. Note that a qualifying family member who is the perpetrator/abuser cannot apply for derivative status.

The relationship between the U applicant and the qualifying family member must exist at the time of filing and continue to exist at the time of adjudication. The regulations protect applicants and derivatives that ‘age out’ during the adjudication process. If the U principal was under 21 at the time of filing for an unmarried sibling, USCIS will continue to consider the sibling a qualifying family member even if at the time of adjudication the U principal is no longer under 21 and/or the sibling is no longer under 18 years of age.

Derivatives must be able to document their qualifying relationship to the principal applicant, with a birth or marriage certificate, and must be admissible to the U.S. Qualifying family members who may be inadmissible may file a waiver on Form 1-192. To apply for derivative status on behalf of qualifying family members, a U principal must submit Form I-918, Supplement A, “Petition for Qualifying Family Member of U-1 Recipient” for each family member. The U principal may apply on behalf of the qualifying family member either at the same time as their U visa application, or at a later date. All Form I-918, Supplement A’s must be accompanied by initial evidence and the required biometrics fees (or fee waiver). If represented by counsel, a separate Form G-28 for each derivative should also be included.

Derivatives presently in the U.S. are eligible to apply for employment authorization concurrently with Form I-918, Supplement A, or at any time thereafter. Derivative family members that live abroad may apply for employment authorization following their entry into the U.S. in derivative U status.

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63 *Id.*
64 8 CFR § 214.14(f)(1).
69 Initial evidence includes evidence demonstrating the qualifying relationship, and if the derivative is inadmissible, a Form I-192 waiver of inadmissibility. If the Form I-918, Supplement A’s are not filed at the same time as Form I-918 but are filed at a later date, they must be accompanied by a copy of the Form I-918 that was filed on behalf of the principal petitioner or a copy of his or her Form I-94 demonstrating proof of U status. 8 CFR § 214(f)(2).
70 *Id.*
72 *Id.*
C. If Your Client Was or Is in Deportation Proceedings

1. Victims in Removal Proceedings

- An individual in removal proceedings may apply for U status, by filing the I-918 with USCIS, not with Immigration Court.
- An applicant in proceedings must file a joint motion with ICE to terminate removal proceedings if U status is granted.\(^{73}\)
- Derivative family members in proceedings may also seek a joint motion with ICE to terminate if Form I-918, Supplement A was approved on their behalf.
- The motion should be filed with the Immigration Court or Board of Immigration Appeals (BIA).
- A grant of the motion results in cancellation of the order of removal, exclusion, or deportation as of the date of grant.\(^{74}\)
- File Form I-918 at Vermont Service Center (VSC). If proceedings were terminated, and the U visa is denied, then DHS can issue a new Notice to Appear (NTA).

**Practice Pointer:** If applicant is detained or in removal proceedings, expedited processing of the U petition may be requested. To request expedited processing, the U application must already be submitted to the VSC with a G-28. VSC may be reached at (802) 527-4888. You will need to leave a message, including the client’s Alien Registration number (A-number)\(^{75}\) and the Receipt number found on the I-918 Receipt notice. It usually takes up to 72 hours for the call to be returned.

Upon confirming that the applicant is detained, VSC will notify ICE and issue a bona fide determination. This determination is not predictive of adjudicative outcome, but is meant to notify ICE that the person has submitted a complete application and may be eligible for U status.\(^{76}\)

**Practice Pointer:** While the regulations\(^{77}\) suggest that the motion can be filed while the I-918 is pending, in practice ICE

\(^{75}\) The Alien Registration number, otherwise known as the A-number, is assigned by the DHS. If your client entered the U.S. without permission or inspection at a border point, it is likely s/he will not have an A-number. In this case, simply leave the I-918 Receipt number with the VSC Hotline. On applications, “none” or “n/a” should always be used instead of leaving the box blank.
\(^{76}\) VSC Stakeholders Meeting, supra note 43.
\(^{77}\) 8 CFR 214.14c1(i) and (ii)
will not join a motion until the I-918 is approved. This may vary among the different immigration districts.

2. **Prior Final Orders of Removal**

   - Form I-918 should be filed at VSC.
   - If the U visa is approved, then an order of removal, deportation, or exclusion by the Secretary (i.e., expedited removals, old INS exclusion orders) will be cancelled effective the date of the U visa approval.
   - Orders of exclusion, deportation, or removal issued by an Immigration Judge or the BIA must be reopened and terminated to be cancelled.

   **Practice Pointer:** When reviewing prior final orders of removal, first call the EOIR Hotline at 800-898-7180 to determine if the Motion to Reopen should be filed with the Immigration Court that issued the order or with the BIA. The Hotline has an automated system that, with the victim’s A-number, will indicate if an appeal was made in the prior case.

