



# Recommendations for A Victim-Centered Approach to Immigration Policy

A Supplementary Brief to *A Presidential Agenda for Ending Modern Slavery and Human Trafficking* | 2021-2024

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## **About the Alliance to End Slavery and Trafficking (ATEST)**

The Alliance to End Slavery and Trafficking (ATEST) is a U.S.-based coalition that advocates for solutions to prevent and end all forms of human trafficking and forced labor around the world. We promote lasting solutions to prevent forced labor and sex trafficking, hold perpetrators accountable, ensure justice for victims and empower survivors with tools for recovery. Our collective experience implementing programs at home and abroad gives us an unparalleled breadth and depth of expertise.

As ATEST, we are social workers, counselors, lawyers, doctors, workers' rights activists, children and youth advocates, researchers, immigrant rights protectors, human rights defenders and others. We believe in a holistic, comprehensive approach to anti-trafficking work, striving to address the needs and vulnerabilities of communities particularly at risk, including immigrants, migrant workers and refugees, LGBTQ+, children, runaway and homeless youth, communities of color, and ethnic and religious minorities. We are committed to focusing on racial and gender equity throughout our work. We promote victims' rights and access to justice and remedy, and the decriminalization of coerced and forced conduct. We insist on the separation of labor law and immigration enforcement. We take a victim-centered, trauma-informed, and worker-experience approach and center our work in a human, civil, and worker rights framework. We advocate for inclusion of survivor voices in the shaping of anti-trafficking policies and programs. We believe in consensus building, collaboration, and partnerships to support bi-partisan solutions that address the root causes of trafficking and the vulnerabilities of the populations for whom we advocate. We promote inclusive growth and sustainable development in our anti-trafficking programming and advocacy, focused on concrete actions, long-term solutions, and measurable impact.

Since its inception, ATEST has focused equally on both labor and sex trafficking. In recent years, we have witnessed back sliding and misinformation about the scope and extent of human trafficking, with the much less attention given to forced labor, and false information about the scope and underlying root causes of trafficking for sexual exploitation. We urge the new administration to engage in an awareness raising information campaign and implement meaningful policies to dispel the harm caused by this unbalanced and unsubstantiated approach.

ATEST member organizations include: Coalition to Abolish Slavery & Trafficking (CAST), Coalition of Immokalee Workers (CIW), Free the Slaves, HEAL Trafficking, Human Trafficking Institute, Humanity United Action (HUA), McCain Institute for International Leadership, National Network for Youth (NN4Y), Polaris, Safe Horizon, Solidarity Center, T'ruah: The Rabbinic Call for Human Rights, United Way Worldwide, Verité and Vital Voices Global Partnership.

## INTRODUCTION

The *Trafficking Victims Protection Act of 2000* (TVPA), which has been reauthorized in 2003, 2005, 2008, 2013 and 2018, created a comprehensive framework to combat human trafficking in the United States. However, current immigration protections for identified trafficked individuals are inadequate and many victims remain in the shadows, too terrified to come forward to seek justice.

Currently, less than 1000 T visas have been granted to trafficking survivors each year since the enactment of the TVPA despite 5000 being available annually. Given the dire consequences that trafficking survivors face if they must return to home countries where the trafficking occurred, the U.S. Government should clarify the T visa standard to protect all trafficking victims in the United States regardless of whether the trafficking occurred in the United States or outside the United States. Notably, other crime victims applying for U visas do not need to show they are in the United States on account of those crimes and can apply for U visas from outside the United States.

Additionally, trafficking survivors, including children who have fled or been displaced to the United States after a trafficking experience, are generally not eligible for any type of immigration relief in the United States. Asylum protections and special immigrant juvenile status protections do not apply despite the survivor facing horrific abuse and a fear of being re-trafficked if they are forced to return to their home countries.

