



USCIS POLICY MANUAL UPDATES

T Visas and the Definition of Trafficking

By Andrew Craycroft

I. T Visa Statutory and Regulatory Requirements¹

T nonimmigrant status (often referred to as the “T Visa”) was created in October 2000 to provide immigration relief for survivors of human trafficking.² Eligibility criteria for the T Visa are governed by the statutory provisions and corresponding regulations. Additionally, U.S. Citizenship and Immigration Services (USCIS) policy guidance provides important information on how USCIS interprets these requirements and approaches T Visa adjudications. On October 20, 2021, USCIS added comprehensive policy guidance on T Visas to its Policy Manual. This practice advisory explores how these updates interpret the definition of a “severe form of trafficking in persons,” a key eligibility requirement for the T Visa.

Since its introduction in 2000, access to T nonimmigrant status has been expanded for trafficking survivors and their family members by subsequent legislation. The current statutory eligibility criteria are that the applicant must show that they:

- Are a survivor of a severe form of trafficking or attempted trafficking, which includes both labor and sex trafficking;
- Are physically present in the United States or at a port of entry on account of the trafficking and have remained in the United States since the most recent act of trafficking;
- Have complied with any reasonable request for assistance in investigating or prosecuting the trafficking (unless they are under the age of eighteen or an exception applies); and
- Are at risk of suffering extreme hardship upon removal from the United States.³

T Visa eligibility for family members of trafficking survivors has also been expanded. Applicants over twenty-one years of age can include their spouse and children as derivatives. Applicants under the age of twenty one can include their spouse, children, parents, and unmarried siblings under the age of eighteen. Additionally, if there is danger to family members due to the trafficking or the survivor’s cooperation with law enforcement, applicants of any age can

¹ The ILRC thanks the Berkeley Law Anti-Trafficking Project (BATPRO) students, Yuxi Han, K.D. Harbeck, Liam Mahagan, and Christopher McKeon, for their research and work on this advisory.

² Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. 114 Stat. 1464, 1470 (Oct. 28, 2000), codified at 22 U.S.C. § 7101; Immigration and Nationality Act (“INA”) § 101(a)(15)(T); 8 C.F.R. § 214.11.

³ INA § 101(a)(15)(T)(i).

include their parents, unmarried siblings under eighteen years of age, and adult or minor children of derivatives.⁴

Federal regulations at 8 C.F.R. § 214.11 further clarify and define these eligibility criteria, as well as outline the application process and evidentiary requirements. The current regulations were revised in December 2016, although USCIS has issued proposed T visa regulations more recently for notice and comment.⁵ Notably, the regulations outline USCIS's "any credible evidence" standard under which USCIS adjudicates T Visa applications.⁶

For additional information about T Visa eligibility, please consult the ILRC's practice advisory *T Visas: What They Are and How They Can Help Your Clients*, https://www.ilrc.org/sites/default/files/resources/t_visas_advisory-20170509.pdf.

II. Overview of T Visa Guidance in the USCIS Policy Manual

USCIS's policy guidance offers important information on how USCIS interprets the T Visa statute and regulations when it adjudicates T Visa applications.⁷ Prior to the 2021 Policy Manual revision, USCIS's T Visa guidance was contained in Chapter 39.2 of the Adjudicator's Field Manual ("AFM").

The Policy Manual guidance, contained in Volume 3, Part B of the USCIS Policy Manual (USCIS-PM) is divided into fourteen chapters. Chapter 1 gives an overview of the purpose and background of the T Visa. Chapters 2-7 discuss T Visa eligibility, evidence, and adjudication for applicants and their family members. Chapters 8-14 discuss additional issues related to the T Visa, including the annual visa cap, procedural issues concerning removal proceedings, work authorization, travel, revocation of status, and confidentiality protections. Additionally, USCIS added guidance on the T Visa-specific inadmissibility waiver to Volume 9, Part O of the Policy Manual. The 2021 Policy Manual guidance supersedes the AFM and represents USCIS's most current interpretation of the T Visa requirements. USCIS has not yet issued updated guidance in the Policy Manual regarding adjustment of status to permanent residence for current T Visa holders.