   If an appeal is on file, a Motion to Reopen with the BIA will need to be filed with the Immigration Court. The Office of the Chief Counsel should be contacted to determine if it would be willing to join the motion to reopen and terminate the prior order.

   - If the U visa is denied, the stay will automatically terminate on the date of the denial.

IV. **After Issuance of U Status**

A. **Employment Authorization**

The Employment Authorization Document (EAD) issued to the U-1 principal should be for the full four-year period, allowing for one-year extensions if law enforcement certifies that continued cooperation is necessary. If the EAD is not granted for the full period, there may be an error. In this situation, contact VSC at 802-527-4888. If it was not an error, a renewal can be filed by submitting Form I-765, proof of identity, two passport photos, and appropriate filing fee (or fee waiver). Those applying for U derivative status within the U.S. will need to apply for the EAD

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79 USCIS filing fees can be found at www.uscis.gov. As of the time of writing, the filing fee for an I-765 was $340.00 (payable to Department of Homeland Security), but since filing fees are subject to change, the amount should be verified prior to filing.
by submitting Form I-765 along with the Form I-918, Supplement A, and include proof of identity, two passport photos, and appropriate filing fee (or fee waiver).

B. Travel Overseas

Technically, individuals in U status are eligible to apply for a U visa at a U.S. consulate, and may use that visa to reenter the U.S. after a trip abroad. However, overseas travel raises a number of concerns in this context, and it may be wise to err on the side of caution and consider advising clients against overseas travel. For example:

- There is no guarantee that the visa will be issued;
- If the applicant accrued “unlawful presence,” departure from the U.S. may trigger a three- or ten-year bar to future immigration benefits in the U.S.
- Individuals in U status applying for adjustment of status to permanent residency must demonstrate continuous physical presence in the U.S. The regulations state that “an alien shall be considered to have failed continuous physical presence...if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days.”

C. Adjustment of Status to Permanent Residency

1. Eligibility to Adjust Status

Under INA § 245(m), a U visa holder may be eligible to adjust status to that of a lawful permanent resident. In order to adjust, U nonimmigrants must demonstrate:

- Lawful admission to the U.S. as a principal or derivative in U status (U-1, U-2, U-3, U-4, or U-5 nonimmigrant status);
- U status at the time of application, OR accrual of at least 4 years in U interim relief status;
- Continuously presence in the U.S. for three years;
- Is not inadmissible;

80 Discussed at length in Part A, section I.B.1 “Immigration Status.”
81 INA § 212(a)(9)(B), 8 USC § 1182(a)(9)(B).
82 8 CFR 245.24(a)(1).
83 Id.
84 Derivatives of the principal U nonimmigrant (U-2, U-3, U-4, and U-5) are able to submit an application to adjust status independently from the principal U-visa holder, unlike derivatives of a T nonimmigrant who must file at the same time or wait until after the principal T-1 has submitted an application to adjust status. See 8 CFR § 245.23(b)(1).
85 U interim relief status is discussed at length in Part A, section III.A “U Interim Relief.”
86 Grounds of inadmissibility are listed at INA § 212(a)(3)(E).
(5) Has not “unreasonably refused to provide assistance to an official or law enforcement agency…after the alien was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence;”  

(6) That a favorable exercise of discretion is “justified on humanitarian grounds, to ensure family unity, or is in the public interest.”

An applicant may not adjust if:

(1) They participated in Nazi persecution, genocide, or any act of torture or extrajudicial killing (other grounds of inadmissibility do not preclude adjustment).

(2) Affirmative evidence shows that the person unreasonably refused to provide assistance in investigation or prosecution of criminal activity.

(3) U nonimmigrant status has been revoked.

2. Inadmissibility and Discretion

The regulations clearly state that INA § 245(m) is a distinct form of adjustment, and therefore does not have the admissibility requirements detailed in 8 CFR §§ 245.1 and 245.2. The only bar to adjusting U nonimmigrants is INA §212(a)(3)(e), which makes inadmissible those “[p]articipating in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing.” This ground is not waivable, so there would be no basis to file Form I-601, Application for Waiver of Ground of Inadmissibility.

However, U adjustment is a discretionary benefit, and the burden is on the applicant to show that a favorable exercise of discretion is merited. Since adverse factors often overlap with inadmissibility grounds, it may be necessary to overcome those factors in advocating for a favorable exercise of discretion. For example, applicants who have been convicted of a crime may not be able to adjust, absent a showing of exceptional and extremely unusual hardship. Given that the regulations are so new, it is unclear at this point if a denial of adjustment by USCIS will survive judicial review.