Moreover, our current immigration practices and policies often result in workers lawfully entering the United States being vulnerable to human trafficking. For example, many U.S. nonimmigrant visa programs have structural flaws that actually increase the vulnerability of immigrant workers to human trafficking in the form of debt bondage, forced labor, involuntary servitude and other forms of severe labor exploitation. We urge this Administration to fix the issues outlined below through improved policies and regulations as well as collaboration with Congress to amend legislation to better protect human trafficking victims and their family members.

# PRIORITY ISSUES

## 1. Remove hurdles to T Visa protections

Mandated in the original *Trafficking Victims Protection Act of 2000* (TVPA) and adjudicated by the U.S. Customs and Immigration Service (USCIS), T visas allow victims of human trafficking and certain family members to stay in the United States for up to four years. T visa holders are eligible for federal benefits and employment authorization (all the benefits refugees are entitled to) and may have a path to apply for lawful permanent residency. Under the Trump Administration, there were dramatic increases in barriers to obtaining T visas, including increasingly frequent requests for evidence (RFEs), denials that contravene legal standards, and delays in adjudications, from six to nine months under the Obama Administration to 24 months or more under the Trump Administration. Together, these changes resulted in victims of human trafficking being denied federal benefits, unable to work, and without legal and social services, all of which can exacerbate trauma and increase vulnerability. This Administration should work to significantly reduce barriers and expand access to T visas, which will help to provide stability for victims of human trafficking and reduce re-victimization.

### Recommendations

- U.S. Customs and Immigration Services - Vermont Service Center
  - Reduce processing time for T visas from over two years to six to nine months as had been the average processing time prior to the Trump Administration. T visa adjudication times have increased to 24 months or more, which means that human trafficking victims remain out of status for a longer period of time. That in turn, prevents them from accessing all benefits that would be available for refugees and places a heavier burden on service providers to meet client needs for an exponentially longer period of time;
  - Provide updates to the T visa regulations or USCIS guidance that clarify that the statutory language in the TVPA does not require a victim to be trafficked in the United States or to remain in the United States after their trafficking to be eligible for a T visa. This important updated guidance would ensure that trafficking victims fleeing trafficking in another country would be T visa eligible. It would also ensure that trafficking victims who left the United States would continue to be T visa eligible, which is the case for U visa holders; and
  - Reduce barriers to applying for and securing T visas for human trafficking survivors by
    - Returning to fee waiver standards and processing procedures in place prior to the Trump Administration. Current procedures implemented have resulted in unnecessary denials based on arbitrary determinations (an increase in fee waiver denials has

made it more financially difficult for human trafficking survivors to waive any grounds of inadmissibility in order to proceed to T visa applications);

- Rescinding the proposed rule update for biometric requirements and go back to prior standards;<sup>i</sup>
- Revoke the Notice to Appear (NTA) memo in removal proceedings. For years DHS's stated policy for T visa applicants whose application was denied was to not refer them to removal proceedings. This policy which encourages victims to come forward should be reinstated for T visa as well as other humanitarian visas;
- Eliminate erroneous requests for evidence (RFE)s that contravene current statutory requirements within USCIS to ensure T visa applications return to historically average processing time of six to nine months and revoke extreme vetting procedures;
- Rescind DHS's updated rule regarding inadmissibility on public charge grounds due to the immense harm it has on survivors of human trafficking, as well as those applying for other humanitarian visas. While human trafficking survivors seeking T visas are exempt from the public charge ground of inadmissibility, the immigrant community's fear of accessing public services will mean fewer trafficking survivors will come forward to seek help and services. Most survivors will be unaware or unconvinced of the exemption, leaving them without the protections afforded by the T visa process; and
- Increasing training and supervisory review on RFEs for T visas. Under the Trump Administration, service providers report the number of RFEs that blame victims and are not consistent with current T visa regulations put in place in 2016 have dramatically increased. The increased denials from Vermont Service Center (VSC) adjudicators based on the reasons the survivor has not left the United States after escaping the trafficking are particularly in need of review.

