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## THE INTERSECTION OF THE U.S. IMMIGRATION SYSTEM AND HUMAN TRAFFICKING: A LEGALIZED LABOR OF INJUSTICE

Stephanie Durr

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THE INTERSECTION OF THE U.S. IMMIGRATION SYSTEM AND HUMAN  
TRAFFICKING: A LEGALIZED LABOR OF INJUSTICE

*Stephanie Durr\**

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\* Stephanie Durr is a 2022 graduate of Mississippi College School of Law. The author would like to extend her sincerest gratitude to Amelia McGowan for her guidance and expertise throughout the research and drafting of this Comment. Additionally, the author would like to dedicate this Comment to the trafficking survivors who inspired this work. May we never grow weary of fighting for access to justice.

## I. INTRODUCTION

At the intersection of human trafficking and immigration—two issues in the spotlight in U.S. political discourse—a deep but little-discussed injustice exists.<sup>1</sup> The U.S. immigration system leaves temporary workers vulnerable to abuse and trafficking and imposes substantial systemic barriers against survivors<sup>2</sup> seeking justice against their traffickers.<sup>3</sup> In this way, the U.S. immigration system both condones and perpetuates human trafficking despite claiming to do the opposite.

This is especially true in the intersection between immigration and labor trafficking. According to the Ending Human Trafficking Podcast, labor trafficking is more difficult to prove than sex trafficking because labor trafficking survivors often immigrate lawfully to the United States with a visa and are then exploited by their employers after arriving.<sup>4</sup> Because they have a visa and hold a “legal” job, it becomes much harder for them to establish the elements necessary to constitute a labor trafficking claim.<sup>5</sup> This is distinguishable from sex trafficking, where prostitution remains illegal and survivors are afforded more statutory protections.<sup>6</sup>

A recent example that garnered national attention is the bankruptcy of Signal International. In 2015, Signal International, Inc., a maritime service company, declared bankruptcy after settling a lawsuit to pay fourteen million dollars to workers it had trafficked in the wake of Hurricane Katrina.<sup>7</sup> As the Signal International example reveals, U.S. political debate has created a false dichotomy for anti-labor trafficking: policy can either be pro-business or anti-labor trafficking. This false dichotomy has created anti-trafficking rhetoric through statutes and case

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<sup>1</sup> 231 –*The Intersection of Diversity and Human Trafficking Vulnerabilities*, ENDING HUMAN TRAFFICKING, <https://endinghumantrafficking.org/231/> (last visited Aug. 28, 2020).

<sup>2</sup> Most existing literature refers to trafficked persons as victims. However, there has been a shift in the anti-trafficking community in the past few years to refer to trafficked persons as survivors rather than victims. For purposes of this paper, the term “victim” generally refers to people who are still trapped in a trafficking situation, while “survivor” refers to those who have escaped their trafficking situation. In some circumstances, the terms are used interchangeably.

<sup>3</sup> 231 – *The Intersection of Diversity and Human Trafficking Vulnerabilities*, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Radha Desai, *Landmark Human Trafficking Case Ends with Bankruptcy for Signal International, Inc.*, HUMAN RIGHTS FIRST (July 24, 2015), <https://www.humanrightsfirst.org/blog/landmark-human-trafficking-case-ends-bankruptcy-signal-international-inc>.

law, while simultaneously causing a pro-business reality through the lack of regulation of non-immigrant visas and employer incentives to minimize labor costs. This causes the U.S. immigration system to work against trafficking victims at every level.

The broad protections afforded to non-immigrant trafficking survivors through current anti-trafficking legislation are undermined by the immigration system in which they operate because the system perpetuates—and even *facilitates*—human trafficking. Ultimately, this Comment will establish that lawful immigration status does not confer protection from trafficking, nor does it confer protection from detention and removal, which further traumatizes survivors. As a result, labor trafficking survivors are forced to choose between remaining in an exploitative work environment or losing their lawful immigration status. By forcing survivors into a Catch-22, the immigration system allows traffickers to perpetuate violence and denies survivors justice. For these reasons, Congress must develop a survivor-centered approach to immigration policy. By putting survivors at the forefront of policy, immigrant trafficking victims will no longer be forced to depend on the whims of presidential administrations to be afforded justice.

In order to provide a critical analysis of the structural barriers to justice faced by trafficking victims, this Comment will explore the legal framework of trafficking in the United States since 2000, discuss how that framework perpetuates trafficking, review the existing remedies available to trafficking survivors, and analyze whether the existing remedies accomplish their purported goals. Part II of this Comment details the legal framework of human trafficking, including the Trafficking Victims Protection Act and its progeny, as well as relevant case law interpreting the Act's statutory language. Part III analytically explores how trafficking is perpetrated through temporary work visas. This includes an examination of the T Visa program, asking whether it accomplishes its purported goals; a discussion on the elements of the T Visa and the benefits and drawbacks of the program; and a detailed analysis of the detention and deportation of trafficking victims—walking through the process of removal and how it specifically traumatizes them. After walking through each stage of the immigration process—from recruitment to removal—the need to provide survivor-centered immigration policy and protections will become increasingly clear.

## II. BACKGROUND

In order to understand the background of immigration and human trafficking, it is helpful to have a working knowledge of the U.S. immigration system. This Comment will discuss how each relevant non-immigrant visa

intersects with and often perpetuates human trafficking. However, to understand the argument of this Comment, it is necessary to understand the legal framework of human trafficking in the United States—a framework by which Congress attempts to criminalize human trafficking and protect victims. For this reason, the Trafficking Victims Protection Act is detailed below, along with an explanation of how courts have interpreted the statute’s language. In addition, this section will explore the current remedies available to non-citizen trafficking survivors within the United States (that is, remedies available to survivors once they have entered the U.S., either with or without status). Once the legal framework of human trafficking and the existing remedies available for non-citizen trafficking survivors are made clear, the injustices of the current immigration system in the United States become evident.

*A. The Legal Framework of Trafficking Protections in the U.S.*

With the passage of the Trafficking Victims Protection Act (“TVPA”) and its subsequent reauthorizations, Congress codified the crime of human trafficking as well as protections to survivors which had previously existed only in scattered legislation and case law. A human trafficking victim is defined as “anyone who is forced or coerced, through fear or lies, to perform labor, services, or sexual acts.”<sup>8</sup> The U.S. State Department estimates that between 14,500 and 17,500 people are trafficked into the United States each year.<sup>9</sup>

The TVPA criminalized forced labor, trafficking with respect to peonage, slavery, involuntary servitude, sex trafficking (of children and by force, fraud, or coercion), unlawful conduct with respect to documents, and attempts to commit any of these acts.<sup>10</sup> Specifically, the TVPA resulted in the creation of chapter 77 of Title 18 of the United States Code, including: 18 U.S.C. sections 1589 (prohibiting forced labor); 1590 (prohibiting trafficking with respect to peonage, slavery, involuntary servitude or forced labor); 1591 (prohibiting trafficking of children by force, fraud, or coercion); 1592 (prohibiting unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or

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<sup>8</sup> Brian Kent, *Does ICE Deport Victims of Human Trafficking?*, CMTY. COAL. AGAINST HUM. TRAFFICKING (Apr. 13, 2018), <https://growfreetn.org/2018/04/13/does-ice-deport-victims-of-human-trafficking/>.

