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September 7, 2001

Ms. Anne Veysey
Director of Program Strategy and Development Branch
U.S. Immigration and Naturalization Service
425 I Street, N.W., Room 1000
Washington, D.C. 20536

Re: Recommendations for T Visa Implementation in Relation to Children

Dear Ms. Veysey:

The following are preliminary suggestions from Lutheran Immigration and Refugee Service (LIRS) and other concerned non-governmental organizations¹ on the implementation of the new T visa as it relates to children who are victims of trafficking. This memorandum is not meant to be an exhaustive list of recommendations. We support and join the National Network on Behalf of Battered Immigrant Women and the Freedom Network (USA) to Empower Trafficked and Enslaved Persons in their earlier T visa recommendations letter. We wish to supplement that joint recommendations letter with comments specifically related to children. We look forward to serving as a resource for the Immigration and Naturalization Service (INS or the Service) as it implements regulations and guidelines regarding children and the T visa.

LIRS's concern and expertise on behalf of children stems from decades of advocacy work on issues relating to refugees, immigrants, unaccompanied minors, children in foster care and all immigrant children in need of social services.² We expect that many of the safety concerns regarding children that LIRS has dealt with in the past will resemble the safety concerns faced by child trafficking victims. In addition to LIRS's program departments, one of which is the Children Services Program, the organization includes the American branch of International

¹ Additional NGO's have signed onto this recommendations letters as listed on the last page of this letter.

² LIRS has a long history of serving unaccompanied minors from other countries and applies this expertise to our input here on the treatment of trafficked children. Since 1975, we have provided specialized foster care services to more than 5,000 unaccompanied refugee minors, through our affiliate network of licensed foster care programs. LIRS has also engaged in advocacy and services to unaccompanied minors in the custody of the INS. Since 1993, LIRS has contracted with the INS to provide specialized foster care and family reunion services to Chinese and Indian minors in Service custody. Chinese and Indian children have been singled out by the Service for special service provision due to protection concerns from smugglers. LIRS also engages in public education related to refugee and immigrant children, including co-coordination of a national technical assistance program on refugee child welfare, funded by the Office of Refugee Resettlement, and creation of the manual "Working with Refugee and Immigrant Children: Issues of Culture, Law and Development.

Social Service (ISS-USA) which is located in-house at LIRS' Baltimore headquarters.³ That relationship has brought about a unique perspective about the issues relating to international social work as children have to migrate across national borders. In addition, the experience and expertise of the organizations joining LIRS in this recommendations letters are substantial and invaluable in helping to shape the response to issues concerning trafficked children.

I. THE PROBLEM AND THE LEGAL RESPONSE FROM NATIONAL AGENCIES

Human trafficking is on the rise worldwide and has taken new and insidious forms according to a new study by the International Labor Office (ILO). The study illustrates that children, the world's most vulnerable population, are increasingly becoming victims of trafficking. Children are being recruited through coercion and deception for armed conflicts, sexual exploitation, forced labor, slavery, indentured servitude, prostitution, and sweat shop labor. The ILO estimates that roughly 50,000 trafficked women and children cross the United States borders annually. The phenomenon is so severe and is increasing at such an alarming rate that most countries in the world are being categorized as either sending, transit or receiving countries.⁴ This human rights crisis must be effectively addressed internationally and nationally.

A. The Victims of Trafficking and Violence Protection Act of 2000

The U.S. Congress addressed the problem of human trafficking through its enactment of the Victims of Trafficking and Violence Protection Act of 2000 (the Act). The new T visa provisions within the Act, though not exhaustive, seem to address many key issues facing trafficking victims such as deportation, employment, protection from traffickers, and benefits. The intent of the legislators of the T visa seems to be twofold in that: 1) victims of trafficking must be protected and; 2) that victims are needed to cooperate with law enforcement in order to ensure successful prosecution of these crime syndicates. While the dual purpose of the T visa must be respected, it is important to consider how the T visa affects various populations. One of the populations on whom the T visa will have a profound impact is child victims of trafficking. Naturally, by the very nature of the practice of human trafficking, all victims are in horrible, life threatening conditions. Moreover, of all the affected populations, children are arguably the most vulnerable. Children lack both the means and knowledge by which to escape from traffickers. Children lack the psychological and intellectual development to handle the harmful effects of trafficking. Thus, children must be protected at an even higher standard of service delivery than may be required of other social groups.