In addition, ATEST urges the Administration to expedite updating of U and T visa regulations, including provisions that allow victims who were trafficked from the United States overseas to access T visas, and ensure that updates to the regulations are appropriately enforced. We also urge administrative actions to provide better training on how human trafficking-related workplace violations can make victims eligible for U or T visa certifications, better interagency coordination to make U and T visa certifications more accessible, and a clear and transparent process for and greater use of Continued Presence (CP) by creating an expectation of application for CP unless particular circumstances warrant not applying. We recommend that:

- The Federal Law Enforcement Training Center (DHS/FLETC) should develop and deliver training to federal, local and state law enforcement about A) their ability to apply for CP for victims, and B) how to effectively conduct such applications; and
- The Departments of Homeland Security (DHS) and Justice (DOJ) should issue guidance and modify field operations to create an administrative expectation of all law enforcement personnel engaging with a foreign national victim of trafficking that they apply for Continued Presence unless circumstances warrant not applying. This could be accomplished by A) building into performance standards for critical positions a certain percentage of successful CP applications for eligible victims, and B) initiating a review process when CP is not applied for but could have been, where the law enforcement must explain in writing (and follow up interviews, as necessary) why they determined it was not appropriate to apply for CP.

We also recommend that the Executive Office for Immigration Review (DOJ/EOIR) rescind the rule for Procedures for Asylum and Withholding of Removal as it arbitrarily eliminates asylum protections for the majority of individuals fleeing persecution including highly vulnerable survivors of human trafficking and other gender-based violence and harassment.<sup>ii</sup> Decreased protections for individuals fleeing gender-based violence and harassment, a particularly vulnerable population to human trafficking, will lead to increased cases of human trafficking in the United States as opposed to the prior asylum regulations that created a better framework of protection. Finally, the rule expressly excludes from asylum eligibility those who suffer persecution on account of “resistance to or recruitment or coercion by guerilla, criminal, gang...”<sup>iii</sup> By definition recruitment and coercion of an individual into labor or sexual services meets the criminal definition of a human trafficking victim. The asylum rule directly harms trafficking victims and should be rescinded.

- Legislative fixes

We urge the Administration to work with Congress to address common barriers survivors face to access protections and immigration relief afforded by law to victims of trafficking in the upcoming TVPA reauthorization or in any immigration reform legislation. These proposed fixes would:

1. Bring waiver of inadmissibility standards for T visas in line with broader requirements in place for U visas;
2. Remove the primary burden for showing cooperation with law enforcement from victims, particularly in cases where law enforcement is non-responsive;
3. Extend the length of the T visa to six years;
4. Create parity with U-visa holders for family and dependents of T visa holders with regard to options for adjusting to legal permanent resident status;
5. Allow adult trafficking survivors to access federal benefits while their T visa or continued presence applications are in process, so that their urgent housing, medical and other basic needs can be more easily met. Alternatively, DHS and

DOJ can conduct a joint review of the difference between the T visa and CP grants by jurisdiction and provide intensive training and analysis for the jurisdictions with the highest disparities. ATEST is committed to ensuring that victims of human trafficking are connected to as many methods of obtaining status as possible; and

6. Remove the on Account of Standard from the T visa:
  - a. Currently, trafficking survivors, including children who have fled to the United States after a trafficking experience, are generally not eligible for any type of immigration relief in the United States. Usually, asylum protections and special immigrant juvenile status protections do not apply despite the survivor facing horrific abuse and a fear of being re-trafficked if they are forced to return to their home countries. Currently, less than 1000 T visas have been granted to trafficking survivors each year since the enactment of the TVPRA despite 5000 available annually. Given the dire consequences that trafficking survivors face if they must return to home countries where the trafficking occurred, the U.S. Government should change the T visa standard to protect all trafficking victims in the United States regardless of whether the trafficking is connected to their presence in the United States. Notably, other crime victims applying for U visas do not need to show they are in the United States on account of those crimes and can apply for U visas from outside the United States. A higher standard should not be applied for trafficking victims applying for T visas, and instead, these standards should be made uniform.