<sup>9</sup> *Human Trafficking: Modern Enslavement of Immigrant Women in the United States*, ACLU, <https://www.aclu.org/other/human-trafficking-modern-enslavement-immigrant-women-united-states> (last visited Oct. 12, 2021).

<sup>10</sup> Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1250 (2011).

forced labor); 1593 (regarding mandatory restitution); and 1594 (providing that the attempt to violate the aforementioned sections is punishable in the same manner as an actual violation).<sup>11</sup> In 2003, Congress added a civil cause of action to the TVPA under which trafficking survivors can bring a civil claim against their trafficker and seek compensation for economic losses.<sup>12</sup>

The next notable piece of trafficking legislation was the Trafficking Protection Reauthorization Act of 2005 (“TVPRA 2005”).<sup>13</sup> This Act criminalized trafficking offenses committed by federal contractors outside the United States.<sup>14</sup> In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA 2008”).<sup>15</sup> This reauthorization criminalized financially benefitting from peonage, slavery, or trafficking; conspiracy in trafficking; and fraud in foreign-labor contracting.<sup>16</sup>

The TVPA defines forced labor as:

[K]nowingly provid[ing] or obtain[ing] the labor or services of a person by any one of, or by any combination of, the following means—(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.<sup>17</sup>

Courts have interpreted this language broadly. In *United States v. Marcus*, the defendant was convicted of labor trafficking and sex trafficking.<sup>18</sup> At trial, the defendant argued that the court should narrowly construe the phrase “labor or services” in 18 U.S.C. § 1589(a)(1) to only

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<sup>11</sup> *Id.*

<sup>12</sup> *Human Trafficking: Modern Enslavement of Immigrant Women in the United States*, *supra* note 9.

<sup>13</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(a)(1), 119 Stat. 3558, 3562 (2005).

<sup>14</sup> Mattar, *supra* note 10.

<sup>15</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(d)(1), 122 Stat. 5044 (2008).

<sup>16</sup> Mattar, *supra* note 10.

<sup>17</sup> 18 U.S.C. § 1589(a) (2008).

<sup>18</sup> *United States v. Marcus*, 487 F. Supp. 2d 289, 292 (E.D.N.Y. 2007).

include labor or services for which compensation is ordinarily given.<sup>19</sup> Otherwise, the defendant argues, the term would be so broad as to include a “wide range of everyday conduct” such as household chores performed as part of an “intimate living arrangement”; this, the defendant posited, was not within Congress’s original contemplation of the statute.<sup>20</sup> The court disagreed, finding instead that Congress intended the statute to apply broadly in order to expand the statutes that previously had prohibited only involuntary servitude.<sup>21</sup> The court relied on the ordinary meaning of “labor and services,” thus construing the meaning of the statute broadly.<sup>22</sup>

In *United States v. Bradley*, the First Circuit was forced to determine the meaning of the term “serious harm,” as it appears in 18 U.S.C. § 1589(a)(2).<sup>23</sup> In that case, the defendants recruited two Jamaican laborers to work for their tree-removal company in New Hampshire.<sup>24</sup> Although the defendants promised wages of fifteen to twenty dollars per hour and housing, they instead paid the workers seven dollars per hour and housed them in a trailer with no running water, electricity, or heat.<sup>25</sup> In addition, the defendants threatened physical violence and threatened to call immigration enforcement after one laborer escaped.<sup>26</sup> After an investigation and trial, the defendants were convicted of forced labor.<sup>27</sup> At trial, the jury instruction defined “serious harm” as any threats, both physical and non-physical, including threats of consequences that are sufficient to compel a reasonable person to provide labor or services.<sup>28</sup> On appeal, the defendants argued this definition was too broad and was not contemplated by the statute itself.<sup>29</sup>

The First Circuit held that this definition was contemplated by the statute because Congress intended to encompass both physical violence and psychological coercion; thus, the term “serious” refers to a broad array of harms.<sup>30</sup>

The Second Circuit interpreted the concept of coercion by abuse or threatened abuse of the legal process in *Adia v. Grandeur Management*,

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<sup>19</sup> *Id.* at 299-300.

<sup>20</sup> *Id.* at 300.

<sup>21</sup> *Id.* at 303.

<sup>22</sup> *Id.*

<sup>23</sup> *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

<sup>24</sup> *Id.* at 148.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 149-50.

<sup>28</sup> *Id.* at 150.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

*Inc.*<sup>31</sup> In that case, the plaintiff entered the United States with an H-2B visa.<sup>32</sup> He worked as a housekeeping attendant and a doorman for the defendants' hotel and resort.<sup>33</sup> The defendants told the victim that his immigration status was dependent upon his "continued reliance" on them and that if he left they would cancel or withdraw his immigration sponsorship.<sup>34</sup> The plaintiff filed a complaint alleging causes of action for forced labor and human trafficking.<sup>35</sup> The district court granted the defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim, stating that the plaintiff's claim failed because it was based on "subjective feeling," rather than actual threats.<sup>36</sup> On appeal, the Second Circuit reversed and remanded, holding that threatening an immigrant with deportation was sufficient to constitute coercion.<sup>37</sup> The defendants' threat to withdraw sponsorship, along with the surrounding circumstances, supported the plaintiff's belief that the defendants were threatening to expose him to deportation.<sup>38</sup>

These cases illustrate that courts tend to interpret the TVPA broadly, in the interest of fairness and access to justice. However, for immigrant trafficking victims, the barriers to justice they face when trying to hold traffickers accountable only adds to the threat to their life and liberty.

### *B. Existing Remedies for Non-Citizen Trafficking Survivors*

Non-citizen trafficking survivors are entitled to "powerful legal protections" under the TVPA such as immigration-related benefits (i.e., immigration status, work authorization, and a path to lawful permanent resident status), housing, food, mental-health counseling, medical care, translation assistance, ESL classes, and legal representation, but these protections are only available after the Department of Homeland Security ("DHS") has become aware of their presence in the United States.<sup>39</sup> Immigration and Customs Enforcement ("ICE")—the enforcement arm of DHS—investigates most cases of human trafficking involving immigrants.<sup>40</sup>

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<sup>31</sup> *Adia v. Grandeur Mgmt., Inc.*, 933 F.3d 89 (2d Cir. 2019).

<sup>32</sup> *Id.* at 91.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 92.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 93 (quoting *United States v. Kozminski*, 487 U.S. 931 (1988)).

