

# Misrecognitions of Victimhood: Discretionary Power of Street-level Bureaucrats in Humanitarian Visas

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*Humanitarian visas provide one of few potential pathways to citizenship for foreign nationals victimized within the United States and are an important aspect of immigration law. Yet one form of humanitarian visas—T nonimmigrant status (T visa)—has received scant attention in the socio-legal studies literature. “T visas” were designed to aid survivors of human trafficking and, though the US government estimates that tens of thousands of individuals are trafficked in the United States every year, only 15 percent of the five thousand T visas available annually have been granted since the program’s inception in 2002. Why are T visas such an underutilized form of immigration relief? Drawing on twenty in-depth interviews with immigration lawyers, law enforcement personnel, and non-governmental organization service providers routinely involved in T visa applications, we find that the low rate of applications and approvals is driven by a combination of structural barriers and expansive discretion of key actors in the legal process to interpret and apply the law, which results in a narrow and often misinformed construction of victimhood. We add to the literature on the discretionary power of street-level bureaucrats to shape the law and determine how it is applied with considerable consequences for survivors of trafficking.*

## INTRODUCTION

Immigrants who are survivors<sup>1</sup> of violent crime or criminal exploitation in the United States have limited options for seeking redress. A lack of documentation not

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1. When discussing individuals who have experienced human trafficking, we use the term “survivor” or “applicant” rather than “victim.” Survivor and applicant indicates agency, strength, and resiliency, attributes that are too often lacking in academic narratives and legal frameworks. We will use victim when referring specifically to visa requirements as this language is a necessary aspect of a survivor’s personal statement.

## 2 LAW & SOCIAL INQUIRY

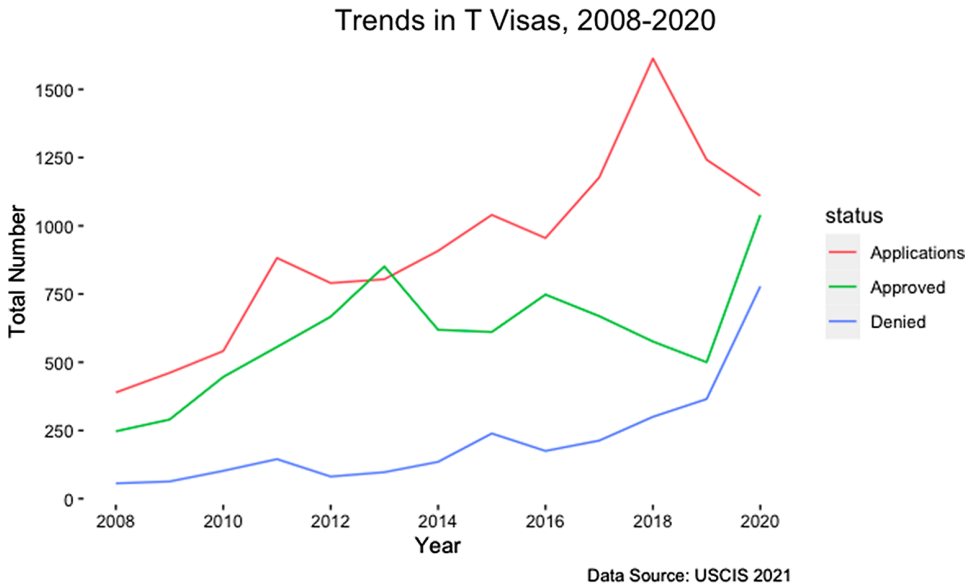
only makes migrants largely invisible to the legal system, excluding them from its potential remedies, but also means any engagement with the law risks exposing them to deportation proceedings (Calavita 1998; Gleeson 2010). However, passage of the Victims of Trafficking and Violence Protection Act (TVPA) in 2000 created two avenues for undocumented survivors of severe crimes to gain temporary legal status so that they might seek justice without fear of deportation.<sup>2</sup> Those who qualify for one of these forms of nonimmigrant status, typically referred to as the U visa and T visa, can even obtain permanent residency and a potential pathway to citizenship for themselves and their immediate family members. Thus, these visas offer substantial benefits to petitioners who have few other options available to them in either the legal or immigration systems (Lakhani 2014). We would therefore expect the demand for both U and T visas to be quite high and to draw a considerable number of applications every year.

This is indeed what we observe in the case of U visas, which are available to undocumented migrants who have suffered “substantial mental and physical abuse as a result of having been a victim of criminal activity” in the United States (USCIS 2018). Since becoming available in 2002, applications for U visas have steadily increased with a high of 37,287 applications in 2017. The annual limit of ten thousand U visas has been met every year since 2010, and the demand so greatly exceeds the supply that, in 2020, the United States Citizenship and Immigration Services (USCIS) reported a backlog of nearly 250,000 applications awaiting review. In contrast, the T visa, which is reserved specifically for survivors of severe forms of human trafficking but otherwise very similar to the U visa, has never had more than 1,613 applications in a single year and never comes close to meeting its annual limit of five thousand visas (see Figure 1). This is despite the fact that even conservative prevalence estimates place the number of individuals trafficked into the United States each year at three to five times above the annual T visa cap (Scullion 2015; Fedina and DeForge 2017). Over the last twelve years, there has been an average of just over nine hundred T visa applications per year with an approval rate of less than two-thirds. In total, only 15 percent of the ninety thousand T visas potentially available since the program’s inception in 2002 have ever been issued. What is the reason for this marked discrepancy in application and approval rates for two similar humanitarian visas? Why is the T visa so underutilized, while USCIS is inundated with U visa applications each year, particularly when so few other options exist for survivors of trafficking to seek recompense?

We draw on twenty key-informant interviews with immigration lawyers, law enforcement personnel, mental health professionals, and non-governmental organization (NGO) service providers who routinely support survivors of trafficking through the T visa application process. Through a theme analysis of these in-depth interviews, we find that the low rate of applications and approvals is driven by a combination of structural barriers and expansive discretion wielded by key actors in the legal process to interpret and apply the law, which results in a narrow and often misinformed construction of victimhood. In particular, legal ambiguity regarding trafficking statutes and pervasive (mis)conceptions about the nature and dynamics of human trafficking

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2. Victims of Trafficking and Violence Protection Act, October 28, 2000, Pub. L. 106-386.



**Figure 1.**  
Trends in T Visas, 2008-2020.

make it difficult for many to be recognized within the legal system as survivors of trafficking worthy of immigration relief.

Even for those individuals that do make it through the process and secure a T visa, our research indicates that the barriers listed above often contribute to re-traumatization and a sense of disempowerment. This further contributes to a narrative that survivors of trafficking lack agency, forcing them to conform to gendered stereotypes in order to secure immigration relief and reinforcing social and political forces of oppression along lines of class, race, gender, and sexuality (Hoyle, Bosworth, and Dempsey 2011; Salcido and Menjívar 2012; Akbari and Vogler 2021). Therefore, in addition to examining potential reasons for the underutilization of T visas, this article also discusses where survivors of trafficking who progress through the T visa application system potentially face hardship, further exploitation, traumatic triggers, and agonizing uncertainty. Our goal in this respect is to encourage reform in the way in which lawyers, law enforcement personnel, and USCIS adjudicators respond to, and engage with, survivors navigating the T visa process.

Our research contributes to the socio-legal studies literature on the discretionary power of street-level bureaucrats and its consequences for shaping both the interpretation and application of the law. Similar to the scholarly projects of Jill Maybritt and Alexis Spire (2014) as well as Émilie Biland and H el ene Steinmetz (2017), we expand the concept of street-level bureaucrats to encompass new categories of state actors such as law enforcement personnel and USCIS adjudicators. Following Sarah Lakhani (2019, 1665), we extend this conceptualization to immigration attorneys, which she calls “parastate” actors: “individuals who technically work outside of the state but whose work is intertwined with it.” To our knowledge, our article is the first socio-legal research project on the T visa process and thus stands to contribute

significantly to the literature by expanding the scope of studies on immigration law, in general, and humanitarian visas, in particular. We also add to a nascent but growing body of literature that examines the intersection between expansive discretion and powerful narratives of criminality, victimhood, and “worthy” migrants that characterize certain aspects of immigration and asylum law (see, for example, Zatz and Rodriguez 2014; Akbari and Vogler 2021).

