PRACTICE POINTERS FOR U AND T VISAS

by Karl Krooth, Sheila Neville, and Sheila Stuhlman[*]

Even though U and T visas have been in existence for a few years, they are still a developing area of immigration law and they have become some of the best options immigration attorneys have to assist their clients. Because of the underlying basis for these visas, they often present very sensitive issues that practitioners must handle with caution and care. This article assumes a working knowledge of these visas; each section below will address a particular issue without necessarily referring to the general requirements of the visas. Where possible, the topic is explained in each section through a case study to illustrate how the practices described can be applied practically.

PROTECTING U VISA CLIENT FILES

As immigration practitioners, we are used to keeping client information confidential, but we are rarely tested on the bounds of attorney–client privileged communications and work-product doctrine. Our U visa cases require us to be more on top of these issues because, unlike most of our other immigration cases, U visa clients are almost always involved in some kind of litigation. Usually the litigation is the criminal case in which they are the victim but it could also be an employment law case, contested protective order, or contested custody hearing involving an abuser. Taking a few extra steps at the beginning of representation can help prepare our clients and ease our pain in responding to a subpoena.

A couple of years ago a potential client contacted our office for immigration advice after being referred to us by her employment law attorney. At the time she was pursuing a civil action in federal court for wrongful termination and sexual assault and battery against her employer and supervisor. Her husband brought her to the consultation appointment at our office but we asked him to wait in the waiting room. During the interview we advised her that she might be eligible for a U visa based on the rapes at work or on a number of domestic assaults involving her husband. With our help, she was granted U nonimmigrant status based on her helpfulness to law enforcement in the investigation of the workplace rapes. Because the certification was based on the rapes at work and not on the domestic violence where the husband was the perpetrator, he could have been a derivative on the U visa application. We decided early on, however, that potential conflicts would prevent us from representing her husband as a derivative, so he was never our client. After approval, we happily closed her case with a positive outcome. Much to our horror, several months later we received a subpoena from the defendant in the employment law case for all our records and communications relating to our representation of the client in her U visa case. Our initial reaction was shock; we had not heard of this happening and we thought everything was protected by attorney–client privilege. Of course, most of the documents were not protected by the work-product doctrine as we assumed. An extra issue turned out to be

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[*] **Karl Krooth** represents crime victims with criminal records, complementing his post-conviction practice. Prior to embracing this work for Immigrant Crime and Justice APLC, Mr. Krooth gained practical experience first prosecuting, and then conducting criminal defense. He has served on the AILA Northern California Advisory Council for several years, and also served on the local board of the National Lawyers Guild (NLG) subsequent to two years as local chair of NLG's Immigration Committee. *SuperLawyers* has recognized Mr. Krooth as a "Rising Star." He has a B.A. from University of California, Berkeley, and a J.D. from the Northwestern School of Law of Lewis and Clark College.

Sheila Neville is a senior attorney at the Legal Aid Foundation of Los Angeles (LAFLA). She represents survivors of trafficking, domestic violence, and other crimes in their immigration and public benefits cases. Ms. Neville also provides training and technical assistance to pro bono attorneys representing immigrant survivors. Before returning to LAFLA in 2002, she worked for the National Immigration Law Center, LAFLA's Immigrants' Rights Office, and the Haitian Refugee Center in Miami.

Sheila Stuhlman is a senior staff attorney at the Immigrant Law Center of Minnesota. Her primary duties are to provide training and technical assistance to Minnesota's public defenders but she also represents clients in front of U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review. She is a member of AILA and the National Immigration Project of the National Lawyers Guild. Sheila is a 2000 graduate of the University of Minnesota Law School and admitted to practice in the Minnesota State Bar, Minnesota Federal District Court, and the Eighth Circuit Court of Appeals.

that the confidentiality of the communications and advice were in question because an accredited representative, not an attorney, had helped her. Since this experience, we have institutionalized a few practices to help our clients and ourselves.

Meet Only with Those Necessary to the Representation of the Client; Note with Whom You Met and Why; Use Confidentiality Agreements

Generally speaking, the attorney–client privilege applies to confidential communications between individuals and attorneys for the purposes of obtaining or rendering legal advice.[1] Luckily for us, the case notes indicated that the client's husband had accompanied her to the interview but that we had asked him to wait for her in the waiting room. Because the party asserting the privilege has the burden to show that it applies,[2] our legal counsel had to produce a privilege log in accordance with Federal Rule of Civil Procedure 45(d)(2)(A) to describe the nature of withheld documents and communications so that the court could assess whether the privilege applied. Our case notes helped us defend withholding certain documents and to show that the communications were indeed confidential because we had taken steps to preserve the privilege.