<sup>38</sup> *Id.*

<sup>39</sup> *Kent*, *supra* note 8.

<sup>40</sup> *Id.*

Confirmed survivors of human trafficking may petition DHS for protection to prevent deportation.<sup>41</sup> However, they are still required to obtain a visa or related benefit in order to achieve lawful immigration status.<sup>42</sup> There are four forms of documentation that survivors normally pursue: Continued Presence status, T Visa, U Visa, or asylum (and/or its related protections).<sup>43</sup> With Continued Presence status, a trafficking survivor is permitted to remain in the country while his trafficker is investigated and prosecuted.<sup>44</sup> This temporary authorization is often accompanied with a temporary work authorization.<sup>45</sup>

T Visas grant non-immigrant status to trafficking survivors.<sup>46</sup> The T Visa program was first established through the TVPA, as one of the ways to protect victims trafficked into the U.S.<sup>47</sup> T Visa recipients are required to work with law enforcement to investigate and prosecute traffickers.<sup>48</sup> In addition, T Visas are statutorily capped at five thousand per fiscal year, but the U.S. has never come close to this number.<sup>49</sup>

The U Visa allows victims who have suffered “extreme physical or emotional abuse” to remain in the United States.<sup>50</sup> Like the T Visa and Continued Presence status, this visa requires survivors to work with law enforcement in the investigation and prosecution of their traffickers.<sup>51</sup> This program also provides a pathway to lawful permanent residency.<sup>52</sup> U Visas are statutorily capped at ten thousand per fiscal year.<sup>53</sup>

Finally, asylum relief and the related protections of withholding of removal and protection under the UN Convention Against Torture allow survivors to remain in the United States if returning to their home country would result in persecution or torture.<sup>54</sup> Applicants for these remedies may

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Alison Kamhi & Rachel Prandini, *T Visas: What They Are and How They Can Help Your Clients*, IMMIGR. LEGAL RES. CTR. (Apr. 2017), [https://www.ilrc.org/sites/default/files/resources/t\\_visas\\_advisory-20170509.pdf](https://www.ilrc.org/sites/default/files/resources/t_visas_advisory-20170509.pdf).

<sup>48</sup> Kent, *supra* note 8.

<sup>49</sup> *Id.* The process of granting T Visas (including the qualifications to receive one) as well as potential reasons why so few T Visas have been granted will be discussed later. *See infra* Table 1, notes 141-43 and accompanying text.

<sup>50</sup> Kent, *supra* note 8.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

be detained during their application process.<sup>55</sup> However, after being granted asylum, applicants can apply for permanent resident status after one year.<sup>56</sup>

While the investigation and prosecution of traffickers is a goal, forcing a survivor who has endured psychological and physical abuse to cooperate with an agency she has been manipulated to fear is a questionable means of accomplishing that goal. Further, the reality that many trafficking survivors are detained by ICE cannot be ignored. If a trafficking victim is detained, she is also required to pay bond to be released (if she even qualifies for one).<sup>57</sup> Bearing this in mind, it is easy to see that despite broad interpretations of the TVPA and its subsequent statutes, trafficking survivors can enter the United States through lawful means, be exploited by a trafficker, then be detained and deported before they even receive a hope of justice. The immigration system appears set up to work against trafficking victims at every level, despite increased efforts to the contrary.

### III. ANALYSIS

Although the existing remedies provide powerful protections to some non-citizen trafficking survivors, a critical review of these options requires asking whether they accomplish the purported goals, or whether they actually hinder the concept of justice for trafficking survivors. As this Comment will demonstrate, the larger immigration system in which these protections operate continues to facilitate trafficking and re-victimize survivors. This larger system severely undermines the efficacy of trafficking protections as well as the United States' commitment to combat trafficking. To demonstrate this concept, this section will analytically delve into each step of the immigration process—from recruitment to removal—in hopes of identifying the ways the U.S. immigration system perpetuates trafficking at every level of the system.

#### *A. How Human Trafficking is Perpetuated through Temporary Work Visas*

The structural conditions embedded in the United States' temporary-guestworker programs, when combined with a lack of oversight through regulation and a plethora of employer incentives to maximize profits, results in a system that makes conditions ripe for exploitation and

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

trafficking.<sup>58</sup> A study published by Polaris—an international anti-trafficking nonprofit organization—analyzed data from the National Human Trafficking Hotline to identify eight-hundred individuals<sup>59</sup> who were trafficked into the United States and worked under temporary work visas.<sup>60</sup> The study utilized data from January 1, 2015 through December 31, 2017 to provide a picture of how trafficking is perpetuated through government-sanctioned non-immigrant visa programs.

According to Polaris, these temporary work visas facilitate human trafficking through two steps: recruitment and ongoing control during employment.<sup>61</sup> The recruitment phase, when it involves foreign nationals, includes travel to the U.S.<sup>62</sup> There are a number of factors contributing to the vulnerability of victims trafficked into the U.S.; they include poverty, government corruption, political instability, armed conflict, organized crime, the attraction of perceived higher standards of living in the U.S., and lack of employment opportunities in victims' home countries.<sup>63</sup>

Many of the conditions that create a propensity to become a trafficking victim are built into the temporary work-visa programs for unskilled workers.<sup>64</sup> Those who live in poverty and are unable to receive education in their country of origin are looking for opportunities to get out of poverty by working and earning a higher wage. The perceived higher standard of living in the U.S. and lack of employment opportunities in their home country, combined with immigrants' lack of education about the immigration system, create vulnerabilities that traffickers are then able to exploit. Unskilled workers are more likely to fall victim to traffickers because of the many exploitable conditions that exist in the home country.<sup>65</sup>

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<sup>58</sup> Sara Crowe, *Human Trafficking on Temporary Work Visas*, POLARIS, 1, 5 (2018), <https://polarisproject.org/human-trafficking-on-temporary-work-visas-a-data-analysis-2015-2017/.pdf>.

<sup>59</sup> It is important to bear in mind that trafficking is largely underreported, especially when the survivor also fears detention or deportation. This statistic should not be regarded as the exact number of persons trafficked on temporary work visas in a two-year period. That number is, in fact, much higher. However, the figures for trafficking victims under each type of temporary visa are considered to be illustratively proportional to the number of victims actually trafficked within each temporary-visa program.

<sup>60</sup> Crowe, *supra* note 58, at 4.

<sup>61</sup> *Id.* at 10.

<sup>62</sup> *Id.*

<sup>63</sup> *Human Trafficking: Modern Enslavement of Immigrant Women in the United States*, *supra* note 9.

<sup>64</sup> Crowe, *supra* note 58, at 10.

<sup>65</sup> The fact that unskilled workers have a higher propensity to be exploited by traffickers has created a presumption that only unskilled laborers can become trafficking victims. This presumption is false and will be rebutted by data when discussing trafficking through H-1B visas.