This article proceeds as follows. First, we provide an overview of the T visa application process and briefly introduce a framework organizing the primary barriers to application and approval into three major stages. Next, we present our theory as to why the combination of bureaucratic discretion and dominant narratives of human trafficking poses a particularly substantial barrier to T visa utilization. We then explain our methods, focusing on our choice of interview subjects and analytic approach, specifically the use of theme identification as a way of anatomizing our qualitative interview data. Next, we present our findings regarding the persistent underutilization of the T visa, highlighting the systemic barriers and sweeping discretion exercised by street-level bureaucrats throughout the three main stages of the application process. We conclude by discussing the implications of our findings for understanding the role of discretion wielded by key actors in the legal processes with few other oversights and offer potential reforms that may help increase the successful utilization of the T visa.

### OVERVIEW OF THE T VISA PROCESS

In order to meet the baseline legal criteria for T visa eligibility, an individual must demonstrate (1) that they were a victim of a severe form of human trafficking; (2) that they are still in the United States or one of its territories as a direct result of human trafficking; (3) that they have complied with all reasonable requests from a law enforcement agency for assistance in the investigation or prosecution of human trafficking; and (4) that they would suffer extreme hardship involving severe harm if removed from the United States. To constitute a severe form of trafficking, force, fraud, or coercion must be used in the process of recruiting, harboring, transporting, providing, or obtaining a person for the purpose of involuntary servitude or commercial sex acts. Trafficking may also be considered severe if it results in physical or emotional harm, involves the use of threats or violence against family members, or if the victim is a minor (USCIS 2018).

These legal definitions are intentionally broad since trafficking can take myriad forms. Though human trafficking often evokes images of kidnapping, confinement, and physical violence, more often traffickers use a combination of fraud, threats, and coercion as tools of exploitation. While the ambiguity in this legal definition is therefore important to account for the diversity of experiences that survivors of trafficking have, it also means that some key aspects of the legal definition can be quite difficult to prove, especially when traffickers rely on psychological or emotional coercion. The T visa statute thus includes few specific evidentiary requirements, which means determining whether an applicant satisfies these baseline legal criteria is left to the judgments and discretion of USCIS adjudicators (Motomura 2011; Smith 2013).

The primary source of evidence required to satisfy the four T visa criteria is typically the applicant's narrative account of their trafficking. In this pivotal document, applicants must lay out in detail the events that led to their being trafficked in the United States or on the way to the United States, the abuses they suffered while being victimized, and explain why returning to their country of origin would expose them to further harm or suffering. Given the aforementioned ambiguity of the legal requirements, this narrative is closely scrutinized by adjudicators to determine if they believe it meets the legal threshold of severe trafficking. Like the U visa, applicants must also show that they have cooperated with reasonable requests from law enforcement (Orloff, Isom, and Saballos 2010). Though an exception was added to the T visa criteria in 2005, removing the requirement to engage with law enforcement if it was likely to cause physical or psychological trauma, as Stacie Smith (2013, 740–41) points out, "the statute does not give any guidance as to what constitutes a state of physical or psychological trauma," thus many survivors and their lawyers still perceive this as a requirement.

The legislative history and context in which the T visa emerged also provides insight into the limitations of accessing this form of immigration relief. When drafting the TVPA, Congress deliberately limited assistance to potential T visa applicants by excluding a range of types of labor exploitation, narrowing the understanding of who constitutes a victim of human trafficking. This is partially due to the legacy of congressional concerns about illegal immigration during the adoption of the TVPA. For instance, Congress was especially concerned about granting T visas to those who consented to crossing the border, even if they also experienced human trafficking along the way (Chacón 2006). Rachel Rosenbloom (2018) argues that, over the last several decades, new forms of humanitarian relief for immigrants contribute to a system of "cimmigration," a term that legal scholars use to describe a convergence of immigration and criminal law. This shift to more expansive forms of relief has also created a new dichotomy of who is considered a "bad" and a "good" immigrant, which is relevant to T visas and the narratives that must be crafted to secure them because "good" immigrants are those who are clearly and only victims of a crime (excluding those who chose to participate in their own smuggling) as well as those who are willing to work with law enforcement. Thus, while the limitations of the T visa application process contribute to barriers for applicants, there is a historical and legislative history that plays a role as well.

Because human trafficking is often a difficult crime to prove, the discretionary nature of the T visa is an important component of the adjudication process in determining whether a survivor meets the criteria listed above. This is particularly true when many survivors are only able to apply years after escaping their trafficker, whether due to trauma, fear, or lack of knowledge of the T visa process or that their experiences amount to human trafficking. However, as Lakhani (2013, 2014) has pointed out in her research on the U visa, the discretionary nature of these humanitarian visas often makes them more challenging to obtain than other types of immigration relief because there is no in-person interview component with USCIS or an immigration judge, so applicants can only plead their case through a written application. Applicants must therefore not only demonstrate in their testimony that their experience satisfies the definition of severe trafficking but also convince

adjudicators that they are deserving of the T visa and its benefits. T visa applications are sent to the USCIS Vermont Service Center, where adjudicators can either approve, deny, or return a request for evidence (RFE) to the applicant. Though the internal policies that guide Vermont Service Center adjudicators and the training they receive on the dynamics of human trafficking are key aspects of the T visa process, little is known about the inner workings of this office. In fact, many of our interviewees expressed frustration at the black-box nature of the Vermont Service Center. Even those who have worked on dozens of T visa applications had little knowledge about how adjudicators reach their decisions.

After applicants send in their application, they face considerable wait times for T visa processing. In late 2021, the USCIS website's estimate for T visa processing time was nineteen to seventy months, a time frame supported by our interview findings. Given their immigrant status, some applicants lack work authorization during this period, and some are worried about their current visas being terminated or expiring during this period, exposing them to both financial hardship and an increased risk of re-trafficking. Though T visa applicants can receive "continued presence," a temporary immigration designation for survivors of human trafficking, this status requires certification by law enforcement, which can be both difficult to secure and a potentially traumatic process given their apprehensions toward police and the ever-present threat of deportation (Gleeson 2010; Ellis 2021). Applicants also frequently contend with requests for additional documentation or evidence (RFEs), which can involve considerable expenses such as additional lawyer fees in the case of for-profit attorneys, medical exams, travel costs, court records costs, and attestations from mental health professionals supporting their claims of severe trauma. Finally, applicants risk denials, which, at best, can result in additional fees if they choose to pursue an appeal or, at worst, their arrest and deportation. This latter threat was particularly pronounced between 2018 and 2020, when a Trump administration policy mandated that applicants whose U or T visa was denied be served with a notice to appear, which immediately began their deportation proceedings. Though President Joe Biden rescinded this guidance in an executive order on his first day in office, we expect the previous administration's hostility towards immigrants to have a lasting impact on survivors and immigration attorneys alike.

As this overview of the T visa process indicates, there are several key points at which a survivor of trafficking might be prevented from initiating or completing a visa application or from receiving an approval. To more systematically analyze these key points and the potential barriers that might deter qualifying survivors from utilizing the T visa, we break down this process into three main stages: (1) pre-application; (2) application; and (3) post-application. By applying this framework to structure our research and analyses, we attempt not only to document the most common barriers at each stage of the T visa application process but also to identify those that are the most difficult to overcome. And for those that do overcome them, we consider the emotional, legal, and financial costs to do so. It is our hope that these findings can potentially help survivors and immigration attorneys to navigate the T visa process more successfully, while also providing policy recommendations to improve the T visa process so that this important form of humanitarian visa does not continue to be so underutilized.

## THEORY: THE POWER OF TRAFFICKING NARRATIVES AND THE PROBLEMS WITH DISCRETION

Every individual we interviewed spoke of misunderstandings about the nature of human trafficking and how T visa applicants must craft their stories to fit within this narrow construction of victimhood. These misunderstandings create barriers that are pervasive among the main actors in every aspect of the T visa process, including USCIS adjudicators, law enforcement officials, NGO providers, and even immigration lawyers. This contributes to the failure of identification (or misidentification) by these actors; the unwillingness of law enforcement to sign victim certification applications or provide attestation for continued presence; the degree of re-traumatization during the application and evaluation process (particularly in some cases of RFEs); and the low approval rates by USCIS adjudicators. This is arguably one of the greatest barriers to the successful application and approval of T visas and is likely driven by a combination of expansive discretion held by key actors in this process and the pervasive nature of often problematic human trafficking narratives that perpetuate misunderstandings of human trafficking and focus on a relatively small subset of victims of trafficking.