³ ISS-USA is an international social work agency dedicated to protecting the rights of children and adults impacted by migration and international crises through service, education and advocacy. ISS-USA addresses the social and legal problems of individuals, children and families who have moved to another country by choice, necessity or force, or whose problems cross national borders. In addition, ISS -USA is a member of an international federation of over 140 social work agencies and uses its accumulated knowledge and case specific experience to advise authorities on issues impacting children and adults worldwide. Since 1924, ISS has been working directly with children and families separated across international borders, including unaccompanied minors.

⁴ International Labor Office Finds Forced Labor And Human Trafficking On The Rise ("Child Labor News Service"), (June 2001)

This memo urges the INS to implement the T visa provisions of the Act in a manner that is not only consistent with the intent of the bill's legislators but is particularly mindful of the extraordinary vulnerabilities of children. Considering the trauma and the harmful physical and psychological impact trafficking has on children, INS should move swiftly to provide shelter, protection, and education for all children trafficked into the United States.

B. The Three General Principles for the Treatment of Trafficked Children

There exist three fundamental principles which should guide decision-making in cases involving child victims of trafficking: 1) the best interest of the child standard; 2) the placement of children in the least restrictive setting appropriate to their developmental and protective needs and; 3) the child's need for permanence. As INS addresses the issues affecting children who are trafficked, it is imperative that these fundamental principles be applied to each issue. Using these three basic principles as guidance in children cases will help to ensure a level of quality in the implementation of the T visa for trafficked children.

A. The Best Interest of the Child Standard- The best interests of the child standard used both nationally and internationally in decisions concerning children should be the overriding principle guiding any decision involving a trafficked child. Children who are trafficked and who have already gone through terrible ordeals while being trafficked, should not be confronted with more roadblocks to reaching safe, nurturing environments suitable for their needs. It is our recommendation that the U.S. Office of Refugee Resettlement (ORR) be the delegated agency responsible for shepherding these child victims through the many complexities involved in the T visa process. ORR is already uniquely situated to handle the main issues related to service delivery and processing of children cases due to its oversight of the refugee foster care programs for which these children will be eligible.

B. The Placement of Children in the Least Restrictive Setting- This principle is one which INS must act diligently to uphold so that trafficked children do not continue to linger for long periods of time in detention while awaiting repatriation, foster care services, and other kinds of relief. Children should not be jailed or placed in detention centers which could further traumatize these children and leave them with permanent, irreparable scars.

C. The Child's Need for Permanence- This principle relates to two underlying factors: 1) efficient decision making and 2) finality of decisions so that the child's case is not in limbo. Trafficked children need to obtain the benefits of food, shelter and education in an expedited manner with as few processing delays as possible. While the INS must balance efficient case management, the agency should avoid fast-tracking these child cases. Children's cases should be handled carefully and expeditiously yet with the understanding that each case poses its own unique issues which must be addressed on a case by case basis. Finding efficient methods of resolving issues such as the age determination, aging out and shelter will assist greatly in the processing of T visa cases.

II. T VISA APPLICATION PROCEDURE

In reviewing the new trafficking legislation, we have identified the following areas in which the Department of Justice (DOJ) and the INS will need to develop policies and procedures to appropriately handle each trafficked child's case. Those who will manage trafficked children's cases will have to appreciate these cases for the unique challenges and opportunities they pose that may be distinct from adult trafficking cases.