## **2. Protecting Nonimmigrant work (Guestworker) visas**

U.S. guestworker programs currently allow trafficking and exploitation to thrive. The structure of the low-wage programs in particular (for example, the H-2A, H-2B and J-1 programs), which generally bind a worker's lawful status in the United States to the employer who sponsored their visa, makes it almost impossible for a worker to leave an abusive employer without facing deportation or economic ruin. Moreover, the lack of oversight by the regulating agencies—including the Departments of State, Labor and Homeland Security—means that law-breaking employers are not held accountable. Despite these issues, Congress and federal agencies continue to support the expansion of these programs without also implementing the necessary reforms to ensure workers are protected. The COVID-19 pandemic has exacerbated these existing problems, particularly for H-2A and other temporary workers deemed “essential.” Despite providing essential services, these workers have received few protections and remain at high risk for both COVID-19 and labor exploitation and trafficking.<sup>iv</sup> This Administration must take steps to reform the temporary visa system to protect workers

and prevent opportunities for trafficking, including by working with Congress to create visa portability to give workers the opportunity to safely leave an abusive employer.

## Recommendations

- Department of Homeland Security
  - Reverse the temporary rule change published in April 2020 and extended in August 2020 that removes certain limitations on visa extensions for H-2A visa workers;<sup>v</sup> and
  - Reverse the temporary rule change published in May 2020 removing certain limitations on visa extensions for H-2B visa workers;<sup>vi</sup>
- Department of Labor
  - Increase protections for guestworkers so they are able to leave their employers if they do not implement and follow worker-centered COVID-19 guidelines;
  - Automatically extend worker visa authorizations should a guestworker be laid off due to COVID-19;
  - Strengthen regulation of foreign labor recruiters (U.S. and abroad)
    - Require that all foreign labor recruiters be registered and licensed to engage in recruitment of overseas workers;
    - Require employers to pay all recruitment-related costs across all visa categories and implement policies where the burden is on the employer to proactively document to DOL that any foreign labor recruiter they utilize is not charging workers fees;
    - Create a system where workers can, without fear of retribution, easily report in their own language, through a third party translator, if they are charged unlawful fees, and receive publicly available information about employers and recruiters with a history of charging illegal recruitment fees;
    - Issue guidance clarifying that the *Fair Labor Standards Act (FLSA)* requires all recruitment fees across all visa categories to be repaid in the first workweek to the extent necessary to bring wages up to the minimum. These repayments cannot take the form of loans to workers. Also, ensure workers know their rights by providing educational materials and pamphlets at the recruiter's office, during the visa application process, etc.;
    - Issue a memo to all Wage and Hour (DOL/WHD) field offices reminding them of the agency's authority to enforce the FLSA with regard to any FLSA-covered worker, regardless of visa category, even when there is no specific regulatory authority with respect to specific visa program rules; and
    - This Administration should implement a policy across agencies that regardless of recruitment fees paid or reporting of illegal



recruitment practices, workers will not be denied visas or otherwise “blacklisted” for reporting illegal or harmful employer practices.

- Legislative fixes
  - This Administration should work with Congress to reform the system of temporary visas to untie visas from employers, allowing workers to leave abusive and exploitative employers without fear of deportation. Data from the U.S. National Human Trafficking Hotline consistently shows that workers on temporary H-2A and H-2B visas are disproportionately represented amongst trafficking victims and survivors. Between 2015 and 2019, the Trafficking Hotline reported more than 3,600 survivors of human trafficking who were legally working in the United States. Approximately 87 percent of these individuals held H-2A and H-2B visas.<sup>vii</sup> The Administration should prioritize working with Congress to ensure U.S. law no longer facilitates forced labor by untying temporary visas from sponsoring employers;
  - Support changes to the TVPA in its next reauthorization to prevent vulnerability to trafficking of domestic workers on B-1 visas and J-1 au pairs:
    - Increase the contractual protections for B-1 domestic workers and J-1 au pairs to match the protections for A-3 and G-5 visa holders; and
  - Support the Visa Transparency Anti-Trafficking Act (VTAT) designed to bring needed transparency to the temporary foreign worker visa system in the United States. This bipartisan legislation would create a uniform system for reporting data that the government already collects on temporary visa programs and require that the information be made publicly available. If VTAT is passed and enacted, policymakers and the public will for the first time have the evidence needed to evaluate the impact of temporary visa programs on the economy and to know whether guestworkers are being paid fairly. This will also better inform advocates and service providers when reaching out to potential victims of labor and sex trafficking.