87 8 CFR § 245.24(b)(5).
88 8 CFR § 245.24(b)(6).
89 8 CFR § 245.24(c).
90 8 CFR § 245.24(l).
91 Id.
3. **Documenting U-Based Adjustment Applications**

The application to adjust status must contain the following documents:  

- Form I-485, Application to Register as a Permanent Resident (including the additional instructions listed in Form I-485, Supplement E);  
- Form G-325A, Biographic Information, if you are between the ages of 14 and 79;  
- Form G-28, if represented by counsel;  
- Appropriate filing fees or request for fee waiver;  
- Photocopy of the applicant’s I-94, Arrival-Departure Record;  
- Proof of applicant’s U status (Copy of Form I-797, Notice of Action, granting U nonimmigrant status);  
- Photocopy of all pages of applicant’s passport(s) that was valid during the period of U status. If applicant does not have a passport or equivalent travel document, an explanation should be included in the affidavit;  
- Dates of any departure from the U.S. as well as the “date, manner, and place of each return;”  
- Sealed medical exam, including vaccinations.

**Practice Pointer:** The medical examination is typically required to determine if the applicant would be ineligible based on medical grounds. However, since those grounds are not at issue in a U visa adjustment, it is unclear if the medical exam should be required in these cases. This is an important issue, given the expense of the medical exam and concerns some individuals may have with the necessary vaccinations. As of the time of writing, USCIS indicated that it would issue a Request for Evidence (RFE) if it is determined that such a medical exam is required. However, if the medical exam is submitted with the adjustment of status, it will facilitate adjudication.

- Evidence that the applicant has not been absent from the U.S. for any period greater than 90 days, or any periods in the aggregate of 180 days or more.

**Practice Pointer:** An exception is if the absences “were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified.”

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93 8 CFR § 245.24(d).
94 As of this writing, Form I-485, Supplement E contains only instructions and can be found at www.uscis.gov.
96 8 CFR § 245.24(d)(5)(iii).
Evidence that the applicant did not unreasonably refuse law enforcement requests for cooperation. This requirement may be met with a newly signed Form I-918, Supplement B, “U Nonimmigrant Status Certification” or an affidavit explaining any requests for assistance by law enforcement and the applicant’s response.\(^ {97} \)

**Practice Pointer:** At the time of this writing, the regulations require a written certification form from law enforcement that the applicant has not unreasonably refused to cooperate. However, it is unclear that USCIS will require this element once the regulations are final.

**Practice Pointer:** Regardless of whether a certification from law enforcement will be required, information about the victim’s willingness to cooperate, or that s/he did not unreasonably refuse to cooperate with law enforcement, should be included in the sworn affidavit.

**Practice Pointer:** If the victim was unable to cooperate, an affidavit from the victim explaining why the refusal was reasonable should also be included. Other evidence to establish that the refusal was reasonable may include statements by a therapist and others close to the victim, explaining the victim’s inability to cooperate.

Evidence that applicant has at least three years of continuous physical presence. Examples include, but are not limited to, taxes, lease agreements, rent receipts, utility bills, school records, credit card statements, birth and/or marriage records, hospital records, and the applicant’s sworn statement.

**Practice Pointer:** While it is not necessary to prove physical presence for every day of the three years, it must be established that a person did not leave the U.S. for more than 90 days at one time, or an aggregate of 180 days. If a person has traveled substantially during the three years, take care to include enough documentation to prove the days do not add up to more than 180 days.

Evidence establishing that approval is warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

**Practice Pointer:** Evidence can include family ties (including U.S. Citizen children), community ties and volunteer work, any medical needs that the victim or victim’s family is experiencing (especially if related to the crime), length of residency in the U.S., and access to the U.S. court system. Additionally, country conditions from the victim’s home

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\(^ {97} \) 8 CFR § 245.24(e)(2).
country that would adversely affect him/her can also be included to show the importance of favorable discretion on humanitarian grounds.

- Evidence relating to discretion, listed above and including any and all mitigating equities, which might offset any adverse factors. Where adverse factors are extreme, a showing of exceptional and extremely unusual hardship in the case of denial may be required. Adverse factors may include, but are not limited to, crimes, drug use, and instances of fraud.

4. **Transition Rule**

The transition rule applies to applicants that have accrued 4 years or more in U interim relief status. In general, U nonimmigrant status cannot be extended beyond 4 years, and applicants must be in valid U status at the time of filing for adjustment. However, given the delay in promulgating the U regulations, there are many who have accrued 4 years or more in U interim relief status. According to TVPRA 2008, applicants who have accrued more than 3 years in U interim relief will remain in valid U nonimmigrant status for one year from the date of approval of Form I-918.

**Practice Pointer:** If at the time of filing the Form I-918 the applicant has been in U interim relief status for 4 years, the adjustment application can be concurrently filed with the Form I-918. The adjustment will remain pending until the Form I-918 is adjudicated.

