2021

Trafficking and the Shallow State

Julie Dahlstrom
Boston University School of Law

TRAFFICKING AND THE SHALLOW STATE

Boston University School of Law
Paper No. 21-17

2021

Julie Dahlstrom
Boston University School of Law

Forthcoming 2021 in 12 UC Irvine L. Rev

TRAFFICKING AND THE SHALLOW STATE

Julie Dahlstrom[*]

12 UC IRVINE L. REV. __ (forthcoming 2021)

DRAFT

ABSTRACT

More than two decades ago, the Trafficking Victims Protection Act ("TVPA") established new, robust protections for immigrant victims of trafficking. In particular, Congress created the T visa to protect immigrant victims from deportation. Since 2000, however, the annual cap of 5,000 T visas has never been reached. Fewer than 1,100 T visas have ever been granted annually to immigrant victims. In the last five years, approval rates also have plummeted. Of the T visa cases adjudicated for victims annually, only 57.21% were approved in fiscal year 2020, compared with 71.88% in fiscal year 2015. These developments came as former President Donald J. Trump, like many presidents before him, proclaimed a deep commitment to end the "epidemic" of human trafficking and to protect "innocent" victims.

Though scholars have critiqued the general protection framework for immigrant victims of trafficking, this article unearths an understudied problem: the often unseen role of the "shallow state." In contrast to the much-discussed "deep state" of career bureaucrats, this article suggests that low-level administrative actors adjudicating humanitarian immigration cases have subtly worked to erode protections for immigrant victims of trafficking. This article demonstrates how such actors have creatively engaged in a range of tactics, including delay, rejection, and heightened stakes, to contort the T visa application process and make it more difficult for immigrant victims to navigate successfully. The article explores how these actions—often diffuse and obscured—have been hard to identify or to subject to judicial review. It warns that these bureaucratic tendencies could erode protections for immigrant victims of trafficking for years to come. It thus prescribes not only greater attention to such practices, but also administrative and judicial remedies.

---

[*] Clinical Associate Professor and Director of the Immigrants' Rights and Human Trafficking Program, Boston University School of Law. Many thanks to Jane Aiken, Cori Alonso-Yoder, Warren Binford, Daniel Kanstroom, Jocelyn Getgen Kestenbaum, Lori Nessel, Faraz Sanei, and Rachel Wechsler for insightful comments. I greatly appreciate the feedback received from the NYU Clinical Law Review Writing Workshop. I am immensely grateful to Brian Flaherty, Samantha Lerner, and Johanna Greenberg for their excellent research assistance. All errors are my own.

DRAFT

TABLE OF CONTENTS

INTRODUCTION

To mark the twentieth anniversary of the Trafficking Victims Protection Act ("TVPA"), former President Donald J. Trump hosted a White House summit on human trafficking.[1] He announced unequivocally: "My administration is 100 percent committed to eradicating human trafficking from the Earth."[2] He reminded the audience that "[w]e've had a tremendous track record—the best track record in a long time."[3] He then proudly proclaimed how his Administration had passed nine pieces of anti-trafficking legislation, authorized $430 million to fight trafficking, and withheld foreign aid from countries that failed to sufficiently fight trafficking.[4]

Former President Trump's summit was not simply a public relations stunt. The Trump Administration, like many Republican and Democratic administrations before it, repeatedly insisted that ending human trafficking was a major foreign policy priority and committed to

[1] *Remarks by President Trump at the White House Summit on Human Trafficking: The 20th Anniversary of the Trafficking Victims Protection Act of 2000*, TRUMP WHITE HOUSE ARCHIVES (Jan. 31, 2020, 12:21 PM), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-summit-human-trafficking-20th-anniversary-trafficking-victims-protection-act-2000/.
[2] *Id.*
[3] *Id.*
[4] *Id.*

protect "innocent" victims.[5] In fact, former President Trump gained notoriety when he controversially proclaimed that trafficking is "[w]orse than ever at any time in the history of our world"[6] and promised to bring the full force of the U.S. government to bear on the problem.[7] This he did at times albeit in a rather cynical, Machiavellian way, by using trafficking to justify broad executive actions aimed at immigration enforcement.[8]

---

[5] *See e.g.*, WHITE HOUSE, THE TRUMP ADMINISTRATION IS COMMITTED TO COMBATING HUMAN TRAFFICKING AND PROTECTING THE INNOCENT (Oct. 20, 2020), https://www.whitehouse.gov/briefings-statements/trump-administration-committed-combating-human-trafficking-protecting-innocent/ [https://perma.cc/FZ2F-GCG5] (quoting former President Trump as stating, "We renew our resolve to redouble our efforts to deliver justice to all who contribute to the cruelty of human trafficking, and will tenaciously pursue the promise of freedom for all victims of this terrible crime."); *see also* Remarks in a Meeting on Human Trafficking at the Mexico-United States Border and an Exchange With Reporters, 2019 DAILY COMP. PRES. DOC. 48 (Feb. 1, 2019); WHITE HOUSE, REMARKS BY PRESIDENT TRUMP AT THE WHITE HOUSE SUMMIT ON HUMAN TRAFFICKING: THE 20TH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000, (Jan. 31, 2020) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-white-house-summit-human-trafficking-20th-anniversary-trafficking-victims-protection-act-2000/ [https://perma.cc/25HX-4E62]; Rebecca Ballhaus, *Trump Strengthens Efforts Against Human Trafficking, Amid Criticism from Victims' Advocates*, WALL ST. J. (Jan. 31, 2020), https://www.wsj.com/articles/trump-strengthens-efforts-against-human-trafficking-amid-criticism-from-victims-advocates-11580482657 [https://perma.cc/Y3U6-TRVL] (quoting President Trump, who proclaimed that his administration "will not rest until we've stopped every last human trafficker and liberated every last survivor").