As lawyers at a nonprofit, we seem especially susceptible to helpful third parties who may in fact break attorney–client privilege. Many of our U visa referrals come from domestic abuse shelters and crime victim advocates who will accompany the client to meetings at our office. It is our practice to meet alone with the client, to explain confidentiality and attorney–client privilege, and then ask if they still want someone else to join us as we discuss the case. Of course, not all third-party participation will break the privilege. The attorney–client privilege is not waived when people with a common interest in the subject matter of the communication, such as joint defendants in a lawsuit, consult the attorney together.[3] Also, the presence of a third party necessary to the rendering of legal advice with not break the privilege. Whether a third party is truly necessary is decided on a case-by-case basis. For example, an interpreter will not usually destroy the privilege[4] and in fact a "translator analogy" is sometimes used by courts to decide whether the third party in question is necessary to the understanding and rendering of legal advice.[5] In contrast, someone present only for moral support will break the privilege.[6] We need to be prepared to defend why the presence of the third party did not break the privilege; thus, case notes about why a counselor or translator was necessary to the representation are crucial. Furthermore, it is our duty to make sure third parties, such as interpreters, understand the duty of confidentiality. That is why we have both professional and volunteer interpreters sign a confidentiality agreement.

Fear of inadvertently breaking the attorney–client privilege should not keep us from consulting with third parties or using their letters of support. To the contrary, national experts argue that the Model Rule of Professional Conduct 1.1 (competence) requires us to involve a domestic violence advocate or sexual assault advocate when a client needs help preparing a substantial harm declaration. Few of us are trained in working with victims and poorly prepared declarations can constitute ineffective assistance of counsel. Associating ourselves with professionals trained in working with victims will ensure the best possible representation. These professionals can also assist with safety planning, a skill most of us do not possess but that is of paramount importance to the client. Some states have domestic violence or sexual assault advocate–victim privilege statutes, but some do not. If you are not sure of the advocate–victim privilege in your state, an overview can be found at www.rainn.org/print/439. Nevertheless, to safeguard the attorney–client privilege and confidential communications, it would be a good idea to explain what is needed to the client and then have the client work directly with the advocate instead of communicating directly with the advocate (even though it may be easier and may be what the client prefers) so we do not inadvertently waive the privilege.

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[1] *Upjohn v. United States*, 449 U.S. 383, 394–95 (1981).

[2] *See Triple Five of Minnesota, Inc. v. Simon*, 212 F.R.D. 523, 528 (D. Minn. 2002)

[3] *See Sandoval v. American Bldg. Maintenance Industries, Inc.,* 267 F.R.D. 257, 273 (D. Minn. 2002).

[4] *See, e.g., People v. Osorio*, 549 N.E.2d 1183 (N.Y. 1989)

[5] *See e.g., United States v. Kovel,* 296 F.2d 918, 922 (2d Cir. 1961).

[6] *See, e.g., D. v. Doss,* 514 N.E. 2d 502 (Ill. 1987).

Have Principals and Derivatives Sign a Disclosure Agreement; Include Derivatives in the Representation Agreement

It is not a question of whether conflicts will arise but when. We need to be prepared and have clients understand at the outset that information will be shared and what will happen if a conflict arises. Having our client's husband stay in the waiting room helped us to avoid a conflict of interest. Because he was a perpetrator of domestic violence and also a potential derivative for the workplace rape case, we were able to offer referrals immediately and not jeopardize our ability to represent the U visa principal applicant. Conflicts have arisen in our U visa cases where the child principal changes her mind about having a parent as a derivative on a case, or where the parent principal does not want the derivative child to have access to sensitive information about a sexual assault, and we have all had the family-based one-step blow up into a Violence Against Women Act (VAWA) case where we were unable to continue with the representation of either party. We or the parent principal may not think that the child needs to see all the documentation in the file, but remember that some consulates require the visa-processing derivative to present the application in its entirety, along with the approval notices, in order to approve the visa.