A. Complying with Any Reasonable Request for Assistance

We recommend that the INS encourage Department of Justice (DOJ) attorneys or other prosecutors to avoid seeking testimony from child witnesses. It is our contention that while child victims are in the care of INS and under its "protection", INS should consider the child victims' best interests by "screening" the requests of prosecutors who seek testimony from children. INS should be concerned about the "reasonableness" of these requests and should weigh that concern against the child's best interest, on a case-by-case basis. Only in cases involving unusual and extraordinary circumstances when there exists no adult witness, should prosecutors consider child testimony. Testimony from a child should not be requested when there exist adult witnesses able to testify instead of the child victim. In those cases, it would be preferable that INS require prosecutors to provide evidence that no adult witness is available to testify. In addition, it is our recommendation that due to the potentially traumatic experience of testifying in person against trafficking smugglers, child testimony should be allowed by video conferencing or other alternate forms of testimony, whenever possible. INS should avoid having children give live testimony in-court in the presence of their assailants.

INS must address the developmental issues unique to adolescents between the ages of 15 through 18 years old. Child witnesses have a special vulnerability and are very impressionable. Indeed, studies have identified characteristics of the investigative process that can compromise memory for detail and interfere with a child's psychological recovery from trauma (in this case, the trauma of being a trafficked victim).⁵ Whether children should be required to "cooperate" with any form of testimony must be considered under a standard that meets a very high threshold for minors between ages 15-18 years old. A number of studies suggest that, at least for a subset of children, involvement as witnesses in the criminal justice system (as opposed to the juvenile justice system) is associated with the prolonging of emotional distress.⁶ Since child trafficking victims between the ages of 15-18 years old would be witnesses in the criminal justice system, prosecutors and the INS must be mindful of the above-mentioned emotional distress that forced compliance would create. Cooperation should be relevant to one's age and maturity and should be determined on a case by case basis based on the professional recommendations of care givers, social workers and/or psychiatrists. We also recommend that INS use interpreters who are culturally and linguistically appropriate for child victims applying for T visas.

B. Defining Who Is A Child

⁵ Ceci & Bruck, 1993; Goodman, Pyle-Taub, et al., 1992; Tedesco & Schnell, 1987.

⁶ DeFrancis, 1969; Goodman, Pyle-Taub, et al., 1992; Oates & Tong, 1987; Runyan, Everson, Edelson, Hunter, & Coulter, 1988.

One of the major difficulties faced by trafficked children who come into the hands of U.S. immigration authorities, unlike trafficked adults, may be the issue of determining their age. At present, the T visa statute state that a person who is a victim of *sex* trafficking is considered to be a child for eligibility purposes so long as he or she has not reached the age of eighteen (18).⁷ All other trafficked victims who are recruited for other purposes, such as involuntary servitude, peonage, debt bondage or slavery have to show that their recruitment was through force, fraud or coercion, in order to be eligible for the T visa. The T visa's eligibility requirements also infer that, regardless of the method by which a person was trafficked, a person fifteen (15) years old or older can be required to comply with a reasonable request for assistance in an investigation or prosecution. This is to say that a child between the ages of fifteen (15) and eighteen (18) could be required to comply with any reasonable request for assistance in any prosecution for acts of trafficking.

Forcing 15, 16, and 17 year olds to comply with evidence gathering measures or witness testimony procedures as a condition for being granted the T visa would be extremely harmful to a trafficked child. If the intent of the law is to protect all persons under the age of eighteen because they are children then, choosing fifteen as an age upon which a child must comply with a prosecution appears arbitrary and harsh for the children involved. Given a child's psycho-social development and relationship to adult authority, many 15 year old children, for example, may be too intimidated, frightened or immature to comply with an investigation. It is also debatable if children can truly be deemed reliable witnesses in criminal cases. Since the regulations imply that the T visa could be denied due to this noncompliance, there is a great risk that children between the ages of 15-18 years old could be left in legal limbo if they do not want to comply. They could be deported into dangerous situations abroad solely because they are unable to give testimony.

We are recommending that the Service create "degrees of assistance" when evaluating the reasonableness of prosecutor's compliance in an investigation. The INS should recognize that most requests for compliance from a child would be inherently unreasonable. For example, the criteria for requiring a child to give in-court testimony would be different and considered more severe than that required when simply requesting that the child provide the authorities with the name of the trafficker. Nonetheless, by not encouraging children to comply with investigations, except in unusual cases, INS will enable most trafficked children to avoid the long-term and traumatic effects associated with child witness testimonies. The presumption in these child trafficking cases would then be that: 1) the request was either not made or 2) the request was unreasonable so the child need not comply with the investigation in order to obtain the T visa.⁸ The Service should still allow the granting of the T visa to trafficking victims who were either not asked to comply with an investigation or who were asked to comply but the request was too unreasonable.