While trafficking survivors are lured in by the opportunity to make money, they often end up plagued by substantial debt caused by their employers and recruiters.<sup>66</sup>

Of the 800 cases analyzed in the Polaris study, the most common non-immigrant visas that employers abused to traffic victims to the United State were: H-2A visas, H-2B visas, J-1 visas, B-1 and B-2 visas, F-1 visas, A-3 and G-5 visas, and H-1B visas.<sup>67</sup> These specific visas are ordered by their vulnerability to trafficking, based on the number of victims reported to the National Human Trafficking Hotline. Those with H-2A, H-2B, A-3 and G-5, and H-1B visas are particularly vulnerable to trafficking because their visas are tied to a specific employer and leaving their trafficking situation means forfeiting their lawful immigration status. Those with J-1 and F-1 visas are vulnerable to trafficking by virtue of their position as students. Finally, B-1 and B-2 visas are vulnerable to exploitation due to their nature of being quickly and easily accessible and far less scrutinized than other temporary visas.

The H-2A visa is a nonimmigrant visa that allows agricultural workers to work for a single employer who has established an inability to hire U.S. workers.<sup>68</sup> Labor trafficking perpetuated through the H-2A visa program is the type of trafficking that most mimics the systematic enslavement of African Americans in American history. To recruit laborers within this program, employers contract with labor recruiters in the countries where they are likely to find willing laborers.<sup>69</sup> The recruiters then find workers and either accompany them or give them specific instructions about applying for an H-2A visa at the U.S. consulate.<sup>70</sup> In trafficking cases, employers will then exploit H-2A workers after arrival by forcing them to work in unsafe weather conditions, work without water breaks, or work upwards of twelve hours per day, all with little to no payment.<sup>71</sup> Further, the victims are often forced to live in social isolation in sub-standard living arrangements provided by the trafficker, which is another way the trafficker is able to control the victim. Because this visa is tied to the employer, trafficker-employers will also verbally abuse workers and threaten to call law enforcement to have the workers deported.<sup>72</sup>

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<sup>66</sup> Crowe, *supra* note 58, at 10.

<sup>67</sup> *Id.* at 17.

<sup>68</sup> *Id.* at 20.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 24.

During the time studied, Polaris identified 323 trafficking survivors in the U.S. who held H-2A visas.<sup>73</sup>

*Antonio-Morales v. Bimbo's Best Produce, Incorporated* is a chilling example of how H-2A visas perpetuate trafficking.<sup>74</sup> In that case, nineteen Mexican nationals filed suit against their employer for trafficking them between 2005 and 2008.<sup>75</sup> The defendants psychologically coerced the workers, threatened them with serious harm and abuse of the legal process, and forced them to work in unlawful and exploitative conditions in the defendant's strawberry fields in Amite, Louisiana.<sup>76</sup> The complaint alleged that the defendant fired his shotgun over workers' heads, shot a dog near the workers while they harvested in order to intimidate them, sprayed workers with pesticides, and physically assaulted a worker.<sup>77</sup> The defendant also confiscated the workers' passports and visas and paid them less than the federal minimum wage.<sup>78</sup> The workers had no choice but to continue to work at the strawberry plantation because they knew that if they left, they would lose their lawful immigration status, employment, and housing.<sup>79</sup>

Similarly, the H-2B visa program allows temporary or seasonal foreign workers to hold non-agricultural jobs that are not specialty occupations under the H-1B visa (discussed later).<sup>80</sup> The Department of Labor reported that H-2B visa holders commonly worked in landscaping, forestry, housekeeping, recreation, and food production.<sup>81</sup> Like the H-2A program, trafficking occurs under the H-2B visa program when recruiters find laborers in foreign countries and recruit them for U.S. jobs.<sup>82</sup> The recruiters force workers to pay separate fees to be considered for the job, to apply for the H-2B visa, and to travel to the U.S.<sup>83</sup> Traffickers may promise food, housing, and reimbursement of expenses to recruit victims; yet, they rarely, if ever, honor those promises.<sup>84</sup> Once the trafficked workers are in the U.S., they are often under-compensated, thousands of dollars in debt,

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<sup>73</sup> *Id.* at 20.

<sup>74</sup> *Antonio-Morales v. Bimbo's Best Produce, Inc.*, No. Civ.A.8:5101, 2009 WL 1591172 (E.D. La. Apr. 20, 2009).

<sup>75</sup> *Id.* at \*1.

<sup>76</sup> *Id.*

<sup>77</sup> Plaintiff's Original Complaint at ¶ 3, *Antonio-Morales v. Bimbo's Best Produce, Inc.*, No. Civ.A.8:5101, 2009 WL 1591172 (E.D. La. Apr. 20, 2009).

<sup>78</sup> *Id.* at ¶ 2-3.

<sup>79</sup> *Id.*

<sup>80</sup> Crowe, *supra* note 58, at 25.

<sup>81</sup> *Id.* at 26.

<sup>82</sup> *Id.* at 28.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

and unable to leave their trafficking situation because their status is directly tied to their employer.<sup>85</sup> Polaris identified 246 survivors that were trafficked with an H-2B visa in the United States.<sup>86</sup>

An example of trafficking workers on H-2B visas in Mississippi can be seen in *Antigo v. Lombardi*.<sup>87</sup> In that case, a group of fifty foreign nationals from the Philippines, Jamaica, Belarus, Indonesia, and Turkey filed suit against their employers for violating the Fair Labor Standards Act and the TVPA.<sup>88</sup> Defendants in the case included Southern Mississippi Pinestraw, LLC, and Beau Rivage Resort, Inc.<sup>89</sup> On a motion to dismiss defendant Southern Mississippi Pinestraw, the court enumerated the trafficking allegations against the company: employing foreign nationals at locations not authorized by their H-2B visas, misrepresenting the number of H-2B workers needed to the U.S. Department of Labor, requiring the workers to pay visa fees that should have been paid by their employers, coercing the workers into signing loan agreements to pay their visa fees, withholding the workers' passports and visas, providing the workers substandard living conditions, and threatening the workers with serious financial harm and legal process.<sup>90</sup>

The J-1 visa, created to “foster international understanding through cultural exchange,” allows foreign nationals to temporarily work in the United States for either educational purposes or to facilitate cultural exchange.<sup>91</sup> J-1 visa recipients typically include au pairs, camp counselors, college and high school students, teachers, and research scholars.<sup>92</sup> While the J-1 visa is not tied to a specific employer, there is evidence that employers use J-1 visas to recruit low-skilled foreign workers and evade regulations imposed by other visa programs that require labor certifications.<sup>93</sup> Oversight of this visa is largely deferred to individual recruiters, meaning there is little incentive to report problems or abuses because the businesses perpetrating the trafficking are the same businesses that hire the recruiter to find more workers; to report potential abuses is therefore to risk not being hired by that business in the future.<sup>94</sup> The Polaris

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 25.