The socio-legal studies literature provides a framework for the study of “street-level bureaucrats,” which Michael Lipsky (1980, xi) defines as professionals who “interact with and have wide discretion over the dispensation of benefits or the allocation of public sanctions.” In the process of applying for a T visa, applicants encounter multiple professionals who, we argue, fall into the street-level bureaucrat categorization, including law enforcement personnel and USCIS adjudicators. Drawing on Lakhani (2019), we also argue that, as “parastate” actors, immigration lawyers fit this category as well. All three of these groups of professionals serve as gatekeepers in the T visa process with varying degrees of control over the fate of applicants, depending on the stage of their application. To secure a T visa, survivors must be recognized as such by all three groups, conforming to often different notions of victimhood in order to make their way through the adjudication process successfully.

Discretion is a key feature in the decision making of street-level bureaucrats. Given the high stress and low resource settings in which they work, street-level bureaucrats often rely on prior knowledge of similar cases, clients, and circumstances to make consequential judgments (Lakhani 2019). Lipsky (1980) writes that, in order for these bureaucrats to ration attention and energy (scarce resources in the day-to-day activities of these professionals), their decision process is characterized as mental simplifications stemming from stereotypes and prejudices (see also Maybritt and Spire 2014). Similarly, in Lakhani’s (2019) work on attorneys’ selection of U visa clients, she writes that lawyers may evaluate these cases based on prior reference points, career experiences, and current caseload, exercising considerable discretion when determining who to take on as a client (see also James and Killick 2012). Though lower caseloads or more resources would not obviate the use of heuristics in decision making, it would give adjudicators more time to evaluate the details of individual cases rather than relying on stereotypes of what trafficking survivors “look like.”

In this article, we extend this argument to consider the consequences of this level of discretion that law enforcement, lawyers, and USCIS adjudicators have in identifying survivors, assessing their eligibility for T visas, and ultimately deciding whether to grant

them protected status or not. We also build upon Lakhani's (2019, 1676) argument that street-level bureaucrats with wide-ranging discretion are prone to using "popular stereotypes of particular criminal offenses [to] provide imagery about 'typical' offender and victim characteristics as well as situational features of the offense" to make highly consequential decisions about whether or not cases fit the statutory definition of trafficking. We argue that preconceived notions and biases that pervade dominant narratives of human trafficking oversimplify the complex dynamics of this crime, create a narrow typology of victimhood, and reify the notion of worthy immigrant survivors who merit assistance at the expense of others who do not fit this narrow category. Several scholars point out the power that human trafficking narratives hold over the collective imagination and the extent to which these entrenched beliefs shape policy responses to it (De Vries 2005; Hoyle, Bosworth, and Dempsey 2011; O'Brien 2015). These dominant narratives, combined with the sweeping discretion of street-level bureaucrats, quite literally determine who is recognized as a survivor of trafficking and offered services and who is not.

Though all legal narratives are constructed to some extent (Mertz 1994), the narrative component of human trafficking cases seems to hold outsized influence, even permeating its legal definition (Hoyle, Bosworth, and Dempsey 2011). The most repeated stories of human trafficking are those with clear villains, an "ideal victim" who is both powerless and sympathetic and a hero who comes to the rescue (Christie 1986; O'Brien 2015). Furthermore, Tabitha Bonilla and Cecilia Mo (2019) study how the public defines human trafficking and find that the average citizen equates human trafficking with the smuggling of women for sex trafficking. Because of this oversimplified representation of trafficking, perpetuated by the media (Austin and Farrell 2017) and the academy (Russell 2018), "constructing an adequately complex narrative of trafficking is daunting" (Vance 2012, 201). While discussing the way in which such oft-repeated narratives perpetuate misconceptions, one NGO program coordinator said the following:

[It's] like trafficking only happens to young, cisgender, white, cute, able-bodied girls, it only happens by strangers, and there's only creepy white vans . . . all of those nonsense pieces that erase trans and men's experiences in sex trafficking. It also totally erases that labor trafficking exists. When somebody is talking about their work exploitation and we're talking about labor trafficking it's often a "No, no, no. It's not like what I've heard on social media. That's not my experience. It couldn't be trafficking because that's not what the Dateline episode was about," for example. Those myths erase so many people. The myths around U.S. citizens not being vulnerable to trafficking. We . . . I could get on a very large soapbox about this, so I'm going to reign myself in. It doesn't help with identification, it doesn't help with folks seeking services, and it doesn't help when . . . it just doesn't help. It's a mess.

These dominant narratives about trafficking also contribute to how policies are designed and implemented to address the problem (Bacchi 2007; Boswell 2011; Chuang 2014). It means that the stories of survivors who do not fit the archetype of an "ideal" or "worthy" victim are more likely to go unrecognized by those with immense power over their fates,



including attorneys, law enforcement, and adjudicators (Christie 1986; Berger 2009; Hoyle, Bosworth, and Dempsey 2011). These stories powerfully influence discretionary decisions made by key actors in the T visa process, shaping notions of what trafficking is, who it happens to, and rendering invisible those who do not fit these narrow constructions of victimhood. Virtually every step of the T visa process is predicated upon survivors' stories being legible to these gatekeepers as a clear case of trafficking and being validated as the type of "worthy victim" meriting redress (Berger 2009).

Related to the influence of narratives on the fate of survivors, studies by both Susan Berger (2009) and Roberta Villalón (2010) of Latina immigrants applying for U visas under the Violence against Women Act highlight the extent to which survivors must cast themselves as lacking agency in a way that often plays into gender stereotypes and reifies existing social power structures.<sup>3</sup> Similarly, Lakhani (2013) demonstrates that the discretionary nature of U visas means applicants must often try to convince adjudicators that they are socially and morally deserving of assistance in addition to meeting the legal requirements. This process often requires stripping power away from applicants in order to make them appear as "innocent victims" (Christie 1986). An immigration lawyer who routinely works on T visa applications further supported this notion, lamenting that

[t]his idea that trafficking survivors have to make themselves into victims in order to get relief . . . All of the clients got out of their [trafficking] situation. They all have some level of agency. It's actually far rarer to, exceedingly rare for our T-visa clients to have been rescued. They figured out a way to get out of it. I feel like we are always having to de-emphasize that agency, that they can actually do something for themselves.

Many attorneys we spoke with expressed similar frustrations with the way that T visa declarations have to be constructed so that USCIS adjudicators view them favorably. Deborah James and Evan Killick (2012) report similar findings from interviews with immigration caseworkers in London, which suggest that this may be a feature of immigration/asylum law more broadly. Though attorneys often take an active role in crafting cases or narratives to make their clients more sympathetic under the law (Coutin 2000; Lakhani 2013), in the case of T visa applications specifically, the process often involves not only removing clients' agency from their own stories but also asking them to take on, at least temporarily, an identity of victimhood (Chuang 2014). There are of course practical reasons for this strategy. As one nonprofit attorney we interviewed explained,

[w]e occasionally start with a client writing their own statement, but I would say not that often. Part of that's just because of the clientele. For a lot of our clients, that's just not going to be something they are able to do or even want to. You learn—you get to know that person and what has gone on in their lives and what has happened to them. And then, again explaining to them why, you help them take the parts of that experience that help what you need

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3. Violence against Women Act, September 13, 1994, 108 Stat. 1796.

to explain in order to get a certain legal result. That's telling a version of their story. That's telling a version of their truth. It definitely is not telling all of it. And yet, if a client has come to us because their goal is to get T-visa relief, I think our job is to advise them—this is the stuff that we need to know in order to achieve that goal.

Acknowledging the practical need for framing clients' narratives to fit the legal definition of trafficking is important; however, given the discretionary nature of T visas, there is also a component of remaking clients as victims that many interviewees argued is traumatizing, even dehumanizing. Some scholars argue that this framing of survivors as helpless victims is intrinsic to the language of trafficking laws (for example, Hoyle, Bosworth, and Dempsey 2011). Understandably then, many attorneys felt it is necessary to cast clients in this way, conforming to the pervasive victim narrative of trafficking in order to have applications favorably reviewed by USCIS adjudicators. When this level of narrative shaping becomes necessary, and the story seems to hold more power than the facts, it suggests that there is a problem with the law itself, the process of adjudication, and/or the degree of discretion involved in the process.

The seeming necessity of crafting T visa narratives that conform to the dominant stereotypes around trafficking arguably contributes to the re-traumatizing nature of the process. Ghazah Abbasi (2020, 477) calls this “the panoptics of pain,” arguing that “state agencies discipline subjects through a seemingly ceaseless interrogation of their deepest wounds.” Many interviewees expressed similar sentiments, noting that the traumatic details of clients' experiences often had to be rehashed in excruciating detail in order to satisfy USCIS adjudicators, particularly if they issued a RFE that questioned the severity of their experience or other key details of their trafficking. As Lipsky (1980) and others (for example, Maybritt and Spire 2014; Biland and Steinmetz 2017) point out, street-level bureaucrats are often implicitly involved in mediating aspects of the constitutional relationship of citizens to the state: “In short, they hold the keys to a dimension of citizenship” (Lipsky 1980, 4). In this instance, USCIS adjudicators exercise wide-ranging discretion to mediate the question of who is worthy of becoming a citizen of the state.