In most U visa cases there are derivatives that you want to include in the case who do not have an obvious conflict. For these cases (and other family-based cases), we have all the parties sign a disclosure and mutual consent to dual representation agreement. We also include the derivatives in the representation agreement and open separate case files for them. Like the confidentiality agreements and representation agreements that we have, the disclosure and mutual consent to dual representation agreement is translated into Spanish and other necessary languages for clients to read after we have explained it to them. These steps help us to be able to proceed with dual or multiple representations under the Model Rules of Professional Conduct 1.7 and improve our capacity to comply with the duty to communicate under Model Rule 1.4.

Organize Your File to Separate and Identify Privileged Material

What is probably obvious to many but was news to us was that most of the documents in our client's file were not protected and had to be turned over. The work-product doctrine protects the work of the attorney "done in preparation for litigation."[7] Work product that reflects the attorney's subjective beliefs and strategies about a case receives the most protection, while "factual" work product is discoverable upon a showing of substantial need. Likewise, the attorney–client privilege protects only disclosure of communications and not "disclosure of the underlying facts by those who communicated with the attorney."[8] When appropriate, counsel can argue that some information is protected by physician–patient privilege or seek a protective order to redact sensitive client information, such as the victim's home address. In our case, the U visa application and attachments were almost completely discoverable in the employment litigation. This is because the application and its contents were more factual in nature and did not contain subjective beliefs and strategies.

Therefore, you should organize the file to separate and identify privileged material such as strategies and client communications. Materials such as notes and communications with third parties would not likely be protected unless your mental impressions or legal conclusions are incorporated into the case note or document. Even then, a court could decide that the work product could be adequately protected by redacting the mental impressions and legal conclusions. This fact could be extremely important to your U visa client and might lead him or her to wait on a U visa application until other collateral litigation ends. Unlike VAWA applications, U visa applications are not considered confidential by the Vermont Service Center (VSC) so we warn our clients that the process is not confidential and that the information may be shared with Immigration and Customs Enforcement (ICE). But many survivors of domestic violence are not as worried about sharing the information with immigration as they are afraid of the abuser seeing their declarations or knowing about the fact of the application. Before subpoenas appeared in our office, I assured many clients that, although the process is not confidential, in practice it has been kept confidential by Vermont, and that there was almost no likelihood of the abuser ever seeing any part of the application. Unfortunately, the client declaration is one of

[7] *In re Grand Jury Proceedings,* 33 F.3d 342, 348 (4th Cir. 1994).

[8] *Upjohn Co. v. U.S.,* 449 U.S. 383, 396 (1981).

the most discoverable pieces of the case, and it is our responsibility to warn the client that collateral litigation could lead to the perpetrator seeing that declaration.

Conclusion About Measures to Protect the Attorney–Client Privilege

Fortunately, most of us will never have to deal with a subpoena. Because of that, you may decide that some of the tips presented would not be cost effective. However, keeping the above tips in mind will help ease the pain of a subpoena and will help you and your client to strategize about whether and when to proceed with a U visa application. Whatever strategies you decide to use should be implemented in your office as a standard practice for all cases so that you can demonstrate steps you have taken to preserve the attorney–client privilege.

ISSUES REGARDING CRIMINAL INADMISSIBILITY FOR U VISAS

An Aggravated Felony Will Not Necessarily Bar a Lawful Permanent Resident from Eligibility for a U Visa, Despite Unavailability of Cancellation Under INA §240A(a), at Least as Long as a Notice to Appear Alleges Inadmissibility Under INA §212(a)(2)(A)(i)(II).

A divorced woman in her mid-thirties has had lawful permanent residency since childhood. She has recently given birth to her second child, another U.S. citizen daughter. This momentous occasion has transformed her emotionally, spiritually, and personally.

She had not borne a child for a decade and a half, and this pregnancy occurred out of wedlock. The father has a history of domestic violence both within and without his relationship with the mother. The mother has not left the child's father because of an abuse cycle in which she has similarly played the submissive in every relationship since her own childhood. She secures a Supplement B by helping to investigate and prosecute the father. Her Form I-192 emphasizes how she broke the cycle of violence and rid herself of passivity by standing up for herself in filing this application to waive an aggravated felony, which is a ground of inadmissibility under INA §212(a)(2)(A)(i)(II).

At the time that the prosecutor executes Supplement B, the mother is on petition for review at the Federal Circuit Court of Appeals. She had previously applied for admission to the United States after traveling abroad. Customs and Border Protection (CBP) paroled her. CBP's Deferred Inspections served her with a notice to appear (NTA) before the immigration judge (IJ), who pretermitted her application for cancellation of removal under INA §240A(a). She appealed to the Board of Immigration Appeals (BIA), which affirmed the order of removal. This final removal order is the equivalent of renunciation of lawful permanent residency.