<sup>87</sup> *Antigo v. Lombardi*, No. 1:11-CV-408-HSO-RHW, 2012 WL 4468503 (S.D. Miss. Sept. 25, 2012).

<sup>88</sup> *Id.* at \*1.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*3.

<sup>91</sup> Crowe, *supra* note 58, at 29.

<sup>92</sup> *Id.* at 31.

<sup>93</sup> *Id.* at 29.

<sup>94</sup> *Id.*

study identified sixty-one labor trafficking victims on J-1 visas, the highest number of whom worked in domestic work.<sup>95</sup>

The B-1 and B-2 visa programs allow non-immigrant foreign nationals to travel to the U.S for short-term business and pleasure purposes, respectively.<sup>96</sup> These two visas can be combined to form a B-1/B-2 combination visa which allows a visitor to travel to the United States for both business and pleasure.<sup>97</sup> B visas are vulnerable to trafficking because the workers can often obtain them through a faster and less-scrutinized process than other temporary visas.<sup>98</sup> Although these visas are not tied to a specific employer and do not permit employment, employers manipulate this process by recruiting workers for training purposes and then forcing them to stay and work under inhumane conditions—paying them less compensation than their American counterparts and threatening them with deportation if they attempt to leave.<sup>99</sup> During the study, Polaris identified fifty-seven labor trafficking survivors on B-1 visas.<sup>100</sup>

The F-1 visa is granted to international students who wish to study in the United States.<sup>101</sup> This visa permits international students to work on campus during their first year of study, then work part-time jobs off campus after their first year if they can demonstrate economic hardship or need practical training.<sup>102</sup> Like the J-1 visa program, there is little government oversight concerning the number of students working with F-1 visas, but there have been reports of victims being trafficked through both sanctioned and unsanctioned employment.<sup>103</sup> Despite the fact that these visas are not tied to specific employers, they still leave the door open for vulnerable students to be trafficked by an employer.<sup>104</sup> There were twenty-five confirmed cases of labor trafficking involving students on F-1 visas from 2015 to 2017.<sup>105</sup>

The A-3 and G-5 visa programs allow diplomats and international organizations in the U.S. to employ foreign workers.<sup>106</sup> These visas tie workers to a specific employer and are typically valid for up to three

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<sup>95</sup> *Id.* at 29, 31.

<sup>96</sup> *Id.* at 33.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 34.

<sup>100</sup> *Id.* at 33.

<sup>101</sup> *Id.* at 36.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 36-37.

<sup>104</sup> *Id.* at 17.

<sup>105</sup> *Id.* at 36.

<sup>106</sup> *Id.* at 40.

years.<sup>107</sup> The trafficking that occurs under these visa programs proves difficult to prosecute because diplomats are involved in trafficking and exploiting domestic workers; thus, they are entitled to diplomatic immunity.<sup>108</sup> Although the Trafficking Victims Protection Reauthorization Act of 2008 mandated the suspension of diplomatic privileges to those who abuse or exploit A-3 or G-5 visa holders, the State Department has yet to take any action to suspend these privileges despite thirty-one confirmed cases of labor trafficking of A-3 and G-5 visa holders.<sup>109</sup>

The case of *Baoanan v. Baja* offers a picture of how diplomats may traffic domestic workers through the G-5 visa, under false promises of employment and debt bondage.<sup>110</sup> Ms. Baoanan was a nurse in the Philippines and sought to find employment in the United States.<sup>111</sup> Ms. Baja, the wife of a Philippine diplomat, offered to help Baoanan obtain work in the U.S. in exchange for 500,000 Philippine pesos, or roughly \$10,400.<sup>112</sup> Unable to meet the payment requirement, Baoanan instead offered to pay half and Baja agreed.<sup>113</sup> Baja helped Baoanan obtain a G-5 visa, and Baoanan traveled to the United States in January 2006.<sup>114</sup> The Bajas' driver took Baoanan directly from the airport to the Bajas' home in New York City, where Baja confiscated Baoanan's passport and informed her that she had to work for the Bajas for six months to pay off the remaining debt of 250,000 pesos.<sup>115</sup> Baoanan was forced to work as a domestic worker in the Bajas' household.<sup>116</sup> During this time, the Bajas forced her to work eighteen-hour days, required her to sleep in the basement with only a sheet, prevented her from leaving the house unaccompanied, limited her meals to leftovers, completely restricted her phone access, and verbally abused her.<sup>117</sup> The Bajas never paid Baoanan for her work.<sup>118</sup>

The H-1B visa program allows skilled workers and entry-level professionals to work in specialty occupations in the United States.<sup>119</sup> These visas are highly sought because they provide a path to permanent

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Baoanan v. Baja*, 627 F. Supp. 2d 155, 157 (S.D.N.Y. 2009).

<sup>111</sup> *Id.* at 158.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 159.

<sup>118</sup> *Id.*

<sup>119</sup> Crowe, *supra* note 58, at 44.

residency.<sup>120</sup> Though there is a common misconception that labor trafficking only affects unskilled workers, there were thirty-one documented cases of confirmed labor trafficking of H-1B visa holders in a two-year period.<sup>121</sup> Trafficking on H-1B visas is perpetrated through labor brokers' or technology-consulting companies' imposing illegal penalties or threats thereof on workers who quit.<sup>122</sup> Because H-1B visas are tied to the employer, trafficking survivors are forced to either remain in an exploitative environment or lose their legal status.<sup>123</sup>

The Polaris study and the illustrative cases portray the reality that lawful immigration status does not automatically confer protection from trafficking and in fact may facilitate abuse. Nonimmigrant visa holders still remain extremely vulnerable to exploitation at the hands of traffickers. For most of these visas, the visa is directly tied to the employer, meaning that trafficking victims feel trapped having to choose between fleeing exploitation or losing their lawful status. As illustrated by the cases, traffickers threaten immigration enforcement as a means of forcing victims to remain in exploitative situations. This causes workers to distrust the very agencies necessary to bring them justice. However, if a trafficking victim is able to escape a situation in which their lawful status is tied to their trafficker, a T Visa could remedy their undocumented status.

#### *B. The T Visa Program: A True Remedy or a Legal Band-aid?*

One of the government's attempts to provide protections to non-citizen trafficking survivors is the T Visa program, which grants non-immigrant status to an adjudicated trafficking survivor for up to four years.<sup>124</sup> USCIS only grants T Visas if deporting the survivor to their country of origin would result in extreme hardship. To analyze the effectiveness of the T Visa program, this section will detail the elements of the T Visa program and the benefits and drawbacks of the program. By highlighting the elements and the limits on this program, this section will demonstrate that the T Visa program is little more than a legal Band-Aid that can be applied at the whim of each presidential administration—making lasting relief for trafficking survivors little more than a whim.