Combined, the requirement to share such explicit detail in order to be recognized as a deserving victim, as well as the constant threat of deportation throughout the process, particularly after the Trump administration's notice-to-appear order was issued, ensure that the T visa process reinforces the state's power and, in some ways, undermines the humanitarian motives of this visa (Beckett and Herbert 2010; Abbasi 2020). It is notable in this regard that most interviewees specifically mentioned that the level of detail required in narratives and the degree to which USCIS adjudicators scrutinized them increased under the Trump administration. Though these observations are largely anecdotal, a general consensus among our interviewees was that the Trump administration's anti-immigrant rhetoric had a tangible impact on the way in which USCIS adjudicators evaluated T visa applications. This trend is supported by studies that find resistance toward immigration increases when cultural anxieties about immigration become more prominent in public discourse (Hopkins 2010; Hainmueller and Hopkins 2014) and that street-level bureaucrats may internalize the state's agenda in their discretionary decision making (Maybritt and Spire 2014). Together, these

findings strengthen the contention that there is an inherent conflict between an immigration system predicated on the spatial control of individuals and a humanitarian visa ostensibly designed to provide redress for immigrants who have been victimized (Beckett and Herbert 2010; Chacón 2010).

Though the T visa may have been designed with genuine humanitarian intentions, the implementation is such that many eligible applicants are prevented from even applying and those that do face a long and arduous legal battle with very little guarantee of recompense. These barriers result both from the construction and application of immigration and trafficking laws. As several scholars note, immigration and trafficking laws are constructed in ways that tend to reinforce existing structures of dominance, hierarchy, and oppression, particularly along lines of class, gender, and sexual identity (Hoyle, Bosworth, and Dempsey 2011; Salcido and Menjívar 2012; Akbari and Vogler 2021). In its application, this degree of discretion, though “a venerable and essential component of the rule of law that recognizes the inevitable complexities of enforcement of laws by government agencies,” is also “a double-edged sword [that] can cut towards harsh enforcement, or it can cut towards mercy” (Kanstroom 2012, 215). Thus, while the discretionary nature of immigration law is not unique to the T visa process, this level of discretion, combined with problematic but pervasive narratives around human trafficking, powerfully influences the ways in which this discretion is exercised and is a distinctive problem. These factors, alongside a narrow construction of victimhood under the law, as we go on to show, make the T visa uniquely difficult to access compared to the U visa (Hoyle, Bosworth, and Dempsey 2011).

## DATA AND METHODS

The primary data source for our study came from twenty key informant interviews focusing on the potential barriers that survivors of trafficking may face when applying for a T visa. Our initial point of contact was an immigration attorney with considerable experience helping clients in the Seattle, Washington, area apply for T visas, who is also a member of the American Immigration Lawyers Association. We then used snowball sampling methods to identify a nationwide sample of immigration lawyers, law enforcement officials, mental health professionals, and NGO service providers who routinely support survivors of trafficking as they navigate the T visa application process. We focused first on conducting in-depth semi-structured interviews with immigration lawyers until we reached data saturation (Glasser and Strauss 1967; Saunders et al. 2018), defined as the point “when the researcher begins to hear the same comments again and again” (Grady 1998, 26). However, following Barney Glasser and Anselm Strauss (1967, 61), rather than stopping our interviews at this point, we then attempted to “stretch the diversity of data” by expanding our pool of interviewees to include the perspective of law enforcement, mental health professionals, and NGO service providers. The interviews typically lasted between one and two hours.

All our interview subjects are professionals who routinely work with survivors of trafficking, but their caseloads vary. One interviewee, an early pioneer in this field who began working on T visa cases in 2003, said they alone had submitted two hundred T visa applications during their career. Several of our interviewees work at large

anti-trafficking NGOs or represent networks of immigration lawyers working on this subject and cumulatively serve hundreds of survivors of trafficking each year. One immigration lawyer reported their firm is typically handling twenty to thirty T visa applications at any given time, while another for-profit attorney estimated working on forty T visa applications over the last several years. We made the intentional decision not to engage with survivors of trafficking directly for multiple reasons. First, from a research standpoint, we felt it would be beneficial to have the perspective of those who have had repeat experiences with the T visa process. Thus, it made sense to interview professionals who assist in the process rather than applicants who would have a single direct experience. From a practical standpoint, because we were conducting these interviews under remote conditions due to the COVID-19 pandemic, we felt that connecting with survivors remotely was an inadequate format to establish trust and apply a trauma-informed approach to our interviews. Finally, from an ethical standpoint, given our experiences working in the anti-trafficking field, we felt that one of the biggest hardships of this process is the fact that survivors must repeat their stories many times for lawyers, law enforcement, USCIS adjudicators, therapists, and others. We did not want to contribute to this pattern of re-traumatization.

Importantly, this means that our research cannot speak directly to the lived experience of survivors of trafficking. In many cases, we make inferences about survivors' experience based on our interviews, but these are secondhand accounts at best. Thus, we acknowledge that this research process simultaneously critiques the construction of narratives, while engaging in the same process to some degree. This is arguably a limitation of our methodology. At the same time, by interviewing those who hold the power in interactions with survivors of trafficking, we were able to assess the ways in which their perceptions of trafficking both produce and reproduce the ideal victim type. Even well-intentioned attorneys, service providers (and researchers) engage in the process of narrative construction and victim identification, and, like the USCIS adjudicators that we more directly critique, are susceptible to bias and preconceived notions of who fits the definition of a survivor of trafficking. We thus attempted to shift the focus away from the experiences of survivors to examine points about how the power of discretion, pervasive narratives of human trafficking, and institutional failures contribute to the underutilization of T visas, but we recognize that this approach is at times imperfect.

In total, we conducted twenty in-depth semi-structured interviews. Our interviewees represent several of the largest nonprofits operating in this space and individually make up a considerable portion of the limited number of immigration lawyers who regularly submit T visa applications. Multiple interview subjects commented on how small the field of immigration lawyers specializing in human trafficking cases and T visa applications is, with one interviewee estimating that there are probably only three hundred to four hundred attorneys in the United States who routinely submit one or more T visa applications each year. Statistics on annual T visa application trends also support this estimate (USCIS 2021). Furthermore, towards the end of our interview period, our snowball sampling approach started to provide us with many of the same names of experts to talk to in this field, all of whom we had already interviewed. Because these interviews were completed between October 2020 and June 2021 during the COVID-19 pandemic, they were all conducted via video conference.

We received an Institutional Review Board exemption since we were interviewing professionals. All interviews were recorded with permission, except for one law enforcement detective who was only able to be interviewed on the condition that it was not recorded. Interviews were subsequently transcribed verbatim by undergraduate research assistants and anonymized prior to our analysis of the transcripts. Following the work of Ryan and Bernard (2003), our primary method of text analysis was theme identification.

We took both an inductive approach, where we let themes emerge from the data and noted where there was repetition of ideas across multiple interviews, as well as an *a priori* approach, where drawing on our knowledge of the field allowed us to identify several themes that we anticipated (and later confirmed) might arise in the course of our interviews. Our text analysis focused on repetition as “the more the same concept occurs in a text, the more likely it is a theme”; once we identified themes, we used the cutting and sorting technique to group themes together (Ryan and Bernard 2003, 89). This allowed us to see where there was the most repetition and agreement among interviewees.

## POTENTIAL EXPLANATIONS FOR T VISA UNDERUTILIZATION

We now turn to an examination of the various possible explanations for the persistent underutilization of T visas and draw upon the most common themes identified through our interviews to help adjudicate between them. By analyzing barriers at each of the three main stages of the T visa application, the power of discretion and entrenched misconceptions of human trafficking become strikingly clear. Before examining specific barriers at each stage, it is important to first consider an obvious alternative explanation for the low rates of T visa applications—namely, that there are simply not enough survivors of trafficking to meet the annual visa limit. Human trafficking is, after all, a much more specific and narrowly defined criminal activity than those covered under the U visa. USCIS lists twenty-eight qualifying crimes for U visa applications ranging from female genital mutilation to extortion. Further, the legislation makes clear that “other related crimes” can also qualify for U visas, leaving significant room for the expansion of this list. By comparison, applicants only qualify for T visas if they are victims of severe forms of human trafficking. It is true, therefore, that the T visa is available to a much narrower category of victims.