For a more in-depth look at these changes, please consult the Coalition to Abolish Slavery and Trafficking and ASISTA's *Advisory on New T Visa Sections of the USCIS Policy Manual*, Nov. 2021, <https://asistahelp.org/wp-content/uploads/2021/12/Advisory-for-T-Visa-Policy-Manual-Dec-2021.pdf>. This practice advisory gives an overview of the new Policy Manual section and identifies areas where it defines a new concept or provides further clarification of an existing concept.

⁴ INA § 101(a)(15)(T)(ii).

⁵ As of February 2023, these proposed regulations have not been finalized.

⁶ See 8 C.F.R. § 214.11(d)(5).

⁷ The guidance itself does not create additional substantive requirements for T Visa eligibility. In fact, guidance that lacks legal support in the regulations or statute may be *ultra vires*, or beyond the legal authority of USCIS.

III. Showing a Severe Form of Trafficking under USCIS’s Updated Policy Guidance

The chapter on eligibility requirements, 3 USCIS-PM B.2, gives an overview of what constitutes a severe form of trafficking and defines some of the underlying terms that make up its elements. Although many of these definitions simply restate the statutory or regulatory definition of the term, the Policy Manual guidance also includes new definitions of previously undefined terms as well as helpful clarification for existing terms beyond what is in the statute, regulations, or prior guidance.

The Policy Manual breaks up the definition of labor and sex trafficking into three elements (the action of trafficking, the purpose or end of the action, and the means used).⁸ The chart the Policy Manual uses to illustrate these elements is reproduced below:

Severe Form of Trafficking in Persons Definition			
Type of Trafficking	Action	End	Means
Sex Trafficking	<ul style="list-style-type: none"> • Recruiting • Harboring • Transporting • Provision • Soliciting • Patronizing • Obtaining • (Of a person) 	For the purpose of a commercial sex act	Induced by force, fraud, or coercion (not required when the victim is under 18 years of age)
Labor Trafficking	<ul style="list-style-type: none"> • Recruiting • Harboring • Transporting • Provision • Obtaining • (Of a person) 	For the purpose of subjecting the victim to: <ul style="list-style-type: none"> • Involuntary servitude • Peonage • Debt bondage • Slavery 	Through use of force, fraud, or coercion

The Policy Manual goes on to define several of these terms, including harboring, coercion, and the terms that make up the purpose of labor and sex trafficking. It does not provide further details on the definitions of force or fraud, or the remaining trafficking-related actions of recruiting, transporting, providing, obtaining, soliciting, or pandering. Nor are these terms defined in the statute or regulations.⁹

A. Harboring

Harboring is not defined in the T Visa regulations or statute. Its use in other areas of federal law generally relate to the sheltering of a fugitive from justice.¹⁰ Here, the Policy Manual clarifies that harboring in the trafficking context “refers to the series of actions a trafficker takes to exert and maintain control over a victim by substantially limiting or restricting the victim’s

⁸ 3 USCIS-PM B.2(B)(1).

⁹ Practitioners have relied on the “plain meaning” of these terms or pointed to their definition from criminal law, other federal statutes, or law dictionaries.

¹⁰ See, e.g., 18 U.S.C. § 792; see also *Harboring*, *Black’s Law Dictionary* (11th ed. 2019).

movement or agency.”¹¹ It must generally last long enough to “substantially limit or restrict the victim’s movement or agency.” Factors that can indicate harboring include isolation of the person, limiting their ability to interact with others, restrictions of their movement, and imposing consequences for acting outside of the trafficker’s orders or without their permission. The definition also specifies that even though it does not require a preexisting relationship, this type of action can occur within a variety of economic, family, and intimate partner relationships.

This definition helpfully diverges from how the term harboring is used or understood in other areas in order to capture some subtler types of trafficking related actions that may not meet the definition of the remaining terms or occur earlier in the process of trafficking. For example, this definition of harboring may encompass actions taken to isolate a person or exercise control over them before the eventual labor or commercial sex act is obtained from them.