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 17.

<sup>124</sup> Kent, *supra* note 8.

## 1. Elements of the T Visa Program

The elements of T Visas are outlined in the Immigration and Nationality Act (INA) § 1101(a)(15)(T). For a non-citizen to receive a T Visa, the Department of Homeland Security must determine that (1) the petitioner is or has been a victim of a severe form of trafficking in person; (2) the petitioner is physically present in the U.S., its territories, or at a port of entry on account of such trafficking; (3) the petitioner has complied with reasonable requests for assistance from law enforcement in the investigation or prosecution of trafficking, is unable to cooperate due to physical or psychological trauma, or is under the age of eighteen; and (4) the petitioner would suffer extreme hardship involving unusual and severe harm upon removal.<sup>125</sup>

The T Visa first requires that an applicant be a victim of a severe form of trafficking. Under the TVPRA, severe forms of trafficking occur where the commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform the act is under the age of eighteen.<sup>126</sup> Labor trafficking is also considered a form of severe trafficking if the labor is obtained through force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>127</sup>

The final requirement to receive a T Visa is that the trafficking survivor establish extreme hardship if removed to their country of origin. This determination is up to the discretion of the adjudicator, making this the element most susceptible to the whims of presidential administrations. To evaluate whether removal will result in extreme hardship involving unusual and severe harm, the adjudicator should consider several factors, including: (1) the age and personal circumstances of the applicant; (2) serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country; (3) the nature and extent of the physical and psychological consequences of the trafficking; (4) the impact of the loss of access to the U.S. courts for purposes relating to the incident of trafficking or other crimes perpetrated against the applicant; (5) the reasonable expectation that the existence of laws, social practices, or customs in the country of origin would penalize the applicant severely for having been a trafficking victim; (6) the likelihood of revictimization and the need, ability, and willingness of foreign authorities to protect the applicant; (7) the likelihood that the

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<sup>125</sup> 8 U.S.C.A. § 1101(a)(15)(t).

<sup>126</sup> RAIO Directorate, *Detecting Possible Victims of Trafficking*, USCIS (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Trafficking\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Trafficking_LP_RAIO.pdf).

<sup>127</sup> *Id.*

trafficker would severely harm the applicant; and (8) the likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict as demonstrated by the designation of Temporary Protected Status.<sup>128</sup> Survivors should present all valid arguments relevant to this determination because adjudicators make extreme hardship determinations based on the totality of the circumstances.<sup>129</sup>

## 2. Benefits of the T Visa Program

There are several benefits an individual derives if they receive a T Visa. The T Visa grants lawful immigration status for up to four years, comes with employment authorization, allows a pathway to lawful permanent residency, makes the holder eligible for public benefits in some states, and grants the ability to petition for certain family members to receive T visas as derivative beneficiaries.<sup>130</sup> T Visa holders are eligible for the same federal benefits as refugees.<sup>131</sup> Such benefits include cash assistance, food stamps, and job training.<sup>132</sup> In addition, T Visas have one of the most generous waivers for inadmissibility in immigration law. For example, DHS may waive prior criminal offenses or immigration violations if they were caused by, or incident to, the trafficking.<sup>133</sup>

## 3. Drawbacks of the T Visa Program

Although the T Visa is accompanied by powerful legal benefits, there are significant drawbacks to the program as well. For one, T Visas may take several months to adjudicate<sup>134</sup> and do not provide protection from deportation or detention while pending. This is particularly important because, as described above, even those T Visa applicants with lawful status oftentimes have their statuses tied to employment with their

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<sup>128</sup> E.E.O.C. v. Global Horizons, Inc., No. CV-11-3045-EFS, 2013 WL 3940674 (E.D. Wash. July 31, 2013); *see also* 8 C.F.R. § 214.11(i)(2).

<sup>129</sup> *Id.*

<sup>130</sup> Kamhi & Prandini, *supra* note 47.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> USCIS does not give an estimated time frame that applicants will have to wait for their visas to be processed after applying for a T Visa, meaning that processing time will vary on a case-by-case basis depending on what evidence is presented with the application. This gives survivors little to no certainty about when, or even if, they will receive status through the T Visa. *See Visa T for Victims of Human Trafficking*, VISAGUIDE.WORLD. <https://visaguide.world/us-visa/nonimmigrant/t-visa/>.

trafficker. Should they overstay or otherwise “violate” that status by fleeing a trafficking environment, they are subject to civil immigration detention and removal. Further, if a survivor’s T visa application is denied, USCIS may put the survivor into deportation proceedings.<sup>135</sup> While there are sound public policy reasons for this, it should not be forgotten that T Visas are approved or denied based on each administration’s determination of “extreme hardship”; what could qualify as extreme hardship under one president could very well cause another survivor’s removal under a different administration.

Moreover, as established by the cases above, traffickers frequently threaten their victims with legal process and deportation. These threats create a culture of distrust with law enforcement.<sup>136</sup> However, in most cases, T Visas require survivors to assist with law enforcement investigations. Gaining the legal protections granted to trafficking victims hinges on whether law enforcement determines that the applicant is a victim of human trafficking.<sup>137</sup> Similarly unhelpful is the fact that trafficking victims can be detained by ICE and put into deportation proceedings.<sup>138</sup> The agency that survivors depend on to receive legal protections is the very agency that traffickers have caused them to fear and avoid.

Another drawback to this visa is that applicants must be physically present in the United States. This element requires that the victim remain in the United States from the time of the most recent act of trafficking until adjudication.<sup>139</sup> If a victim leaves the country with a pending T Visa—either voluntarily or by forced removal—the application is considered abandoned and the petitioner loses his application. Applicants may be detained and placed in removal proceedings before their T Visa applications are adjudicated; thus, trafficking victims may be removed before they ever reap the benefits of the T Visa program. This deprives victims of justice and empowers traffickers to exploit the removal process.

The final drawback to T Visas is the statutory limitation. T Visas are statutorily capped at five-thousand visas per fiscal year, despite the fact that an estimated 14,500 to 17,500 individuals are trafficked into the United States each year.<sup>140</sup> Even with the statutory limits, the United States has never come close to reaching that limit. USCIS offers data on the number

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<sup>135</sup> *Immigration: How long does my T visa status last and what happens when it expires?*, WOMENS LAW.ORG (Sept. 18, 2019), <https://www.womenslaw.org/laws/federal/immigration/t-visa-trafficking-victims/basic-information-and-definitions#node-7136>.

<sup>136</sup> Kent, *supra* note 8.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Kamhi & Prandini, *supra* note 47, at 2.