During the pendency of the petition for review, the cycle of violence reached a climax. The mother ended her relationship with the father, but he gained some rights to visitation with the child. He battered the mother at the conclusion of a visit with the child. The mother called the police, who arrested the father. She received domestic violence therapy, to which she initially proved unreceptive because of its one-size-fits-all approach. Counsel encouraged her to reach out to a forensic psychiatrist, who adopted an approach better suited to her personality. This psychiatrist connected the Supplement B offense of domestic violence with the aggravated felony of transporting narcotics for the purpose of sale. He diagnosed a long history of abusive intimate relationships in which the mother submitted to the demands of aggressor males on account of fear and self-loathing. The diagnosis described impaired judgment on the date of committing the aggravated felony, and the good that criminal custody did the mother by making her feel a profound sense of shame and a desire to change. The diagnosis provided the law enforcement agency (LEA) and U.S. Citizenship and Immigration Services (USCIS) with a chronology of her life experience from being an extremely submissive person to a steadily more proactive individual. Medical reports of a vehicular accident that undermined her physical and mental health, a prescription for antidepressant pharmaceuticals, her decision to attend therapy, and this diagnosis overcame the perception of her as a deviant and culpable offender; instead, both the LEA and the adjudications officer imputedly accepted her as a vulnerable person coaxed to commit crime unwillingly. Her vulnerability made the connection between the Supplement B offense and the aggravated felony.

Counsel took a proactive approach with the prosecutor to explain that the mother had already taken part in the investigation and prosecution before learning of the U visa. As the father resisted a plea bargain, the mother's cooperation in preparation for trial earned the prosecutor's respect. Persistence of counsel in

supporting the mother's cooperation and soliciting the Supplement B certification eventually led the prosecutor to secure a conviction and execute Supplement B. The decision to file Form I-918 and await a request for evidence (RFE) as to Form I-192 turned on the preference for a psychiatric diagnosis based on a therapy term longer than the six-month validity of a certification, as well as U visa unavailability until October 1 and consequent postponement of adjudications.

The favorable adjudication of the waiver on Form I-192 gathered support from the pivotal position that the mother played in the lives of her many family members and friends in the United States. These relatives and friends described the birth of her second child as the moment of truth when she changed from an unreliable person to the community's rock, the individual on whom they all relied for assistance in time of need.

The mother in the case example was fortunate because her travel abroad led to a notice to appear (NTA) that alleged inadmissibility under INA §212(a)(2)(A)(i)(II) for her aggravated felony. Had the mother instead committed an offense that could have led to a separate Supplement B certification for the victim thereof, the waiver might not have been approved because VSC has a general policy to deny waivers in such cases. Given VSC's policy in this regard, filing Form I-192 in this context is suspect.

The immigration judge entered a removal order under INA §212(a)(2)(A)(i)(II), so VSC had obvious jurisdiction to grant the waiver. The odds of VSC's recognition of jurisdiction and exercise of discretion decrease when a NTA charges an aggravated felony under a ground in INA §237, and a removal order issues under INA §237.

Both LEA and VSC Adjudications Officers Exercise Discretion to Serve Justice, So Advocacy for an Aggravated Felon Requires Emphasis on Vulnerability as Support for a Connection Between the Supplement B Crime and the Potential Petitioner's Aggravated Felony.

Although traditional notions of vulnerability are not expressly encompassed by the certification process or adjudication of a waiver on Form I-192, the perception of an aggravated felon as vulnerable is often the linchpin that turns the tables in favor of a Supplement B certification and a waiver on Form I-192. Expression of emotions and a history of loss may improve the odds for a potential petitioner to establish vulnerability. A cycle of violence that ended when the potential petitioner assisted law enforcement with an investigation or prosecution can also be a powerful incentive for certification if the helpfulness demonstrates that the potential petitioner's offenses are unlikely to recur. The low likelihood of recurrence is supported by a record that a potential petitioner committed the aggravated felony or other offense under inducement of the Supplement B perpetrator before the potential petitioner broke the cycle of violence.