5. **Adjustment of Status for U derivatives**

Derivatives (i.e. those who hold U-2, U-3, U-4, U-5 status) are eligible to adjust status; however, the regulations as written present a conundrum:

- Derivative not continuously present in the U.S. for three years are not eligible to adjust. If the principal U holder adjusts to permanent residency, the U derivatives have no basis to extend their status. U derivatives who gain U status after the principal are in essence precluded from fulfilling three years in U status.

- At the time of writing, USCIS has not issued guidance on how a U derivative who gains U status after the principal will be able to remain in U status to be eligible to adjust. The most likely solution will be to file Form I-539 requesting extension of U nonimmigrant status.

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98 INA § 214(p)(6), 8 USC § 1184(p)(6).
**Practice Pointer:** While this form is not explicitly eligible for a fee waiver, under INA § 245(l)(7), all filings related to VAWA, T visas, or U visas are eligible for a fee waiver.

6. **Petitioning for a “Qualifying Family Member”**

There is a separate process for family members that have never held U status. In these cases, the U principal may petition for a “qualifying family member” (QFM) to directly adjust status to permanent residency by submitting the new Form I-929. The Form I-929 may be filed concurrently with, or subsequent to, the principal’s adjustment application. However, the Form I-929 will not be adjudicated until the U-1 principal’s adjustment is adjudicated.

**NOTE** that family members who hold derivative U status (i.e. U-2, U-3, U-4, and U-5) are not considered to be QFMs for purposes of the I-929. The following eligibility requirements must be met to be recognized as a QFM:

- The QFM never held U nonimmigrant status;
- The qualifying family relationship exists at the time of the U-1’s adjustment and continues through the adjudication of the QFM’s adjustment;
- Either the QFM or the U-1 applicant would suffer extreme hardship if the qualifying family member is not allowed to remain in or enter the U.S.;
- Principal U-1 applicant has adjusted status, has a pending application, or is concurrently filing an application for adjustment of status.

7. **Travel Issues after Filing an Adjustment Application.**

As discussed above, while individuals in U status may travel outside of the U.S., issues relating to potential inadmissibility should be discussed before departing the U.S. Such issues are a concern even if the U nonimmigrant received advanced permission to travel through Form I-131, Application for Travel Document (advanced parole). Most disconcerting of these is the risk that if a U nonimmigrant accrued “unlawful presence,” departure from the U.S. may trigger a three- or ten-year bar to future immigration benefit.

**U nonimmigrants pending adjustment of status must also be aware of these reentry issues.** In addition to these issues, an applicant pending adjustment of status must obtain

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100 A “qualifying family member” should not be confused with a family member who was originally included in the U visa petition, and currently holds U-2, U-3, U-4, or U-5 status. These derivative U visa holders follow the same procedures to adjust status to permanent residence as the principal U visa holder.

101 8 CFR § 245.24(g).

102 8 CFR § 245.24(a)(2). Includes the U-1 principal applicant’s spouse or child, or, if the principal applicant is a child, a parent.

103 INA § 212(a)(9)(B), 8 USC § 1182(a)(9)(B).
advanced parole through filing Form I-131, which must be obtained prior to departing the U.S., otherwise the adjustment application will be deemed abandoned by USCIS. Note that the U nonimmigrant’s prior unlawful presence will not preclude issuance of the advance parole, nor will it impede re-entry into the U.S. However, it may nevertheless trigger a denial of the adjustment of status. Once USCIS makes this determination, the immigrant will be treated as an applicant for admission, subject to all grounds of inadmissibility.104

104 8 CFR § 245.24(j).
Part B: Preparing the U Nonimmigrant Visa Application Package

I. The Basics of the Application

Crime victims who have suffered substantial physical or mental abuse and cooperated with law enforcement officials to investigate or prosecute the crime may apply directly to USCIS for U status. A petition is made by submitting Form I-918; Form I-918, Supplement B, Form G-28 and supporting documentation to the Vermont Service Center.\(^{105}\) If filing for a waiver of inadmissibility, Form I-192 should be filed concurrently with the Form I-918.\(^{106}\) A request for fee waiver should cover the fees for both Form I-192 and biometrics.

The basic documents to include in the application package are:

- a brief cover letter acting as a roadmap to the evidence included.
- a duly signed and executed Form G-28 (on blue paper);
- filing fees or request for fee waiver; Form EOIR 26A\(^{107}\) may be used for this purpose;
- duly signed and executed Form I-918, with copy of applicant’s birth certificate and identify document (biographic page of passport or other government issued ID);
- duly signed and executed Form I-918, Supplement B, or proof of previous grant of deferred action pursuant to interim U relief;
- duly signed and executed Form I-918, Supplement A for each derivative family member (if appropriate) and documents establishing derivative's identity and relationship to primary applicant (birth certificate, marriage certificate, etc.);
- duly signed and executed Form I-765, for each derivative physically present in the U.S. applying for employment authorization. The principal applicant is not required to file a Form I-765.
- 2 passport photos of each applicant requesting employment authorization (including principal U applicant and derivative family members);\(^{108}\)

\(^{105}\) ATTN: U VISA UNIT; U.S. Citizenship and Immigration Services, Vermont Service Center, 75 Lower Welden Street, St. Albans, VT 05479-0001.