That said, our interviews indicate that there is likely no shortage of eligible trafficking victims in the United States. Combined, our sample of interviewees and the organizations they represent have served thousands of trafficking victims over the last decade. For example, interviewees at a single NGO in the Washington, DC, metro area reported serving two hundred foreign national trafficking survivors per year, while another local network of trafficking NGOs in Buffalo, New York, has served about fifteen hundred survivors in the last ten years. These numbers are further supported by US government prevalence statistics, which, though methodologically problematic and prone to overinflation, place the number of individuals trafficked into the country each year, by even the most conservative estimates, at three to five times higher than the T visa cap (Scullion 2015; Fedina

and DeForge 2017). Thus, it is unlikely that a lack of survivors of trafficking explains the low numbers of T visa applications.

### Pre-application Barriers

Many survivors of human trafficking go unidentified either because they never encounter the legal system or because they are misidentified as criminals or survivors of another related crime. Identification represents the first barrier to T visa utilization, a point firmly supported by our findings and the extant literature on human trafficking. This problem is twofold. First, many T visa applicants are undocumented, which, as Nicholas de Genova (2002) and others point out, not only leaves migrants with little protection under the law but also means that their very existence is criminalized (see, for example, Ellis 2021). Thus, even while being actively victimized by traffickers, they may fear law enforcement and avoid contact with the legal system. Survivors of trafficking have good reasons for this mistrust. There is a long history of these individuals being misidentified as criminals and labelled and detained as sex workers or undocumented immigrants rather than being seen as survivors of trafficking (Haynes 2004; Chacón 2010; Noyori-Corbett and Moxley 2017). Multiple studies in the United States have found that even law enforcement officers who have received training on the subject still struggle to accurately identify survivors of trafficking (Farrell and Pfeffer 2014; Mapp et al. 2016).

Identification of survivors of labor trafficking is further complicated by the fact that, despite being the most prevalent form of trafficking, it receives considerably less attention and resources compared to sex trafficking, which has become a focal point of the global narrative on trafficking (Agustín 2008; Goehring 2019). Undocumented migrants are particularly vulnerable to labor trafficking in the United States as the demand for cheap labor and the threat of detention and deportation pushes many migrants into informal and unregulated sectors, where exploitation is rampant. Labor trafficking in the United States is widespread and can take many different forms. For example, migrants are sometimes trafficked in private homes through domestic servitude, while others may face exploitation working in agriculture, construction, or hospitality (Owen et al. 2015). Denise Brennan (2008) argues that the reason for the low numbers of survivors of forced labor found in the United States is partly a result of not looking. A detective we interviewed who specializes in labor trafficking cases further supported this claim:

So if you think about the environments where labor trafficking occurs, those are private corporations, private businesses. So we just don't have the authority to go marching in because we feel that agricultural workers are a highly exploited population . . . We don't have the ability to do that by law. We have to have some kind of probable cause to get search warrants to go on peoples' property. So again, that hidden population concept makes it very difficult.

In contrast, law enforcement has more established means of identifying and policing sex trafficking. For instance, the same detective attested that prostitution stings are an

inveterate tactic in the law enforcement repertoire. While many sex trafficking survivors still certainly go unidentified, the problem of identification is much more difficult to overcome for labor trafficking cases. However, law enforcement is not the only area where sex trafficking is prioritized over labor trafficking. Several studies conclude that sex trafficking also receives more attention and resources than labor trafficking in social services, policy, the media, and the academy (Brennan 2008; Gozdzak and Bump 2008; Gulati 2011; Austin and Farrell 2017). As another interviewee, a leader in a national anti-trafficking NGO, noted, “we continue to lack [a] big picture understanding of the pervasiveness of labor trafficking in this country.” Without this big picture understanding and given the challenges of enforcement and identification, labor trafficking survivors are particularly prone to slipping through institutional cracks or being misidentified.

Even if a survivor of trafficking does come into contact with the legal system and is not labeled as a criminal, they may still not be correctly identified as someone who is eligible for the T visa. In part, this is an issue with the language of the law itself. The statutory criteria for a severe form of human trafficking is as follows:

**Sex trafficking:** When someone recruits, harbors, transports, provides, solicits, patronizes, or obtains a person for the purpose of a commercial sex act, where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age; or  
**Labor trafficking:** When someone recruits, harbors, transports, provides, or obtains a person for labor or services through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery. (USCIS 2018)

Thus, to be legally considered a survivor of trafficking, an individual must satisfy one of the two above definitions in full, which typically constitute multiple co-occurring crimes under specific conditions and in a particular order. Several interviewees noted the challenges involved in identifying potential victims given the complexity of this law, even by immigration lawyers. One private attorney noted that only after their firm received training on the subject of trafficking were they able to go back and identify multiple survivors of trafficking who were eligible for the T visa but who had initially only been thought to qualify for a U visa. Even then, the same attorney expressed with some frustration that “you have to practically interrogate people to figure out if they’re a victim of human trafficking”; given the specificity of the legal definition, “it has to be a multi-appointment, layered process in identifying them.” This observation underscores not only the difficulty of accurately identifying survivors of trafficking even by trained legal professionals but also the inherent complexity of the crime that requires a great deal of familiarity with the details of the survivor’s experience in order to know whether or not it fits the statutory definition of trafficking.

Though individuals can and do self-identify as victims of trafficking, it is quite rare. The complexities of human trafficking law and the overlap with other crimes and abusive circumstances make it more likely that a lawyer, law enforcement officer, or NGO service provider will be the first one to identify them as fitting into the legal category of human trafficking. This is not to say that survivors of trafficking are unaware

that they have been victimized. As one interviewee put it, “[survivors] don’t self-identify as human trafficking, but they know they have been wronged or hurt in some way.” Though some previous research has argued that marginalized individuals are less likely to perceive the abuses they experience as injustices meriting recompense (see, for example, Felstiner, Abel, and Sarat 1980), more recent studies by Margaret Boittin (2013) and Shannon Gleeson (2010), find that even marginalized individuals “illegalized” by virtue of their work or lack of documentation still often understand their experiences as unjust. Mistrust of the legal system, fear of retaliation, resignation to their circumstances, and the unlikelihood of obtaining justice may all mediate any attempts to engage the legal system (Bumiller 1988; Merry 1990; Nielsen 2004; Gleeson 2010). Relatedly, since some applicants for the T visa lack legal documentation and have been working in illicit industries, survivors are likely to have misapprehension about the legal system (Ellis 2021) and perhaps a general sense that the law is not designed for them (Ewick and Silbey 1998).

One immigration attorney working for a non-profit that regularly supports T visa applications underscored the rarity of self-identification:

Most cases are not self-reported. Self-referred clients that call us up and say I’m a victim of trafficking and I’m looking for representation for a T-visa. In fact, the rare times that does happen, it makes me suspicious. It’s unusual. The majority of our cases get identified one of two ways. They either get referred to us by another legal or social services provider that identified the case or flagged the case, or they are a case that comes in from a client seeking representation generally or seeking advice generally, whether it’s on a family, employment or immigration matter. And we are the ones who can identify it as trafficking. We do get referrals from law enforcement . . . . But it’s not the majority of the cases. I would say the majority of the cases are from social services, community organizations, legal service providers, or clients seeking advice on other legal issues and we identify the trafficking.

As this quote suggests, and numerous other interviews corroborate, in most cases, survivors of trafficking are identified as such only after having some contact with law enforcement, immigration attorneys, or NGO service providers. These findings illustrate three important points. First, there is the need for more and better training on those most likely to come into contact with survivors of trafficking, including law enforcement, immigration attorneys, NGO service providers as well as medical and mental health professionals. Second, there is the need to increase the number of immigration attorneys trained on the topic of T visas. Even when contact with the legal system does happen, and a survivor of trafficking is correctly identified, they must then be connected to an immigration attorney or nonprofit that is familiar with the T visa and capable of helping them apply. Third, the above quote underscores the point that immigration attorneys in their capacity as street-level bureaucrats also act as highly consequential gatekeepers sorting survivors into categories of those meriting support and those whose stories should be scrutinized more carefully. This too is part of the narrative crafting process of interpolating (un)worthiness into survivors’ stories, and it is important that immigration attorneys maintain an awareness of this power that they hold.