A cycle of abuse may be relied upon to establish that the perpetrator of the LEA-certified offense manipulated or otherwise drove the victim to commit crime(s) on which the petitioner's inadmissibility turns in whole or in part. For instance, LEA-certified offenses of domestic violence and child abuse often occur in a context of intimidating circumstances that must be documented to establish a series of incidents that resulted in collective harm. The LEA-certified offense need only be one of these incidents.

A LEA May Claim Discretion to Decline a Supplement B Certification to an Aggravated Felon Despite Helpfulness in a Criminal Investigation or Prosecution Unless the Perpetrator of the Supplement B Offense Manipulated the Potential Petitioner to Commit the Aggravated Felony and the Vulnerability of the Potential Petitioner Is Manifest.

In the case of a potential petitioner who seeks certification but has an aggravated felony or a series of lesser offenses, vulnerability may be a powerful inducement for the LEA to certify. The practitioner has great potential to extract significant details in the interview process with the client, whose family and friends may also provide declarations that emphasize redeeming qualities and thereby improve the likelihood of the client's characterization as vulnerable. Perception of a potential petitioner's vulnerability may lead to certification notwithstanding traditional notions of what defines a victim.

Despite Certification of an Aggravated Felon on Supplement B, an Inadmissibility Waiver on Form I-192 May Well Be Necessary and May Turn on a Connection Between the Petitioner's Role as a Victim of the Supplement B Crime and the Aggravated Felony.

Although not all aggravated felonies render a foreign national inadmissible, the strongest U visa applications will submit alternative arguments against inadmissibility and in favor of waiver in the event that the adjudications officer finds the petitioner inadmissible. In support of a connection between the petitioner's conviction of an aggravated felony and the petitioner's role as a victim of the Supplement B crime, a petitioner should advance a theory of vulnerability to manipulation and the Supplement B perpetrator's actual manipulation of the petitioner to commit the aggravated felony.

The practitioner's success often depends on submission of strong evidence about the client's departure from the relationship, social group, and/or context in which the crime or crimes occurred. The diagnosis of a mental health professional may be pivotal both to connect a cycle of violence to any crime that renders the petitioner inadmissible, as well as to explain the petitioner's rehabilitation and departure from the relationship or social group and other factors that led the petitioner to commit the crime. One important caveat: When the LEA-certified offense was domestic violence, and the petitioner has not left an abusive relationship that a mental health professional finds is a source of committing the crime(s) that render the petitioner inadmissible, diagnosis may do more harm than good.

Whether to Submit a Waiver Application on Form I-192 with Form I-918 Requires Emphasis on Preferences for Expediency or Delay in Adjudication of a Petition in Light of the Criminal History and Immigration Proceedings.

A petitioner without residency would achieve her or his anticipated goal of improving the efficiency of adjudication by filing Forms I-918 and I-192 concurrently.

In contrast, residency forecloses a U visa unless either the BIA has affirmed a removal/deportation order or the petitioner has renounced residency. The latter is impossible while proceedings are pending before the IJ or BIA, so a lawful permanent resident who files Forms I-918 and I-192 before issuance of a final order should include a request to hold adjudication in abeyance. A potential petitioner with lawful permanent residency may thus prefer neither to present a waiver application on Form I-192 nor file Form I-918 until a week or two before Supplement B is bound to expire (just shy of six months after Supplement B is executed). This strategy improves the possibility of an RFE with a longer potential statutory deadline (up to 84 days) rather than a notice of intent to deny (NOID) with a statutory standard deadline of 30 days.

Conclusion: A Heavy Burden Awaits U Visa Petitioners with Criminal History

A potential petitioner's documentation of vulnerability may not always support the connection between the Supplement B crime and the petitioner's conviction of an aggravated felony. An aggravated felony from which the potential petitioner has been fully rehabilitated improves his or her chances. Complete rehabilitation alone is insufficient without proof that the potential petitioner has broken the cycle in which she or he was the victim of violence or sex offenses. The best evidence of breaking the cycle is a Supplement B certification in which a prosecutor or judge indicates that the petitioner was helpful in both investigation and prosecution. A great case would also introduce the diagnosis of a psychiatrist that attests to the history of abuse in a chronological format, explains how the petitioner took baby steps that concluded with the Supplement B-certified offense, and opines that the petitioner is unlikely to find herself or himself in another abuse cycle based on statistical data of victims who break the cycle.