\(^{106}\) All immigration forms can be downloaded off the internet, available at www.uscis.gov.

\(^{107}\) This is not a required form, and an affidavit by the applicant is also acceptable. Note that at the time of this writing, USCIS is in the process of creating a new fee waiver request form.
The U Visa Manual

- a duly signed and executed Form I-192, if waiver of inadmissibility is being sought; and
- evidence supporting the claim (personal statement/affidavit, documentation of facts surrounding the crime, documentation of substantial harm suffered).

II. Preparing and Drafting the U Visa Application Package

A. Completing the Forms

1. Form G-28

The Form G-28, or notice of appearance of an attorney or representative, designates the attorney or representative of a religious, charitable, social service, or similar organization as the representative on behalf of a person involved in a matter before USCIS. There is no filing fee associated with the Form G-28, but it should be on blue paper.

2. Form I-918

Part 1. Information

- Complete basic background information about the applicant.
- Make sure to put dates in the U.S. format (Month/Day/Year) as opposed to the European format (Day/Month/Year) followed by many countries.
- Safe Mailing Address: This is the address to which USCIS will send notifications. It is a good idea to include the practitioner’s address to ensure that the case is properly processed.
- Date and Place of Last Entry into US: This should be taken from the current I-94 card, or stamp in the passport. If neither passport nor I-94 are available, make an estimate and note on the form that it is an estimate.
- Passport Information: If passport is not available, write “N/A.” An attempt to obtain one should be made, but if it is not possible, then file Form I-192.

Standards for the photographs can be found at www.travel.state.gov/passport/pptphotos/composition_checklist.html.
**Current Immigration Status:** Check client’s current I-94 card (this will usually be a white card stapled into the passport). It is the I-94, and NOT the visa stamp in the passport, that denotes status and authorizes length of stay. The individual’s status is noted by a letter, hyphen, and number (usually “B-1 or B-2” or “A-3” or “G-5”), and the expiration of that status is noted below.

**Part 2. Additional Information/Specific Questions**

- **Q4. Law Enforcement Certification.** If the applicant was not previously granted interim U relief, then check “Yes.” If the applicant was previously granted interim U relief, then check “No.”

- **Q6. Under the Age of 16.** This question refers to the applicant’s age at the time of the crime.

- **Q7. Employment Authorization.** Check “Yes.” Principal applicants do not have to file any additional applications to obtain employment authorization. Derivatives must file their own Form I-765 to receive work authorization. This can be filed concurrently with the Form I-918 if they are within the U.S.

- **Q8. Immigration Proceedings.** This question refers to Deportation or Removal Proceedings, only. Check “Yes” if the applicant was ever ordered to appear before an Immigration Judge in the U.S.

- **Q9. Place of entry and status.** This information should be taken from the visa in the passport. If neither the visa nor passport is available, make an estimate and note on the form that it is an estimate.

- **Q10. Consulate notification.** This only applies if the principal applicant or derivative is abroad.

**Part 3. Processing Information**

These questions are to determine “admissibility,” a legal standard required for all foreign nationals applying for a legal status to either enter or extend their stay in the U.S. It is also very important to the ultimate “green card” application. Be sure that clients answer each question truthfully, especially questions about criminal conduct in the U.S. If the answer to ANY of the questions is “Yes,” the applicant will have to file a Form I-192, Waiver of Inadmissibility.

- **Q1. Criminal History.** You may want to check the immigration regulations and statutes to make sure that the applicant’s admission to a criminal act does not subject

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109 Filing a petition for someone who is not eligible could result in a Notice to Appear (NTA) before an Immigration Judge (IJ) and subsequent removal (deportation) from the U.S.
him or her to a permanent bar from immigration benefits. However, the U visa allows most criminal acts to be waived.

**Q2. Public Charge.** If the applicant has received any cash assistance from the U.S., state, or local government, answer “Yes” and complete a Form I-192 Waiver.¹¹⁰

**[Q3, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22.]** Answering “Yes” to these questions should not bar U status, but consult an immigration attorney to make sure that the applicant is eligible for a waiver. Filing an application for someone who is not eligible could result in applicant being placed in “deportation” or “removal proceedings” before an Immigration Judge.