B. Coercion

Coercion is defined by statute as (1) threats of serious harm to or physical restraint against a person; (2) 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 (3) the abuse or threatened abuse of the legal process.¹²

The Policy Manual provides examples of this conduct and defines the underlying concepts of serious harm; physical restraint; threats; scheme, pattern, or plan; and abuse or threatened abuse of the legal process.

Serious harm is defined as any harm, including physical, psychological, financial, or reputational harm that is sufficiently serious to compel a reasonable person of the same background and under the same circumstances to perform labor in order to avoid experiencing it. The Policy Manual includes a list of examples of harm to the person being trafficked as well as other persons close to them.¹³ One type of harm alone can constitute serious harm, or if several types of harm are involved, they can constitute serious harm when considered together. USCIS will consider the person’s specific vulnerabilities in determining the seriousness of harm including their “socioeconomic situation, physical and mental condition, age, education, training, experience, or intelligence.”¹⁴

USCIS provides several examples of physical restraint and specifies that there is no requirement that the person be physically restrained and prevented from escaping. Additionally sexual abuse can constitute physical coercion.

USCIS defines a threat as a “serious expression of an intent to inflict harm” as perceived by a reasonable person who hears, reads, sees, or experiences it.¹⁵ USCIS views threats from the viewpoint of the target considering the totality of the circumstances. In addition to this objective test, the trafficker must have made the expression intending it to be a threat and knowing that it would be viewed as such.

¹¹ 3 USCIS-PM B.2(B)(2)

¹² 22 U.S.C. § 7102(3); 8 C.F.R. § 214.11(a).

¹³ 3 USCIS-PM B.2(B)(3).

¹⁴ *Id.*

¹⁵ *Id.*

The Policy Manual uses the definition of “scheme, plan, or pattern” from the forced labor statute in federal criminal law.¹⁶ Scheme, pattern, and plan are defined as an alternative to direct threats or overt violence. Instead, the trafficker may employ a scheme, pattern, or plan “intended to cause the person to believe” that they would suffer serious harm or physical restraint if they do not perform.

Abuse or threatened abuse of the legal process is briefly defined in the federal statute as the use or threatened use of a law or legal process, whether administrative, civil, or criminal manner for a purpose for which the law was not designed in order to exert pressure on another person to take or refrain from an action.¹⁷ USCIS provides additional clarification of examples that may constitute abuse or *threatened* abuse of the legal process including threats of imprisonment or prosecution, threats of institutionalization, and threats of immigration enforcement. It specifies that the threatened outcome does not have to be an actual legal possibility.

These definitions provide helpful context in determining whether conduct constitutes coercion, especially conduct that is not a direct threat of harm or physical restraint. Crucially, USCIS instructs adjudicators to view the threat in the totality of the circumstances and assess how it would be understood by a reasonable person under the same circumstances as the person experiencing it. Finally, threats of abuse of the legal process do not need to be limited to legally possible criminal or immigration consequences in order to constitute coercion.

C. Purposes of Labor and Sex Trafficking

The Policy Manual defines the legally required trafficking purpose for sex trafficking, a commercial sex act, as well as the various trafficking purposes that constitute labor trafficking. Although some of the entries for these terms merely restate the statutory definition or point to preexisting case law, the Policy Manual provides additional clarification on the terms involuntary servitude and peonage. It also provides a definition of slavery, which is not defined in the statute or regulations.

A commercial sex act is defined by statute as “any sex act on account of which anything of value is given or received by any person.”¹⁸ The Policy Manual restates this definition, but does not provide any further clarification or examples.¹⁹

For purposes related to labor trafficking, only “involuntary servitude” and “debt bondage” are defined by the statute.²⁰ Debt bondage is described as the condition of a debtor who has pledged their personal services as a security for debt if the value of those services is not applied toward its liquidation or if the length and nature of the services are not respectively limited and defined. The Policy Manual restates this definition and points to its appendix of case law decisions for further clarification of the term.²¹

¹⁶ 18 U.S.C. § 1589(a)(4).

¹⁷ 22 U.S.C. § 7102(1).

¹⁸ 22 U.S.C. § 7102(4).

¹⁹ 3 USCIS-PM B.2(B)(5).