### **3. Homeland Security Investigations**

Created in 2010, Homeland Security Investigations (HSI) is an investigative division of the Department of Homeland Security, responsible for the investigating transnational crime such as human trafficking. Successful responses to human trafficking, including investigations and prosecutions, rely on building trust with communities and protecting victims from additional trauma and victimization. Under the Trump Administration, directives led to an increase in HSI’s involvement in

workplace raids and interior immigration enforcement. Especially since immigration status is a widely-used method of force, fraud or coercion in human trafficking and forced labor, this expansion of HSI's role undermines any legitimate effort to identify trafficking victims and bring them justice.

## **Recommendations**

- Department of Homeland Security
  - Reverse directives from the previous Administration that increased HSI's role in worksite raids and other immigration enforcement efforts. There should a clear delineation of roles between HSI and Enforcement and Removal Operations (DHS/ICE/ERO) to ensure DHS/ICE/HSI focuses on and fulfills its legal authority to investigate transnational crime, including human trafficking; and
  - Ensure that efforts within DHS to counter human trafficking, including the new DHS Center for Countering Human Trafficking, do not include interior immigration enforcement components and instead focus on identifying, supporting and pursuing justice for victims of human trafficking and forced labor, including through immigration relief.

## **POINTS OF CONTACT**

### **Coalition to Abolish Slavery & Trafficking (CAST)**

Stephanie Richard | Policy & Legal Services Director

Email: [stephanie@castla.org](mailto:stephanie@castla.org)

Phone: (213) 365-5249

### **McCain Institute for International Leadership**

Kristen Abrams | Senior Director, Combatting Human Trafficking

Email: [Kristen.L.Abrams@asu.edu](mailto:Kristen.L.Abrams@asu.edu)

Phone: (202) 360-6021

### **Polaris**

Allison Grossman | Director of Public Policy and Strategic Advocacy

Email: [agrossman@polarisproject.org](mailto:agrossman@polarisproject.org)

Phone: (520) 820-9684

### **Safe Horizon**

Anita Teekah | Senior Director of the Anti-Trafficking Program

Email: [Anita.Teekah@safehorizon.org](mailto:Anita.Teekah@safehorizon.org)

Phone: (718) 943-8655

Cell: (646) 438-1730

### **Solidarity Center**

Neha Misra | Senior Specialist, Migration & Human Trafficking

Email: [nmisra@solidaritycenter.org](mailto:nmisra@solidaritycenter.org)

Phone: (202) 974-8337

## ENDNOTES

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<sup>i</sup> DHS Docket No. USCIS-2019-0007: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (September 11, 2020)

<sup>ii</sup> Executive Office for Immigration Review, Department of Justice, *Procedures for Asylum and Withholding of Removal*, September 2020, see 85 FR 59692.

<sup>iii</sup> *Id.*

<sup>iv</sup> Polaris, “COVID-19 Exposes Flaws in the H-2A Visa System,” April 15, 2020, available at: <<https://polarisproject.org/blog/2020/04/covid-19-exposes-flaws-in-the-h2a-visa-system/>>

<sup>v</sup> U.S. Citizenship and Immigration Services, Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency, April 2020, extended August 2020, see 85 FR 21739.

<sup>vi</sup> U.S. Citizenship and Immigration Services, Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency, May 2020, see 85 FR 28843.

<sup>vii</sup> Polaris, “Labor Trafficking Red Flags in Latest Work Visa Program Changes,” June 23, 2020, available at: <<https://polarisproject.org/blog/2020/06/labor-trafficking-red-flags-in-latest-work-visa-program-changes/>>