IMMIGRATION LAW PRACTITIONERS SHOULD SCREEN FOR HUMAN TRAFFICKING

You are providing a consultation to a potential new client. He entered the United States a year ago on an H-2B visa that will soon expire. He no longer has his original passport with the visa in it, but he has brought a copy of it. He recently left the hotel food service job on which the H visa is based because he was not being paid what he was originally promised. He wants to know if there is any way he can get a work permit to stay in the United States so that he can earn enough money to pay off the money he spent to come here.

This client may be a victim of human trafficking who can qualify for T nonimmigrant status. Do you see the red flags?

Noncitizen victims of human trafficking almost never identify themselves as such. In most instances they are not aware that their victimization is a violation of U.S. law or can form the basis for a T nonimmigrant status. Although T cases can be challenging to identify, your awareness of the basic definition of human trafficking could be invaluable to a client who has no other form of relief available.

The Trafficking Victims Protection Act (TVPA) defines a "severe form of trafficking in persons":

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[9]

Significantly, coercion is defined to encompass more than physical force or the threat of such force. Under the TVPA, coercion now includes the more subtle means of psychological coercion that lead victims to believe that serious harm will result to them or to others if they leave their jobs.[10] Many approved T visa cases involve solely psychological coercion.

A Few Red Flags

Although the circumstances of individual cases can differ widely, it is helpful to be aware of a few red flags that can alert you to a client who has been trafficked:

- Has the client lived at his or her place of employment, or lived in housing closely monitored by the employer? USCIS has granted T visas to applicants whose employers have locked them in at night at factories and restaurants or whose houses or apartments were closely watched by the employer's associates to prevent escapes. If your client has worked as a live-in nanny or housekeeper, ask her if she was allowed to leave the employer's home unaccompanied.
- Did the employer take the client's passport? Some traffickers hold their victims' passports as a way of preventing them from leaving a job.
- Did the client pay a large recruitment fee in the home country for a job in the United States that does not provide the promised pay or work conditions? Sometimes clients go into deep debt and mortgage family property to pay a recruiter for a job that pays far less than what was promised. The traffickers then warn their victims that if they leave their jobs they will be financially and socially ruined without the means to pay off the debt in their home country.
- Did the client's employer tell him that if he left the employer's job or housing, he would probably be arrested, jailed, and deported?
- Did the employer make large deductions from the client's paycheck for items such as housing, meals, and smuggling fees?
- Did the client come to the United States as a child to live with relatives or family friends, but never enrolled in school? It is possible that the client was forced to work as a babysitter or housekeeper in spite of promises to her parents that she would go to school in the United States. A child in such circumstances is also vulnerable to physical or sexual abuse.

Past Victimization

If you see a red flag that points to possible trafficking, you should explore the details with the client even if the victimization occurred years ago. You can report a trafficking case to law enforcement even if the statute of limitations has expired on possible criminal offenses. For unreported trafficking cases that occurred before the passage of the TVPA in 2000, the victim must show that exceptional circumstances—including severe trauma—prevented her from filing for T status earlier.[11]

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[9] Trafficking Victims Protection Act §103(8), 22 USC §7102(8).

[10] *See* Trafficking Victims Protection Act §102(b)(13), 22 USC §7101(b)(13).

[11] 8 CFR §214.11(d)(4).

Law Enforcement Certification

Although there is a law enforcement endorsement form available for T visa cases, the Form I-914 Application for T Nonimmigrant Status can be filed and approved without it. While you must prove to USCIS that your client is a trafficking victim who has reported his victimization to law enforcement—usually to the Federal Bureau of Investigation, ICE, or the U.S. Department of Justice—you can proceed with the T visa application even if law enforcement declines to investigate or prosecute the case.

Conclusion: After You Identify a Human Trafficking Case

If you believe you have identified a victim of human trafficking, it is critical to look for guidance from a practitioner or agency with experience in reporting trafficking cases to law enforcement and representing trafficking survivors. For a guide to advocates in different regions of the United States, go to the members section of the Freedom Network website: *www.freedomnetworkusa.org*.

The facts above raise a few red flags that the client may have been trafficked. Here are some follow-up questions: Did his employer keep his passport? Did he ever ask the employer for its return? Was the large debt incurred to pay a recruitment fee? What pay was he promised? Did he have a written contract? What was he actually paid? Did the employer make deductions from his paycheck? Did the employer provide housing? Was he free to come and go from his housing? Did he quit his job, or did he escape from it?

For a complete human trafficking screening questionnaire, contact Sheila Neville at *sneville@lafla.org*.