²⁰ 22 U.S.C. § 7102(7)-(8).

²¹ See 3 USCIS-PM B, Appendix: Case Law References for T Visa Adjudications, <https://www.uscis.gov/policy-manual/volume-3-part-b>.

The statutory definition of “involuntary servitude” is a condition of servitude obtained by causing a person to believe that if they did not enter into it they would suffer serious harm or physical restraint, or obtained by abuse or threatened abuse of the legal process. The Policy Manual provides some additional guidance explaining this concept. Importantly, it clarifies that it may occur in circumstances where the person has a preexisting relationship with the trafficker, including a previously voluntary smuggling arrangement or a domestic relationship.²² It details that domestic violence, encompassing physical abuse, mental abuse, emotional abuse, sexual violence, intimidation, and controlling behavior, can be a means employed by a trafficker to create a condition of involuntary servitude in the home. USCIS adds the caveat that not all labor occurring as a result of domestic abuse constitutes a condition of servitude, adding that unequal assignment of household tasks may signify an abusive relationship but not necessarily servitude. According to USCIS, the distinction is whether the motivation of the perpetrator is to subject the person to a condition of servitude. It also instructs the adjudicator to evaluate whether the perpetrator employed force, fraud, or coercion and take into account any of the enumerated trafficking actions the perpetrator has taken to maintain the person in a condition of servitude.

Peonage is not defined in the statute, but is defined by regulation as a status or condition of involuntary servitude based upon real or alleged indebtedness.²³ USCIS distinguishes situations in which a person agrees to perform services or labor for a creditor but is free to break the contract. In drawing the distinction, adjudicators are instructed to follow the guidance related to involuntary servitude. A finding of peonage means that the person should also be considered a victim of involuntary servitude.

Slavery, which is not defined in the statute or regulation is defined in the Policy Manual as being “generally understood to mean the state of being held under the complete and total ownership or control of another person or entity and being deprived of liberty, autonomy, and independence” for the purpose of forcing them to provide labor or services.²⁴

D. Key Principles of Trafficking

The Policy Manual also includes guidance clarifying key principles related to trafficking.²⁵ Importantly it maintains the position USCIS has taken in previous policy guidance that a person does not actually have to have performed the labor or commercial sex act to be eligible for a T Visa. A person who has been recruited through force, fraud, or coercion for a trafficking purpose may escape prior to performing labor or services and still be considered a victim of a severe form of trafficking.

Relatedly, a person does not have to show that they were placed in this condition for a defined length of time in order to qualify as long as circumstances establish that the nature of the work

²² The Policy Manual also includes a section in which it distinguishes smuggling and trafficking generally and outlines scenarios where trafficking may occur during the course of a previously-voluntary smuggling arrangement. 3 USCIS-PM B.2(B)(7).

²³ 8 C.F.R. § 214.11(a).

²⁴ 3 USCIS-PM B.2(B)(4).

²⁵ 3 USCIS-PM B.3(B)(6).

was intended to place the person in a condition of servitude. Trafficking can also include labor or services that were provided voluntarily for a time and involuntarily at others. In many circumstances a person may begin working voluntarily for an employer who subsequently subjects them to trafficking. If the labor or services were being performed involuntarily for “at least some portion of the time,” it may constitute trafficking.

The Policy Manual also clarifies that trafficking can include work that is compensated. The fact that someone may have been paid does not rule out the possibility that they were subjected to trafficking. Trafficking can also include non-traditional types of work, including domestic labor where the trafficker’s purpose was subjecting the person to a condition of servitude.

IV. Conclusion

The addition of the T Visa sections of the Policy Manual constitute an important source of guidance as to how USCIS approaches T Visa adjudication and interprets eligibility criteria. The Policy Manual offers more comprehensive guidance than previous USCIS policy sources and provides interpretation and examples of previously undefined terms and concepts. This will hopefully help practitioners better identify trafficking survivors who are eligible for a T Visa. If practitioners have any comments or concerns regarding Policy Manual guidance, they can submit it to USCIS at <https://www.uscis.gov/outreach/feedback-opportunities/policy-manual-feedback>.



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