<sup>140</sup> Kent, *supra* note 8.

of T Visa applications received, approved, and denied each fiscal year starting in 2002 and running through 2019. The number of T-1 Visa applications filed, as well as each Presidential administration's approval and denial rates, are listed in Table 1:

**Table 1 – Approvals and Denials of T-1 Visas from 2002-2019**

Presidential Administration	T-1 Visa Applications Filed	T-1 Visa Applications Approved	T-1 Visa Applications Denied	Approval Rate	Denial Rate
Bush Administration (2002-2008) <sup>141</sup>	2,919	1,318	1,039	45%	35.5%
Obama Administration (2009-2016) <sup>142</sup>	6,381	4,788	1,037	75%	18%
Trump Administration (2017-2019) <sup>143</sup>	4,032	1,745	878	43%	21.7%

There are several reasons why the Trump Administration has the lowest approval rating of T Visas. The administration's more restrictive immigration policies caused fewer trafficking survivors to be awarded T Visas.<sup>144</sup> In addition, the application-processing time has expanded from one year to almost three years.<sup>145</sup> This longer processing time for T Visa applications has incredibly detrimental effects for trafficking survivors without status: they are not protected from removal, and they do not qualify for any of the benefits until their application is approved.

The approval and denial statistics of each Presidential administration highlight the necessity of legislative change for immigrant trafficking survivors. The fact that each administration can adjudicate T

<sup>141</sup> *Form I-914 – Application for T Nonimmigrant Status and Form I-918 – Petition for U Nonimmigrant Status Visa Service-Wide Receipts, Approvals, and Denials Fiscal Years: 2002 Through 2012 To-Date*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Aug. 2012), <https://www.uscis.gov/sites/default/files/document/data/I914T-I918U-visastatistics-2012-aug.pdf>.

<sup>142</sup> *Number for Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status Fiscal Years 2008-2019*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Oct. 2019), [https://www.uscis.gov/sites/default/files/document/data/I914t\\_visastatistics\\_fy2019\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2019_qtr4.pdf).

<sup>143</sup> *Id.*

<sup>144</sup> Michael Gordon, *Lured to the U.S. at 16, she sought visa for trafficking victims. Now she may be deported.*, GREENSBORO (Sept. 12, 2020), [https://greensboro.com/news/state/lured-to-u-s-at-16-she-sought-visa-for-trafficking-victims-now-she-may/article\\_da47ff06-f456-11ea-a9c7-f3babaebdd19.html](https://greensboro.com/news/state/lured-to-u-s-at-16-she-sought-visa-for-trafficking-victims-now-she-may/article_da47ff06-f456-11ea-a9c7-f3babaebdd19.html).

<sup>145</sup> *Id.*

Visas based on the whims of political climate affords little protections to trafficking victims who are left to bear the real brunt of those decisions. By creating real protections to immigrant trafficking survivors through meaningful legislation, Congress can afford protections to trafficking victims that will have real effects, rather than just serving as a survivor's unattainable pipe dream.

### *C. Detention and Deportation of Trafficking Victims*

The previous sections establish that lawful immigration status does not protect against trafficking. Lawful immigration status also does not protect against detention; neither does eligibility for a T Visa protect against removal. When a trafficking victim applies for a T Visa, USCIS processes that application. But ICE, another arm of DHS, is the agency that both investigates trafficking and administers immigration detention and removal. To understand how trafficking victims can be detained and deported, it is necessary to understand the process of deportation.

The removal process begins with arrest. This arrest can happen by local police for criminal violations or ICE for non-criminal violations. If an undocumented immigrant is arrested by local law enforcement, they will be transferred into ICE custody.<sup>146</sup> Trafficking victims can either be arrested for criminal violations or arrested during ICE raids at their place of employment. In some cases, employers will even call ICE to report their employees if they believe the trafficking survivors are going to report them or escape. It is also important to note that a documented trafficking victim may become undocumented (out of status) if their visa is tied to their employer and they flee from trafficking conditions.

After arrest, ICE decides whether to detain individuals and begin removal proceedings, which is a procedure that allows the Department of Homeland Security to remove a noncitizen from the United States.<sup>147</sup> If ICE decides to detain the individual, the agency will assess the security and safety risk to determine if bond should be granted or if the individual may be released.<sup>148</sup> Those who are not released are detained in immigration detention centers or other contracted prisons.<sup>149</sup> Detention is often traumatizing and works to revictimize trafficking survivors rather than

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<sup>146</sup> Sara Wise & George Petras, *The Process of Deportation*, USA TODAY (Jun. 25, 2018), <https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* It is important to note that ICE rarely sets bonds. It is much more likely that ICE will release the person for proceedings. If a bond is sought, it must be granted by an Immigration Judge.

<sup>149</sup> Wise & Petras, *supra* note 146.

protect them. Trafficking victims are arrested and thrown into immigration proceedings. They are taken from inhuman living and working conditions and thrown into prisons—the very facilities they have feared since arriving in the U.S.

If ICE decides to proceed with removal, the trafficking victim may be subject to either removal proceedings in immigration court or expedited proceedings without an Immigration Judge.<sup>150</sup> In order to be placed in expedited removal proceedings, an individual must be arrested within one hundred miles of a U.S. border and have been in the country for less than two weeks.<sup>151</sup> Judicial review of expedited removal orders is extremely limited under the INA.<sup>152</sup> Trafficking victims may be placed in expedited removal proceedings if they meet the two elements for such proceedings. If a trafficking victim is placed in expedited removal proceedings, it is almost certain that their T Visa application will not be processed before their removal.

If an individual does not meet the requirements for expedited removal, they are given a Notice to Appear (NTA) and begin their removal proceedings with the Immigration Court process.<sup>153</sup> The NTA details the reasons the government believes the individual is undocumented and should be removed.<sup>154</sup> For trafficking survivors, the reason for removal could be that they have overstayed a temporary work visa, or that they left the job to which their visa was tied.

If an individual is detained, the next step in removal proceedings is a bond hearing before an Immigration Judge.<sup>155</sup> The bond amount,<sup>156</sup> set by the judge, is based on factors such as local family ties, ability to pay, time in the country, criminal record, and how the individual entered.<sup>157</sup> Because these hearings are civil, individuals do not have the right to an attorney if they cannot afford one; most individuals therefore represent themselves.<sup>158</sup> At this hearing, ICE will either argue that the individual is a flight risk or agree that the individual should be granted bond.<sup>159</sup> Individuals who are not granted bond or cannot afford bond remain

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* This only applies if the individual is eligible for a bond. In addition, even if the individual is statutorily eligible, the Immigration Judge might still deny it. This is a determination left to the judge's discretion.

<sup>157</sup> Wise & Petras, *supra* note 146.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

incarcerated until their deportation proceedings are complete.<sup>160</sup> For trafficking victims, this can be another traumatizing step. These individuals have no right to counsel and are given a price for which they can purchase their freedom. In addition, trafficking survivors often have little to no money and no means of making money to post their bail<sup>161</sup>; thus, bond payments can also revictimize trafficking survivors because they are forced to choose between paying a debt they cannot afford and losing their freedom.