Since this pathway is predicated on (1) sympathetic contact with the legal system; (2) accurate identification as a survivor of trafficking; and (3) subsequent connection to the T visa process, a survivor can easily fall through the cracks at any of those three key pre-application points. At best, they might be categorized as a U visa applicant, which though promising, means they face an extremely long wait time, and, at worst, they may be misidentified as a criminal and/or undocumented immigrant and face punishment, including deportation. The precarity of this pathway certainly helps explain the underutilization of the T visa to some extent. Yet, given the high numbers of trafficking survivors and gradually growing levels of awareness among immigration attorneys and law enforcement on the subject, it is unlikely that this factor alone explains the dearth of applications. However, the overarching problem of survivor identification, rooted in misconceptions of what human trafficking looks like, is a prevalent factor, which, as we will show, is a theme that arose again and again in our interviews and permeates every stage of the T visa process.

### Application Stage Barriers

Even if a survivor of trafficking reaches the point of self-identification or referral to a lawyer who agrees to begin the T visa application process, our research indicates several institutional hurdles to completing an application as well as potential pitfalls related to the discretionary nature of lawyers and law enforcement personnel in assisting with applications. These hurdles include significant language barriers, onerous fees, inability to secure supporting documents from law enforcement agencies, and the re-traumatizing nature of the T visa process itself through the crafting of a personal declaration, which often requires reliving their worst experiences in excruciating detail. These structural barriers, much like the language of the law itself, function, at least implicitly, as another means of privileging some groups of immigrants over others. English proficiency, economic self-sufficiency, and maleness confer significant advantages to those seeking redress under this facet of immigration law (Salcido and Menjívar 2012).

For example, all forms and instructions on USCIS's website are only available in English, posing a barrier for individuals who are not native English speakers. Even with considerable language proficiency, several interviewees noted that it would be nearly impossible for someone without legal training to complete the forms. As one lawyer explained, "[t]he minimum requirements are already pretty onerous. There's certain forms that have to be filled out. You're supposed to be able to do them pro se, but I cannot imagine anyone filling them out themselves. I may be a bit biased, but the questions are (a) in English, they're not available in any other language. And (b) the yes or no eligibility questions on them all are tied to certain statutory provisions." Without prior knowledge of immigration law and the specific definitions and regulations on human trafficking, it is unlikely that a survivor of trafficking would be able to put together a successful application without the assistance of a lawyer.

Another significant barrier that survivors face when applying for a T visa is the associated fees. This creates a darkly ironic conundrum for immigrants. Applicants for a T visa were once exploited for their labor, but they must find a way to pay for this relief

without authorization to work. While the main forms for a T visa application are free, there is a \$930 fee for an inadmissibility waiver for an unlawful entry fraud or other immigration or criminal violations (some as simple as having an expired passport or not being able to afford to replace one stolen by their trafficker). There is also a \$410 fee for each family member who needs a work permit (WomensLaw 2019). One nonprofit attorney explained that she worked with a survivor who had one child, and the costs reached \$2,270 with two inadmissibility waivers and a work permit. If an application is denied, an appeal costs an additional \$675. Survivors can apply for a fee waiver from USCIS, but the criterion for approval is vague and subject to change without explanation. For example, most of the lawyers we spoke with mentioned that, around 2018, it became nearly impossible to get a fee waiver approved. Though difficult to confirm, many of our interviewees suspect this is likely due to directives from the Trump administration.

Depending on where a survivor is located, there are some lawyers who will not charge a survivor for their time. However, private attorneys are becoming increasingly involved in submitting T visa applications, and they generally bill survivors at their legal fees. A contentious debate between lawyers who charge survivors for their time and those who adamantly oppose that practice came to light in our interviews. Some believe that the involvement of private attorneys is necessary because there are not enough lawyers working pro bono. One private attorney we spoke to said: “There should be funding for everybody. But there’s just not so we have to figure out in an imperfect world how to assist folks.” They also pointed out that the resource constraints of nonprofits mean they tend to be more selective with the cases they accept and may be reticent to take more complicated (and thus more costly) cases. Thus, private attorneys can fill an important gap in services, offering an avenue of support to survivors who do not qualify for non-profit assistance.

Others feel the power dynamics inherent in this transaction are too large to ignore. As one interview subject noted: “[T]here’s a racialized element, like you are a white woman, particularly seeking out men of color who have been exploited to charge them \$15,000 for a T visa, which a lot of nonprofits offer for free.” In contrast, some private attorneys argue that blanket opposition to charging clients for T visa assistance reinforces the stereotype that all survivors are poor and assert that they are serving a different demographic of survivors than nonprofits. Furthermore, the federal or state aid available to applicants is largely dependent on geographic location and the lawyer’s knowledge of where to request it. For example, we learned that the state of New York will grant a survivor thousands of dollars to pay for legal fees and wrap-around services. In contrast, interviewees from South Carolina noted that, even though federal programs exist to aid survivors of trafficking awaiting a decision on their T visa application, they are often unable to access such services without state-level support or support from locally based NGOs.

On top of filing and legal fees, attorneys may look for an expert opinion to include in their application to validate an applicant’s experience, which can be up to five hundred dollars. Psychological evaluations, which can help explain the impact of trauma on a survivor’s memory, can also be expensive. As one lawyer explained, “I have one really good Portuguese speaking psychological evaluator that I have referred all of my Brazilian clients to but she’s expensive. She charges \$1,000 for an evaluation.”

Given the burden of these fees, several of our interviewees indicated that survivors will sometimes find themselves going into debt, which forces them into another exploitative relationship or work dynamic just to pay for the T visa application, the outcome of which is by no means guaranteed.

In addition to the structural barriers like onerous fees and language requirements, the requirement that survivors may have to engage with law enforcement often poses another significant barrier related to persistent anxieties over their documentation status (Ellis 2021). Throughout our interviews, the perils and fear of working with law enforcement emerged as a recurring theme. T visa applicants are required to demonstrate that they have cooperated with “reasonable” law enforcement requests. In practice, this means that survivors must report their crime to law enforcement and cooperate if law enforcement decides to pursue an investigation. There are many reasons why this poses a barrier for survivors who would otherwise qualify for a T visa. Lawyers spoke of the fears, guilt, and hesitancy of survivors to engage with law enforcement. One lawyer explained how this requirement is sometimes enough of a barrier to keep a survivor from applying:

There are a lot of times where the idea of having to speak to law enforcement is such a barrier that survivors are unwilling to try for the process . . . . Because to be eligible to apply for a T, you have to report that trafficker, who is often a friend, or a family member, or a loved one, or a father of [their] child. Very frankly, that is such an impossible barrier or burden that they’re not willing to do it. Having that conversation, we’ve got survivors who will call us every couple of years and say “Hey, has anything changed? Can I try and get a visa, or can I try to speak to an immigration attorney now? I’m still not going to speak with law enforcement. I’m still not going to report the trafficker.” They’re not willing. So we go through “This is still a requirement.” We talk through what we can do and what we can’t do and what their choices are, and then wait another six months for the same phone call again.

Many of the lawyers we spoke with report positive relationships with law enforcement personnel in their area. One common point of clarification for lawyers was that the law enforcement personnel they work with have made an active effort to distinguish themselves from Immigration and Customs Enforcement (ICE). As one lawyer in California explained, “Our police forces fully understand the detriment of being associated with ICE.” Though our interviewees, both in the legal field and law enforcement, spoke highly of the cross-sector professional relationships they had developed, there were also several troubling and traumatic accounts of survivors engaging with law enforcement. One lawyer told a story of a male client from India who was interviewed by Homeland Security Investigations (HSI) in South Carolina. When the attorney and interpreter arrived, they were not allowed in the room with the client, where the HSI officers interviewed him for hours without water or a bathroom break: “And he came out of there so scared and traumatized. That was one of the law enforcement encounters that really scared us and made us not want to do interviews.” Our research indicates that lawyers have different opinions and strategies about the extent to which survivors must interact with law enforcement for an application to be

successful with USCIS. As the quote above demonstrates, some lawyers encourage their clients to participate in an interview with law enforcement, while others merely include an email correspondence with law enforcement reporting the crime. Here, the lawyers have complete discretion over whether their client should engage with law enforcement as there is no standard around this in the guidelines for working on a T visa.

In addition to the requirement to report the crime and cooperate with reasonable requests from law enforcement, there is an optional certification (Form I-914 Supplement B) that applicants can include if they find a law enforcement officer willing to sign it. This form validates that this applicant is a survivor of trafficking, that they will experience retaliation if they leave the United States, and that they have cooperated, or will cooperate, with an investigation. One detective we spoke with described common hesitancy around signing this form and how law enforcement should think of it as a tool to benefit their work:

There's this concept that "if I fill out this form, they're going to get status. Or I'm giving them status." But no, there's a whole process, a court that they have to go through. There are other organizations that look through this. There are other qualifying factors other than your opinion of whether they're a survivor or not. You really start to see this fear of responsibility surrounding filling out this form and the education surrounding it. So we try in a lot of these situations to simplify it and say that this is a law enforcement tool. Because that's what the t-visa was and even continued presence, it's a law enforcement tool that was developed for you to be able to continue your investigation to help build that trust, further these investigations, and be able to provide status to a survivor who can now feed his family and get medical care for his injury. That is going to create documents for you that you're going to be able to bring forward to your prosecution.