**Part 4. Information about spouse and/or children**

Fill in information as completely as possible. This section should contain all children, including U.S. citizens.

**Part 5. Filing on Behalf of Family Members**

Check “Yes” or “No,” depending on whether the applicant is petitioning for family member(s). If “Yes,” a separate Form I-918, Supplement A must be completed and included for each family member.

**Part 6. Attestation, Release, and Signature**

Signature by the applicant certifying that everything is true and correct under penalty of perjury, and that the applicant understands that the USCIS can and may share this information with other government agencies.

**Part 7. Signature of Person Preparing Form, If Other Than Above**

Should be completed by the attorney or advocate who assisted in preparing the forms. This is a normal part of any immigration petition or application.

**3. Form I-918, Supplement B**

Except for those granted interim U relief,¹¹¹ a law enforcement certification is required of all principal U applicants. The Form I-918, Supplement B is the law enforcement certification (“LEC”), which can only be signed by:

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¹¹⁰ In addition, if an applicant has received public benefits in the name of a U.S. Citizen child, s/he may answer “No” to this question. An answer of “Yes” only applies where the cash assistance was received in the applicant’s name.

¹¹¹ If the Applicant was previously granted interim relief on a pre-10/17/2007 application, the applicant does not need to submit Form I-918, Supplement B. Such an applicant must provide proof of previous grant of interim relief.
- A judge;
- The head of the certifying agency;\textsuperscript{112} or
- A specified designee of the certifying agency appointed by the agency head.

**Practice Pointer:**

- Your first step in the U visa process should be arranging the Form I-918, Supplement B from a law enforcement agent.
- Law enforcement certifications are only valid for 6 months. As indicated in the Federal Register, this compulsory time limit aims to prevent the submission of “stale” certifications and to preclude “the situation where petitioners delay filing…and they cease to be helpful to the certifying agency.”\textsuperscript{113}

4. **Form I-918, Supplement A**

A separate Supplement A, G-28, and filing fee, or a request for fee waiver, must be included for each family member being sponsored. Derivatives who are applying from outside the U.S. will undergo an interview at the appropriate consular post. Attorneys should examine whether derivative applicants face inadmissibility issues, such as unlawful presence, issues around unlawful entry, or prior criminal convictions.

**Part 1. Relationship**

Check the appropriate relationship.\textsuperscript{114} Applicants over 21 can file for their spouse and unmarried children under 21. Applicants under 21 can file for their spouse, children, parents and unmarried siblings under 18 at the time of filing of Form I-918 (not at time of interim filing).

**Part 2. Information about the Main Applicant**

If the Supplement A is filed together with the original Form I-918, check “Pending” for the last question in this section.

**Part 3. Information about Derivative Applicant**

Be sure to answer all questions. Answer “None” or “N/A,” but do not leave blanks.

\textsuperscript{112} The Act does not define law enforcement agency nor does it specify which law enforcement agencies are qualified to provide the needed law enforcement certification to U visa applicants. The interim regulations identify the head of the certifying agency or a designated official as the appropriate person to sign the LEC

\textsuperscript{113} USCIS Interim Final Rule, 72 Fed. Reg. 53014 at 53023 (2007), supra n. 3.

\textsuperscript{114} Perpetrators/abusers cannot be a qualifying family member.
Part 4. Additional Information

Q1. Immigration Status. This question is the same as the immigration status portion of Part I of Form I-918.

Q4. Same as Part 2, Question 10 of Form I-918.

Q5. Immigration Proceedings. This question refers to Deportation or Removal Proceedings. Check “Yes” only if the Family Member has been ordered to appear before an Immigration Judge.

Q6. Employment Authorization. Note that family members already living in the U.S. are eligible to receive employment authorization. Derivatives must file Form I-765 accompanied by Form G-28, if represented by counsel, two passport photos, appropriate filing fee (or fee waiver), and for Q16 on Form I-765, indicate ‘a20’ as the eligibility category.

Q8-23. As with Part 3 on the Form I-918, these questions are to determine “admissibility.” Be sure to answer truthfully to each question. If the answer to any question is “Yes,” a Form I-192 with filing fee or request for fee waiver will need to be filed for each applicant. Consult an immigration attorney to determine eligibility for a waiver and/or risk of deportation or removal.

Part 5. Attestation and Release.

This is similar to Part 6 on the Form I-918. If the family member is in the U.S., s/he should sign. If the family member is NOT in the U.S., only the principal applicant needs to sign.

Part 6. Signature

The same as Part 7 on Form I-918.