After the bond hearing, the next step in deportation proceedings is the master-calendar hearing. At this hearing, charges are listed and the individual can admit or deny each one.<sup>162</sup> This is also the hearing where the judge decides which defenses against deportation will be considered.<sup>163</sup> Defenses can include asylum and its related protections, cancellation of removal, or relief outside of the court's jurisdiction such as family-based petitions.<sup>164</sup> For trafficking survivors, it is at this hearing that they must assert their claim for relief based on trafficking or an attempt to obtain a T Visa. Because USCIS (rather than the Immigration Court) adjudicates T Visas, a pending T Visa is not an adequate defense to removal. Instead, T Visa applicants without other defenses must seek continuances from the court to avoid deportation—a remedy that the Attorney General all but eviscerated under the Trump Administration.<sup>165</sup> An Immigration Judge still has discretion to continue the proceedings despite a trafficking claim.

The merits hearing is the immigrant's opportunity to present arguments for remaining in the country.<sup>166</sup> This hearing is where the parties present the merits of their claims or defenses raised in the master-calendar hearings. At the end of the hearing, the Immigration Judge decides whether the individual can remain in the U.S.<sup>167</sup> If relief is not granted, the individual may appeal to the Board of Immigration Appeals (BIA) within thirty days.<sup>168</sup>

Trafficking survivors in merit hearings face an uphill battle. For trafficking victims representing themselves pro se, the merit hearing

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* This is especially true if the victim has no family or other contacts in the U.S. Since the trafficker has likely kept the victim isolated, this reduces their ability to gain contacts who could help them with bond payment.

<sup>162</sup> Wise & Petras, *supra* note 146.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Matter of L-A-B-R- et al., 27 I&N Dec. 405 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1087781/download>.

<sup>166</sup> Wise & Petras, *supra* note 146.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

presents an even more difficult obstacle. At this hearing, the trafficking survivor must assert all applications under the court's jurisdiction. These include cancellation of removal and asylum, withholding of removal, and Convention Against Torture.<sup>169</sup> This means the survivor must have eligibility for a separate form of relief outside of their trafficking in order to have a valid defense to removal.

If the immigration judge denies relief, the next step is an order of removal.<sup>170</sup> The judge may make this decision on the day of the merits hearing or may delay the decision and send it by mail if the individual is not detained.<sup>171</sup> These decisions can be appealed by either the individual or the government.<sup>172</sup> At this point in removal proceedings, everything that a trafficking survivors' trafficker threatened has come to pass: abuse, arrest, legal process, and threat of imminent removal. The survivors have been abused by a trafficker, arrested by the agency that is tasked with fighting for justice, thrown into removal proceedings, and now ordered to be removed because they could not assert their trafficking victimization as a defense to removal.

Through the appeals process, individuals are able to request a delay of deportation and appeal their case's decision.<sup>173</sup> Decisions made by Immigration Judges are appealed to the Board of Immigration Appeals, then to the federal circuit courts, and finally to the Supreme Court.<sup>174</sup> Once this process is complete, if relief is not granted, then the individual will be deported.<sup>175</sup> Although trafficking victims are allowed to appeal their decisions, the decision to appeal their case must be balanced with the cost of the appeal and the fact that they could likely remain in detention throughout the entire appeals process. They can also be deported at any point past the Board of Immigration Appeals' decision unless they affirmatively get a stay of removal from the federal circuit court.

Once a trafficking survivor is placed in removal proceedings, his chances of remaining in the U.S. diminish significantly. But if the situation is viewed from the survivor's perspective, the injustice becomes alarmingly clear. A trafficking survivor is lured from a vulnerable environment by a trafficker seeking to exploit the very vulnerabilities the trafficking victim is trying to escape. The victim immigrates to the U.S. through a lawful

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<sup>169</sup> For a discussion of these applications, see *supra* notes 56-58 and accompanying text.

<sup>170</sup> Wise & Petras, *supra* note 146.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

avenue with a valid nonimmigrant visa. Upon arrival, their trafficker steals the victim's immigration documents, forces him to work in inhumane conditions, and threatens to deport him if he runs away. Further, the U.S. government has told the victim that to leave his job is to lose his status, automatically making him a target for removal. Unless the victim comes into contact with an immigration attorney, he has no choice but to remain in his trafficker's custody. To flee is to give up the only security he has ever known. If he flees, he immediately becomes removable.

If the survivor happens to figure out how to file a T Visa application,<sup>176</sup> that application is based on the whims of the current political climate which is unstable at best. The entire time his application is being processed, the victim is removable and ineligible to work. If USCIS denies the victim's application—which may occur because of a simple error in paperwork or lack of proof—the agency will likely place the survivor in removal proceedings. If the survivor's employer calls ICE, the survivor will be placed in removal proceedings. And even in removal proceedings, the trafficking victim is still set up to fail. Barring protection granted from a federal circuit court, the survivor is considered removable at every point after fleeing the trafficking situation. This system is set up to work against trafficking victims at every level, despite the fact that the United States has purported to support trafficking victims since the passage of the TVPA over twenty years ago. For this reason, it is not only important, but necessary for Congress to implement survivor-centered policies to address the gaps in justice faced by immigrant trafficking victims.

#### IV. CONCLUSION

The politicization of immigration and human trafficking has created a dichotomy: policy can either be pro-business or it can be anti-human trafficking. The harsh reality is that at the structural level, immigration is more pro-business than anti-trafficking. The way the U.S. immigration system is currently run, it is designed to work against trafficking victims at every level. When workers are recruited, there is little oversight to ensure that companies are not charging recruitment fees or making false promises to workers. Once workers arrive in the United States, they are forced to

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<sup>176</sup> Filing the application is an incredibly daunting task in and of itself. Without counsel, the applicant has to acquire the forms, answer them in English, provide all required proof with English translations (if the documents are not already in English), as well as the certification from law enforcement (unless they meet the exception). This process alone is yet another reason why survivor-centered policies are necessary; so often survivors feel defeated by paperwork and bureaucracy despite having a valid claim to a T Visa.

rely on their employers for information regarding laws, wages, and housing. They enter a foreign country, accept a paycheck out of necessity, and if they ever question their situation, they are threatened with deportation. Further, because the majority of temporary work visas are tied to employers, victims of human trafficking are forced to choose between remaining in an exploitative work environment or losing their lawful immigration status.

However, taking a critical look at the immigration system reveals that the harsh realities faced by immigrant trafficking survivors can be remedied. By creating a survivor-centered approach to justice, policy can become both pro-business and anti-trafficking. The lessons learned from Signal International demonstrate that benefitting from trafficking only harms businesses in the long run. To focus on victims and create more oversight in the immigration system will ensure protections for victims and safer business practices for employers. At that intersection, we will find justice.