Another detective we interviewed described her refusal to sign certificates because of the possibility that the individual is not credible. Some of the lawyers we spoke with believed that this signed certificate is important to ensure an approval from USCIS, but they described the difficulty in finding an officer who is willing to do so. On the other hand, some interviewees expressed frustration at this strategy because of the burden it puts on the survivor to speak with law enforcement when the certification is not a requirement of the application. A leader of an anti-trafficking NGO that publishes guidance on T visas explained that she does not believe the certification should exist at all: "I think there's also this hesitancy to file T visas without law enforcement certifications for people who don't do them often . . . . The fact that the certification form exists, reinforces this misunderstanding. I think we should just get rid of it."

The lack of consensus around how to engage with law enforcement adds to the stress and uncertainty that survivors face when applying for this relief. The law enforcement certification also adds another important layer of discretionary ambiguity to the legal process. There is seemingly no consensus among lawyers, law enforcement, or adjudicators as to whether and to what extent a favorable outcome for a T visa depends upon law enforcement certification or cooperation. In addition, survivors not only face the uncertainty of legal repercussions due to their citizenship status but also, as

one lawyer pointed out, “[l]aw enforcement itself poses a risk to the survivor because usually, the trafficker has intentionally created a criminal history for the survivor. By reporting, they are also exposing themselves to law enforcement.” The involvement of law enforcement in this process puts survivors in a vulnerable position regarding their documentation status, may lead to backlash from their trafficker, and adds another layer of discretion to street-level bureaucrats with immense power over determining the fate of T visa applicants.

Arguably, the most important aspect of a survivor’s T visa application is the personal statement or declaration, which outlines the survivor’s exploitation, often in excruciating detail. Though the statement is supposed to be written by the applicant, lawyers will aid survivors in crafting their narratives to fit the statutory definition of trafficking. This typically takes many hours and multiple sessions with a lawyer. Further complicating the personal statement writing process is a lack of clear understanding about the definition of trafficking by the lawyer. An interview participant who provides routine assistance to immigration attorneys working on T visas explained: “Our most frequently asked question in our technical assistance is ‘Is this trafficking?’ In a lot of ways, we’re still helping people analyze whether a situation is trafficking or not under the legal definition.”

This process also seems to pose a dilemma for lawyers as they must engage with the part of a survivor’s story that fits the specific definition of trafficking while constructing a narrative of victimhood: “You feel like you’re participating in a system designed to re-traumatize people by preparing cases that way.” Applicants are expected to remember specific details like the names, dates, and visual details of situations that sometimes took place years prior. Nearly every interviewee expressed concern about the traumatizing impact of working on these narratives. Furthermore, trauma may interfere with a survivor’s ability to recall their traumatizing experiences (Saadi et al. 2021). A therapist who works with survivors of trafficking explained why this is a troubling process:

The legal process of having to re-live such a hugely traumatizing experience in your life over and over again and constantly being in the victim mindset hugely affects someone’s mental state . . . Some of my clients, their trafficking occurred even 20 or 30 years ago, and maybe they’d moved past it, but now entering back into that frame of mind and history has triggered mental struggles that they didn’t face before.

Another psychologist suggested that a trauma-informed counselor should be present during this stage so that there is always “somebody who is familiar with tenants of trauma,” which they defined as “safety being important, trust being important, power and control being important, self-esteem being important and relationships being important.” As this psychologist pointed out, without the feeling of safety and trust carefully cultivated by a mental health professional, survivors may not be able to recall specific memories. The effects of trauma on memory can have real consequences for survivors: many lawyers noted that USCIS adjudicators use minor inconsistencies in personal narratives as a reason for rejecting applications or issuing RFEs.

## Post-Application Stage Barriers

Many of our interviewees identified the USCIS review and adjudication stage as being the most precarious for applicants. Increasingly long wait times for applications to be reviewed mean that many survivors must wait indefinitely, usually without temporary protected status or any ability to work legally. In addition, it is at this stage that both the ambiguity of the statutory definition of trafficking and the enormous discretionary power of USCIS adjudicators is put into the sharpest relief. A major theme that emerged from our interviews is a seeming lack of agreement among USCIS adjudicators regarding what constitutes human trafficking and a tendency to reject applications when this crime was intertwined with romantic or familial relationships.

It is important to reiterate that human trafficking is not a singular crime. Rather, it is a specific formula of multiple co-occurring crimes the details of which can vary widely from case to case. Constitutive crimes can include wage theft, kidnapping, blackmail, extortion, rape, assault, and child or domestic abuse. Typically, it is only when several such crimes are combined and experienced by the same person that they amount to human trafficking. However, a common theme that emerged in our interviews was the tendency of USCIS adjudicators to deny T visa applications on the grounds that some co-occurring crimes, particularly domestic violence, preclude cases from being considered human trafficking. In such cases, the lawyers we spoke to reported that adjudicators frequently responded with a RFE or denial stating that the crime was domestic violence, not human trafficking. When, in fact, these are often mutually constitutive, rather than mutually exclusive, crimes. Human trafficking often involves the same dynamics of power and control present in abusive relationships and commonly begins with or includes domestic violence. Additionally, traffickers are commonly a loved one, romantic partner, or spouse (Malangone and Crank 2015). However, many interviewees indicated that USCIS adjudicators, with their expansive discretion over the implementation and interpretation of trafficking laws, often failed to recognize cases of trafficking because they focused only on the more obvious co-occurring crimes like domestic violence.

The other type of applications that lawyers reported were met with the most resistance from USCIS adjudicators were instances of individuals being smuggled into the United States and then subsequently trafficked or those who were trafficked in the course of willingly attempting to cross the border. The conflation between human smuggling and human trafficking is a common misconception. Smuggling is in reference to the way a person unlawfully enters a country and the involvement of third parties who assist with the process (Salt 2000). While trafficking itself does not require being moved across a state line or national border, T visa applicants must demonstrate that they are currently present in the United States on account of human trafficking. Jennifer Chacón (2010, 1615) argues that, despite the humanitarian aims of the TVPA and subsequent T visa system, the goal of protecting individuals who have been exploited often clashes with enforcing immigration law: “The line between voluntary migrants who participate in smuggling schemes and unwilling trafficking victims—a line that is often murky at best—has been vigilantly policed.” Adjudicators at USCIS seem to interrogate this line when smuggling is part of an applicant’s narrative:

We've seen a trend of people who were trafficked in the course of being smuggled to the United States in, what we would call in the field, stash houses. And basically what we would see is that smugglers keep their cargo, their human cargo, at stash houses down at the border and they rely on some of the people being smuggled to feed and maintain those situations. So we usually see women being targeted where the smugglers will become traffickers and take two or three of the women in the house and say you're in charge of the cooking and cleaning. And then use force and coercion to make them do it, meaning they never agreed to work. When you get to the stash house they're told you will do this, if you don't do this, we will throw you outside and let immigration get you, kill you and throw you in the desert where no one can find you . . . And USCIS is saying is that this is just in furtherance of the smuggling conspiracy.

This trend seems inextricably tied to anti-immigrant sentiment in the United States, and many interviewees noted that these types of denials increased dramatically under the Trump administration.

Relatedly, lawyers pointed to pushback because of the physical presence, or present on account of, requirement in T visa applications as particularly challenging to overcome. This is a common point of contention in RFEs and denials from USCIS. Unlike U visa applicants, T visa applicants must demonstrate in their personal narrative that they have entered, or continue to remain in, the United States as a direct result of being trafficked. Guidance published by the Coalition to Abolish Slavery and Trafficking (CAST), a Los Angeles-based nonprofit organization, advises lawyers to focus on the applicant's current situation and why the applicant is still present in the United States (Coalition to Abolish Slavery and Trafficking 2020). This requirement poses barriers for applicants and lawyers, who must refrain from highlighting any success or healing the survivor has achieved in order to demonstrate that the survivor is still in the country because of the trauma of their trafficking experience rather than because they now have a family or have found medical treatment.