INS should establish *guidelines* describing what is a "reasonable" request for assistance from children between ages 15 and 18 years old. In sum, the Service should encourage the testimony and compliance of adults and only request child testimony under the most rare

⁷ INA 101(a)(15)(T)(i)(I) and the Trafficking Victims Protection Act Sec. 103(8) and 103(13).

⁸ It is unclear from the T visa regulations if an individual, who is 15 years old or over and is classified as a trafficked victim, can still obtain the T visa if a request to comply with the investigation is never made to him/her.

circumstances. The Service should apply a very stringent standard when requesting that children comply with an investigation in order to obtain a T visa.

Even with the application of a higher threshold when requiring evidence from children, there still exists the initial problem of determining the age of young people. For example, there is no scientific means by which to determine from physical attributes alone, the age of a child. The accuracy of such methods has been questioned, particularly with regard to identifying the age of young persons from countries having low levels of nutrition and access to health care. Distinguishing a 15 year old from a 14 year old, without legal documents to prove age, can be impossible both physically and scientifically. In the past, INS has relied on forensics testing or dental records to determine the age of those claiming to be children. The accuracy of such methods has been questioned. Indeed, several Western European countries do not use such methods because of their inaccuracy.

Consequently, we recommend that INS defer to the Office of Refugee Resettlement (ORR) to determine who should be classified as a child. At present, ORR has already been mandated to issue benefits letters to victims of trafficking.⁹ ORR could issue benefits letters to individuals it believes to be children and INS could accept ORR's findings unless INS has incontrovertible evidence that proves otherwise. At present, the Act has already delegated to ORR the authorization to conduct certification procedures for adults. The Act requires these adults to meet certain criteria before becoming certified as trafficked victims. The Act also allows ORR to provide all children (under 18 years old) with letters that prove their eligibility for benefits, and ORR has issued a State Letter outlining the procedures it will follow. The Act states that children who have been subjected to trafficking do *not* need to go through the certification process like adults, in order to get similar letters. This authority given to ORR recognized the need to expedite the process of getting child trafficked victims the same social service benefits as refugees.

Not allowing ORR to determine whether a trafficked victim is a child could become problematic for victims. In some cases, there could be situations wherein an individual is receiving ORR benefits because ORR has determined that he or she is a child while INS states that the individual is not a child. We recommend that in cases where age is questionable that ORR's determination be given more weight. Indeed, one processing scenario could be that when a trafficked child is in INS custody, ORR would issue a certification letter which would allow INS to release the child, place the child in foster care and allow the child to file for the T visa. Acceptable evidence would include evidence proffered by psychologists, social workers and pediatricians who are recommended by ORR and trained to understand and evaluate children. Trafficked children need not be subject to more delays and confusion while INS and ORR go through a protracted period in which the agencies dispute whether the victim is a child or not.

C. Aging-Out

The INS should consider an applicant for the T visa to be a child for eligibility purposes based on the applicant's age at either the *time the application is filed with the INS or as of the*

⁹ See ORR State Letter #01-13, *The Trafficking Victims Protection Act of 2000*, Clay- Thompson, Carmel, May 3, 2001.

date the applicant can prove he/she made first contact with law enforcement or an NGO as a trafficked victim. Individuals who can prove that they were children under the age of 15 based on either of the two criteria, should be considered children eligible for the T visa when the visa is processed. This is to say that the age requirement to comply with any reasonable request for testimonial evidence would be determined by knowing if the person was under 15 either on the date of filing or on the date of contact with law enforcement or a NGO. This method of determining age can help safeguard those children whose T visa applications may not be filed until much later than when they first made contact with law enforcement or an NGO.