5. Form I-192

This two-page form should be signed and submitted for the applicant and each derivative family member who is inadmissible under INA § 212(a), along with: 115

- Supporting statement and other evidence, if any, requesting favorable exercise of discretion (may describe sympathetic circumstances that gave rise to inadmissibility and/or the reasons why the applicant or derivative seeks to stay/enter the U.S.);

115 Even though the applicant may be physically in the U.S., in order to permit them to be “entered” into a legitimate status, the Form I-192 must be filed.
A check or money order for $545 payable to the **U.S. Department of Homeland Security**, or a request for fee waiver, must be included for each Form I-192.\(^{116}\)

**Completing the form**

- **Q1-6.** Self-explanatory.

- **Q 7. Desired Port of Entry into US.** Enter “Vermont Service Center” and the city of the nearest District Office. For example: “VSC/New York, NY.”

- **Q 8. Means of Transportation.** Enter “N/A.”

- **Q 9. Proposed Date of Entry.** Enter the date on which you are filling out the form.

- **Q10. Approximate Length of Stay in the US.** Enter “Indefinite.”

- **Q11. Purpose for Entering the US.** Enter “Obtain U nonimmigrant status.”

- **Q12. I Believe I May be Inadmissible.** List any and all of the issues to which applicant answered “Yes” to in Part 3 of the Form I-918. Consult someone with expertise in this area to make sure the ground is eligible for a waiver. It should be a brief explanation. The most common are, “I may be inadmissible because I . . .:”

  - “entered the U.S. on a fraudulent visa.”
  - “violated my nonimmigrant status.”
  - “entered the U.S. without inspection.”

- **Q13.** If applicant previously filed I-192, answer “have.” If applicant has never applied to enter the U.S., s/he would never have filed this form, and can answer “have not previously filed.”

- **Q14-17.** Applicants for T and U nonimmigrant status do not need to answer these questions, so response should be only “Applicant for U Status.” No other details need to be provided.

- **Q18. Applicant’s Signature and Attestation.** The applicant should sign and date the form.

- **Q19. Preparer’s Signature and Certification.** This should be completed by attorney or advocate who assisted in the preparation of the petition. This is a normal part of any immigration petition or application.

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\(^{116}\) Pursuant to 8 CFR § 103.7(c)(5), applicants for T and U nonimmigrant status may submit fee waiver requests for I-192 applications.
6. Fee Waiver Request

- Fee waivers are available at the sole discretion of the USCIS.
- Note in the cover letter if a fee waiver request is being included with the application.
- Form EOIR-26A may be used for this purpose. The fee waiver lists the applicant’s assets, income, and expenses, to show that the applicant does not have sufficient funds to pay the application fee.\(^{117}\)
- Applying for a fee waiver will not prejudice the applicant.
- Only one fee waiver per applicant needs to be filed to cover all applications submitted together.

7. Photographs and Filing Fees

- Applicant must include two (2) passport photographs (for work authorization), with name and A# (if available) written on the back of each photo in pencil
- There is no filing fee for the I-918. However, there is a biometric fee of $80, as well as filing fees for the I-765 ($340) and the I-192 ($545).\(^{118}\) Fees may be paid with check or money order, and should include applicant’s name.\(^{119}\)

B. Preparing the Supporting Documentation

1. Personal Statement/Affidavit

The personal statement/affidavit must be in the applicant’s own voice (i.e., no legal jargon). Applicant should submit a detailed personal statement or affidavit addressing each element required for U status:

- Details of Criminal Activity:
  - Explain who, when, and where and the circumstances of the crime
  - Indicate whether specific records of the crime are available

\(^{117}\) Gail Pendleton, *National Immigration Project, Practice Pointers on Filling with VSC*, Feb. 27, 2002. In addition, as indicated in *supra* n. 107, USCIS is in the process of developing a form to request a fee waiver, please check www.uscis.gov prior to filing.

\(^{118}\) USCIS fees increase often. Always check www.uscis.gov for current fee schedule.

\(^{119}\) It is helpful to pay by check, because the cancelled check will have applicant’s case number on it and is also proof of filing if USCIS misplaces the file.
Details of Law Enforcement Involvement:

- Describe how law enforcement became involved
- Name the responsible law enforcement agent
- Describe Applicant’s cooperation in the process

Details of Substantial Physical and/or Mental Abuse:

- State circumstances surrounding the victimization, including, but not limited to:
  - Nature of the injury inflicted or suffered
  - Severity of the perpetrator’s conduct
  - Severity of the harm suffered
  - Duration of the infliction of the harm
  - Extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim (including aggravation of preexisting conditions)

- Letter from a nongovernmental organization or clinical social worker affidavit may be helpful to describe the situation and the trauma experienced

Information Supporting any of the Other Eligibility Requirements:

- If there is any additional information (i.e., admissibility, helpfulness, etc.) that the applicant wants USCIS to consider in order to establish eligibility, describe in the affidavit.