This requirement essentially excludes survivors who have left the country either voluntarily or involuntarily before applying, those who USCIS deems have waited too long to apply and must be in the United States for other reasons, and those who have shared parts of their stories that are used against them. For example, one lawyer explains why one of her clients' applications was denied: "He's remarried and he has a stepdaughter and so anyone where there's any sort of family component they're like well you're not still here because of the trafficking you're here because you have a family here in the U.S. now." All but one of the lawyers we interviewed brought up this physical presence requirement as one of the most confusing and arbitrary justifications for not approving an application, which has serious consequences for many who would otherwise qualify for a T visa. As one lawyer said, "[p]resent on account of has been defined so narrowly that people are being left out." This is particularly concerning because undocumented survivors of trafficking who are excluded because of this physical presence requirement are left with no other options for immigration relief and aid, except perhaps by applying for a U visa instead. Ultimately, adjudicators at USCIS use their expansive discretion to

determine whether they believe a survivor is in the United States at the time they apply for the T visa because of trafficking.

Once an application is completed, survivors must wait for an approval, denial, or RFE. This wait time has increased over the years, reaching anywhere between nineteen and seventy months, according to USCIS in 2021. During this wait time, applicants often struggle to secure housing and employment, leaving them vulnerable to unsafe and potentially exploitative circumstances. If USCIS returns a RFE, lawyers and survivors often must go through the painful process of re-engaging with law enforcement, recrafting the personal statement, and/or connecting with a therapist to conduct a psychological evaluation at the request of USCIS. Interviewees expressed the fact that RFEs often seem “nitpicky,” “frivolous,” and “arbitrary.” One lawyer summarized this frustration as follows:

You have judges or adjudicators who are looking for any possible reason to deny. And you can also tell from the tone of their questions . . . . These are applications that are supposed to protect people. Why isn't everyone looking for a reason in the law to support a grant? Especially in the T visa context where the visas aren't even being maxed out. If you have a possible case for relief, why isn't the adjudicator looking for a reason to approve the application?

Many lawyers also reported a marked increase in the seeming arbitrariness of denials and RFEs during the Trump administration's tenure, with one lawyer estimating that “probably 80 to 90 percent we've filed in the last two years [2017–2019] have received a RFE.” These observations again underscore the extent to which the sweeping nature of street-level bureaucrats' discretion profoundly shapes the outcomes of T visa applications. Supporting similar findings to Maybritt and Spire (2014), our interviews indicate that, whether due to explicit direction or via an implicit internalization of the administration's agenda, the way in which USCIS adjudicators exercise their discretion is subject to change along with political administrations. This further reinforces our argument that this degree of bureaucratic discretion and the way in which the agenda of the executive branch influences how it is exercised makes the fate of applications difficult to predict and is a key reason for the T visa's underutilization.

In summary, a combination of identification issues, structural barriers, misconceptions about what constitutes trafficking, the discretion inherent in deciding who is a survivor worthy of relief, and a legal process that often extends the precarity of an immigrant's experience in the United States all contribute to many survivors falling through the cracks of the system. For those that do make it to the end of the process with an approval, there can be high emotional, social, and financial costs. While our aim is to highlight pitfalls in the system that should be addressed to reflect a more survivor-centered, trauma-informed approach, we do not wish to ignore the enormous benefit of receiving a T visa. This is an essential form of humanitarian relief, which is transformational for those that receive it. As one lawyer said, “[a]t the end of the day, this horrible thing that happened to them is leading to something that—not all cases—but in some cases, really does revolutionize their lives and the lives of their families for generations to come.”



## DISCUSSION AND CONCLUSION

Bringing to light these aspects of the T visa process is important not only to help increase the successful utilization of the T visa in its current form but also to catalyze reform to a more just system, which could begin to address some of the root causes of trafficking. At its core, human trafficking is one particularly egregious manifestation of inequalities in social and economic power. And, in its current form, the T visa process tends to reaffirm the power of the state, reify social hierarchies, and do little to empower survivors. As one interviewee eloquently put it,

[e]xploitation takes place because we live in systems that exploit. And then what is justice within that framework? Somebody being incarcerated and somebody receiving services? That's hardly restorative and it's not reducing the likelihood of this happening again in the greater world, never mind for this particular survivor and so it's just. . . . I think there are so many structural factors that need to change before trafficking is ever going to be eradicated.

While addressing these systemic causes in full is beyond the scope of any single policy instrument, legal processes like the T visa have the capacity to empower those who suffer the worst injustices resulting from such inequalities. As Austin Sarat (1990, 374) shows in his study of the welfare poor in the United States, despite serious misgivings about the legal system and a well-founded sense that the system is not truly designed to serve them, “[n]evertheless, some use law and lawyers to get welfare bureaucracy to live up to its own *raison d'être*.” Perhaps the same can be true for the T visa process. With moderate reforms, seeking a T visa could be not only empowering to survivors but also force the T visa to live up to its ostensible purpose of truly aiding survivors and providing some semblance of justice to those who have experienced horrendous abuses on US soil.

This does not necessarily mean that the T visa and its related statutes need to be scrapped or entirely rewritten. In fact, this alone would be unlikely to solve the problem. For one, the complexity of human trafficking makes it difficult to craft a legal definition of this crime that does not require some degree of discretion in its enforcement and adjudication. Second, as Frances Zemans (1983) notes, rewriting laws is often not enough, rather transforming social perceptions and engagement with the law is necessary to enact meaningful change. This is certainly true of trafficking laws, but our study indicates that there is ample room for improvement in the way in which the T visa process is implemented, which if combined with the type of perceptual change advocated for by Zemans, could be truly transformative. Small changes to the law and administrative procedures like removing the requirement of law enforcement interaction and optional certification altogether, providing forms in Spanish and other languages, making it easier to secure continued presence and its concomitant temporary work authorization, making fee waivers easier to obtain (or removing fees altogether) and decreasing wait times for processing would go a long way toward making the T visa more accessible. In addition, greater transparency and some level of standardization in the adjudication

process might help insulate USCIS adjudicators (and, therefore, trafficking survivors) from the everchanging whims of the executive branch.

Other deeper reforms, like better training of adjudicators on the circumstances of trafficking and dismantling misconceptions about the dynamics of this crime will take much more time and work. Given that time is a precious commodity for street-level bureaucrats, decreasing the number of applications that each adjudicator must review could reduce both processing times for applicants and allow USCIS officials to rely less on heuristics and stereotypes and more on the details on individual cases. Similarly, providing training on the effects of trauma on memory, the emotionally and psychologically manipulative dynamics of many human trafficking relationships and the varied pathways to being trafficked would all potentially help transcend the narrow misconceptions of victimhood that permeate popular narratives of trafficking. In addition, a broader cultural shift in terms of how human trafficking is understood may be necessary for these more nuanced understandings of this crime to be internalized by law enforcement, attorneys, and adjudicators. Finally, a clearer division between the humanitarian goals of the T visa and a given administration's border-related objectives are important to ensure that anti-immigration sentiment does not continue to taint the T visa process.

Humanitarian visas like the T visa will always conflict with an immigration system predicated on policing borders and regulating the movement of individuals across them. But problematizing these aspects of the T visa process and questioning the simple villain-victim narrative that dominates mainstream understandings of human trafficking are the first steps toward meaningful reform. Perhaps the largest open question for future research on both the T and the U visa may be to analyze the costs versus benefits of discretionary visas as well as a systematic analysis of USCIS adjudicators and the immense, largely unchecked power wielded by these government bureaucrats. Indeed, one of the worst ironies of the T visa is that, to seek redress for survivors, whose lives were previously controlled by a trafficker, they must find themselves at the whim of a single nameless, faceless adjudicator with the sole power to decide their fate. In the interest of reforms that give more agency to survivors, another key feature of this process should be the inclusion of survivors' experiences and voices in the T visa reform process.

The journey from experiencing injustice as the victim of a crime to taking legal action can be an empowering one (Zemans 1983; Merry 2003). Some scholars even contend that only through engaging the legal system can individuals begin to understand themselves as rights bearing and deserving of protection or justice under the law (Merry 2003). Because the decision and ability to engage the law in this way is mediated by social, economic, and political conditions (Galanter 1983; Zemans 1983; Burstein 1991), it is imperative to design processes like the T visa to be accessible even to those who are most marginalized. Law helps give meaning to lived experiences and helps us to understand what is just and unjust and who is deserving of protection under the law (Merry 1990; Sarat 1990; Ewick and Silbey 1998; Marshall and Barclay 2003). Thus, if a form of humanitarian relief, like the T visa, is ever going to live up to its original purpose, the process must be as accessible and empowering as possible.

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