Children, unlike adults, cannot monitor the filing status or processing of their T visa applications. By applying either of the two criteria for determining age, a child under 15 years old won't be forced to testify because he/she is over 15 years old when the application is finally submitted by a caseworker. Under this standard, children run less risk of being penalized for any long delay in processing by those entrusted with the filing of their applications. A child, who is under 15 and is therefore not required to comply with a request for evidence, will not later be ineligible for the T visa or have the status revoked because he or she is suddenly above 15 and is too frightened to give testimony. The traumatic experience of being trafficked may still be so horrific to someone who would have only recently become an "adult" for eligibility purposes that it may still be too unreasonable to require testimony. Conceivably based on the current interpretation of the law, a thirteen year old could acquire the T visa and be waiting to adjust her status yet receive a request to testify in a trial when she turns fifteen. This would prevent children from starting a new, safe life and would put them back into the frightening world of trafficking. The impact such a requirement would cause on a fragile child victim could be severe and damaging. INS should attempt to avoid such situations by stopping the "age-clock". INS should also consider whether such children would run the risk of losing their T visa status and be placed in removal proceedings for noncompliance with the investigation. We urge INS to weigh on the side of the best interests of the child standard and the child's need for permanence by refraining from applying such rigid standards to child victims.

D. Self-Petitioning and Guardian Ad Litem : Victim-Controlled Protection

We recommend that child trafficking victims have the ability to initiate the T visa process by filing applications themselves and/or by having their applications filed by adults who act as concerned adults or guardians ad litem. Children in INS custody who are believed to have been trafficked or who are applying for T visas or are serving as material witnesses, should have a home study prior to their release to relatives or caregivers. The procedure should follow the model used for the special immigrant juvenile visa. The model should allow a social worker, prosecutor, relative or other concerned adult to represent and assist the applicant with the filing of the T visa application. Whether the child is released into the care of the individual who filed the T visa should not necessarily be an automatic procedure but should be determined after considering all factors as to what is in the child's best interest. When considering factors which are in a child's best interest, INS should consult with child welfare professionals who are trained to access the developmental and emotional needs of children. These child welfare professionals may be in a better position to access the child's mental health needs. INS should not necessarily release children to anyone who assists the child in filing the T visa. By taking this precautionary measure, INS would then avoid unknowingly giving the child to an adult

whose only intention is ultimately to harm the child. In addition, there should be no bar to self-petitioning if a child is in INS detention.

Further, we recommend that INS respect the child's right to participate in the decision making process. In some cases, especially where the child welfare professional agrees that the child has the age and maturity to have a reasonable opinion about his or her well being, INS should also consider the child's wishes.

E. Who Represents the Best Interests of the Child

We recommend that INS and ORR work together through a referral system which would operate as a mechanism to shepherd child trafficking victims through the entire T visa process. These two agencies would communicate with each other as soon as a trafficked child is identified and they both should seek the best solution for each child victim. Some of the factors that must be considered are: 1) who should represent the child's interest; 2) what is the age of the child; 3) should the child remain in the U.S.; 4) should the child testify; 5) what is the child's mental health situation; 6) where should the child be housed; 7) how do the authorities locate the next of kin and; 8) is the T visa the best legal option for the child in the first place. In some cases, asylum, special immigrant juvenile and automatic citizenship may be viable options either in lieu of the T visa or in conjunction with the filing of the T visa.¹⁰

Parental permission should not be required in order for a child to self-petition, in case the parents are implicated in the trafficking of the child. Parents should be notified and given ample opportunity, once contact is made, to show cause why their child should or should not be allowed to obtain a T visa. However, INS should create an efficient mechanism to deal with cases wherein parents are not responding, in a reasonable timeframe, in order to regain custody of their child. In those situations, INS should consider the principle that children need a sense of permanence. Additionally, INS should try to ensure that persons claiming to be parents or guardians are not themselves traffickers.

In addition, in court cases, INS should develop its own method for overcoming the possibility that trafficker-hired attorneys of children could attempt to influence the outcome of trafficking cases. The Service may create a form of inquiry to discover these trafficker-hired attorney situations. This method of inquiry may prevent and sever trafficker-hired attorney from influencing children cases.

Additionally, the best interest standard may be applied to see if there is another relative in the country of origin before repatriating the child. Additionally, when returning the child to his or her parents abroad is not an option, the state or foster care system should also be able to apply for a T visa for the child. To familiarize state agencies with the T visa before they are confronted with many trafficked children, INS is urged to send information as soon as possible regarding the T visa regulations to state social service offices as a training mechanism.