If possible, provide the applicant with a translation of the document (if the applicant is not fluent in English). If a written translation is not possible, orally translate the Personal Statement, giving the applicant the chance to make edits and corrections.

2. **Supporting Documentation/Exhibits**

- Any document not in English must contain a certified translation
  - must include a **signed and dated** statement of accuracy by the translator, i.e. - “This is to certify that I am competent to translate from [insert language] into English and that the attached translation is accurate.”
  - translated document should be on top of the foreign language document to allow the Adjudicator to see the English version first.
- Applicant’s Marriage Certificate. If applicant is filing for her/his spouse, a copy of the marriage certificate with translation, must be included. If either the principal applicant or the spouse was previously married, include proof of the termination of all previous marriages (death certificate or divorce decree with translation);  

- Birth Certificates.
  - If applicant is filing for children, provide a copy of the child’s birth certificate. If the child was adopted, include official copy of certificate or record of adoption.  
  - If applicant is filing for parents, the principal applicant’s birth certificate must be included. If both parents are not listed on the birth certificate, also include the parent’s marriage certificate. 
  - If applicant is filing for siblings, the principal applicant’s birth certificate and the derivative applicant’s birth certificate should both be included to demonstrate the relationship. 

- General Exhibits. Try to submit at least one document, in addition to the Personal Statement, that addresses each element. Examples of general exhibits include:
  - Witness affidavits (counselors, case managers, shelter workers, family members, friends, ministers, etc); 
  - Trial transcripts; 
  - Court documents; 
  - Police reports; 
  - Hospital and other medical records; 

Practice Pointers:
  - Double-sided copies are acceptable, and copies do not have to be notarized or certified;
  - VSC suggests highlighting key portions of exhibits; 

120 USCIS recognizes marriages as valid based on the laws of the country where the marriage took place. This may be an issue with tribal, dowry, or other non-state marriages, so you may need to supplement the documentation with evidence demonstrating the validity of the marriage. The Library of Congress is an excellent resource for research on this subject.  
121 Note that not all countries recognize adoption, including several Muslim countries. You may want to consult with an attorney familiar with local laws regarding adoption in that country.
3. Application Checklist

- **Cover letter** printed on your agency’s letterhead.\(^\text{122}\)
- **Form G-28** (if applicable).
- **Filing Fees or EOIR-26A, Fee Waiver Affidavit**.
- **Form I-918**, with
  - applicant’s birth certificate
  - applicant’s identity document.
- **Form I-918, Supplement B**, or proof that applicant was previously granted U interim relief.
- **Form I-192 Waiver** (if applicable) for principal applicant.
- **Form I-918, Supplement A and I-765** (if applicable) for each family member.
  - two (2) photos;
  - identity documents for each derivative;
  - documents establishing relationship to the principal;
- **Filing Fees or EOIR-26A, Fee Waiver Affidavit**
- **Form I-765** for each derivative, if applicable
- **Form I-192** for each derivative, if applicable
- **Tabbed Exhibits:**
  - Personal Affidavit
  - Witness affidavits
  - Court documents/transcripts
  - Medical documents
  - Any other documents relevant to the claim

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\(^{122}\) See “Cover letter accompanying U petition submission” on the probono.net/ny/family website (registration is free) in the library under immigration, which is available at: http://www.probono.net/ny/family/library/folder.21203-Immigration. The cover letter indexes the documents included with the application, providing a roadmap for the adjudicator and provides a summary of how the evidence addresses the required elements.
5. **Finalize and Submit Application**

- **Hole punch and fasten the original application.** Use a two-hole punch and punch through the top of the pages. Fasten the entire packet with a metal fastener.

- **Make two (2) copies of the complete packet.** Give one to the applicant and keep one for your files.

- **Submit via courier,** or other traceable service

- **Mark Envelope in Bold Ink, **Attn: U Visa Unit, **and send to:**

  U Visa Unit  
  United States Citizenship & Immigration Services  
  Vermont Service Center  
  75 Lower Welden Street  
  St. Albans, VT 05479-0001

6. **Follow Up**

- Receipt Notice(s) and Application Support Center (ASC) biometric/fingerprint appointment(s) should arrive within three weeks of submission.

  - **Practice Pointer:** Ask client to provide the stamped ASC notice to evidence attendance at appointment

- Track status with receipt notice number, in the upper left hand corner of the receipt notice, at www.uscis.gov.

- If there is Request for Additional Evidence (RFE) or a Notice of Intent to Deny (NOID), note the due date, this is the date the response was be received by VSC.

- If approved, check the validity dates; U nonimmigrants can apply to adjust status after three years in U status.

- Approval validity dates for family members: U derivatives must also be in U status for three years to be eligible to adjust.

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123 Note that biometric appointment is not an indication of approval