F. Shelter for Trafficked Children

¹⁰ In some cases, the U visa might also be an option.

The INS should follow the principle of the “least restrictive setting” and release trafficked children into the specialized ORR-funded refugee foster care system once these children receive their benefits letter from ORR. We urge INS to not retain custody once a certification letter has been issued by ORR. In most cases, these children would already have experienced the trauma of being trafficked into the U.S. for sex or other forms of bondage. Children should not be detained by INS while the T visa is being processed. Traditional INS shelters should not be a placement option for trafficked children except under the most unusual and compelling circumstances. Children should enter the unaccompanied minor program and thus the foster care program swiftly so that they can experience a sense of normalcy. We would welcome a meeting with relevant staff from DOJ to discuss victim-witness concerns as they relate to children, in an effort to work with our foster care networks to appropriately address safety issues.

We also recommend that INS create a mechanism wherein there exists a contact person at a central location to whom children’s care givers would be able to report, when there are threats against a trafficked child. Custody must provide meaningful protection from traffickers as well as adhere to the highest standards of child welfare. For instance, protections are needed before releasing children to families to ensure that traffickers are not posing as loving family members.

Further, we recommend the creation of an NGO-run “safe-house” for children that could be funded by the Department of Health and Human Services (HHS) and ORR. INS should also consult with the experts at the Department of Justice who are familiar with the complexities of protecting witnesses in criminal proceedings. We urge INS to consider a mandatory home study model to ensure safe placements for children.

G. Adjustment of Status

Lack of identity documents frequently raises “fraud” issues at the time immigrants attempt to adjust or change their status through the INS. These fraud issues invariably delay the adjustment process. INS should issue guidelines on the processing of child T visa applications when there do not exist the necessary documents to prove age, nationality, etc. Indeed, the very nature of smuggling humans internationally is flooded with the use of fraudulent documents used by smugglers to cross national borders. Victims should not later be required to provide legal documents or forfeit their cases. INS should use other supporting evidence including verbal testimony and affidavits to establish age and other records so that victims can acquire permanent residence and citizenship in the U.S. after having T visa status. The INS should also defer to the United Nations High Commissioner for Refugees for suggestions regarding the handling of these “statelessness” cases.

H. Adjudication of T Visa

We recommend that the INS set up a centralized office such as the Vermont Service Center (VSC) to handle all T visa applications, including applications for child victims. This recommendation concurs with that which was suggested to INS by both the National Network on Behalf of Battered Immigrant Women and the Freedom Network. A centralized method of

T visa adjudication would be the most efficient means of processing applications and training INS staff about the T visa. Modeling the system after the VAWA self-petition adjudication system at VSC would be an efficient means of processing these cases. INS should provide special training for adjudicators of T visas that focuses on children and their unique vulnerabilities.

We urge INS to process T visa applications and apply its eligibility requirements under a low threshold when the trafficked victim is a child. For example, the definition of ‘extreme hardship’ must also take into account the vulnerabilities of children so that that requirement is not a difficult hurdle for child applicants. There should exist an implied understanding by those who adjudicate child T visa cases that these children, by virtue of having been trafficked, have presumably already suffered extreme hardship. That sensitivity could help to ensure fairness in the processing of T visa applications for children. Training a centralized, expert group of T visa examiners will also create more consistency and efficiency in adjudication.

I. Derivatives

Considering the fact that many children who are child victims of trafficking may not be trafficked with their families, we recommend that the INS allow relatives abroad to be able to gain their derivative T visas without having to be physically in the U.S. during the processing of their derivative T visa. This recommendation would promote the ideals of family unity on which the U.S. immigration system is based.

III. Conclusion

We hope you find this memorandum helpful. We thank you for all of your hard work on behalf of all trafficked victims and look forward to working with you and your staff in the future.

Sincerely,

Signatories

(Please provide the name of your organization and the name and title of the signing representative)

Ralston Deffenbaugh, President
Lutheran Immigration and Refugee Service;

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