[6] WHITE HOUSE, REMARKS BY PRESIDENT TRUMP AT THE WHITE HOUSE SUMMIT ON HUMAN TRAFFICKING *supra* note 1. President Trump's statement that trafficking was "worse" than any other time was heavily criticized by scholars and activists who remarked that there is no evidence to support this assertion. *See e.g.*, Aaron Blake, *Trump says human trafficking 'is worse than it's ever been in the history of the world.' Where to begin?*, WASH. POST (April 19, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/19/trump-says-human-trafficking-is-worse-than-its-ever-been-in-the-history-of-the-world-where-to-even-begin/ [https://perma.cc/VXB4-KDXN] (noting that this "seems this is one of those facts that nobody else knew — because it's not true"); Daniella Diaz, *Trump says human trafficking is 'worse now than it ever was*,' CNN (July 28, 2017), https://www.cnn.com/2017/07/28/politics/donald-trump-human-trafficking/index.html [https://perma.cc/JU5K-TYSR] (citing to statistics related to African slavery to argue that, while human trafficking is a serious problem, it is certainly not "worse" than it has ever been).

[7] WHITE HOUSE, PRESIDENT DONALD J. TRUMP HAS MADE IT A PRIORITY TO COMBAT THE HEINOUS CRIME OF HUMAN TRAFFICKING (Oct. 29, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-made-priority-combat-heinous-crime-human-trafficking/ [https://perma.cc/6D4C-YM6G] ("My Administration is committed to leveraging every resource we have to confront this threat, to support the victims and survivors, and to hold traffickers accountable for their heinous crimes.").

[8] President Trump used trafficking as a justification for wide scale immigration enforcement efforts, which had the impact of separating hundreds of immigrant families, criminally prosecuting immigrants who entered the country unlawfully, and dismantling asylum protections. *See, e.g.*, Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CAL. L. REV. 379, 433 (2020) (citing Jeff Sessions, Attorney General,

When advocates opined that such efforts would imperil protections for immigrant victims,[9] he reassured victims: "You are not alone."[10]

Yet immigrant victims of human trafficking in the United States had never felt so alone. Prominent anti-trafficking advocates boycotted the White House Summit on Human Trafficking.[11] They called the former President's anti-trafficking rhetoric a "public deception."[12] Advocates

---

Addresses Recent Criticisms of Zero Tolerance By Church Leaders (June 14, 2018) (examining how President Trump used trafficking as a sword to fuel immigration enforcement efforts with serious collateral consequences)).

[9] This article uses the term "victim" throughout because it is a term of legal significance. Many have argued that the term "victim" is problematic, as it characterizes individuals by weakness or passivity, rather than by strength or courage. *See, e.g.*, Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993) ("Victimhood is a cramped identity, depending on and reinforcing the faulty idea that a person can be reduced to a trait. The victim is helpless, decimated, pathetic, weak, and ignorant. Departing from this script may mean losing whatever entitlements and compassion victim status may afford."); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 160 (2007) (discussing the iconic trafficking victim as "meek, passive objects of sexual exploitation … exercising no free will during their illegal entry" and suggesting this rhetoric has become a myth to lawmakers and law enforcement agents). However, this article uses the term victim in place of "survivor" because it is a legal term of art that allows individuals to access important protections, including but not limited to immigration status, public benefits, civil damages, and criminal restitution. *See* Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 2016 UTAH L. REV. 535, 539 (2016) ("In the human trafficking context, victims receive much more than mere attention by wearing the label [of victim]; they earn legal rights, services, benefits, and freedom from criminal charges.").

[10] *Trump to trafficking victims: You are not alone*, CNN (Apr. 11, 2018), https://www.cnn.com/videos/politics/2018/04/11/trump-signs-sex-trafficking-act.cnn [https://perma.cc/4DT2-ECU8].

[11] *See, e.g.*, Jessica Contrera, *Anti-human-trafficking groups refuse to attend Ivanka Trump's White House summit*, WASH. POST (Jan. 30, 2020), https://www.washingtonpost.com/local/human-trafficking-groups-refuse-to-attend-ivanka-trumps-white-house-summit/2020/01/29/6410de32-41d4-11ea-b503-2b077c436617_story.html [https://perma.cc/B9WR-MJ6E]; Katie Rogers, *White House Holds Trafficking 'Summit,' but Critics Dismiss Lack of Dialogue*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/us/politics/trump-trafficking.html [https://perma.cc/5WX6-VH83] ("[T]he White House event, which lasted the better part of two hours, did nothing to ease the concerns of activists who have said the administration's previous efforts on the issue have harmed some of those seeking help.").

[12] Advocates criticized the White House for leveraging anti-trafficking rhetoric to justify immigration enforcement efforts, while "abandon[ing] actual survivors of trafficking when they need immigration relief themselves." *See, e.g.*, Melissa Gira Grant, *The Trump Administration Finally Broke the Anti-Trafficking Movement*, NEW REPUBLIC (Feb. 18, 2020), https://newrepublic.com/article/156579/trump-administration-finally-broke-anti-trafficking-movement [https://perma.cc/92B7-GBNY] ("While the Trump administration uses a sensationalistic, false narrative of trafficking at the southern border to justify anti-immigrant policies—and stoke racist panic among Trump's base about threats to white women—it has abandoned actual survivors of trafficking when they need immigration relief themselves."). As Trump has intensified immigration enforcement efforts, many scholars and activists express alarm that immigrant victims of trafficking were caught in

pointed to rising denial rates for T visas, a specialized form of immigration relief for trafficking victims. They also highlighted new, significant barriers that immigrant victims of trafficking faced when applying for immigration benefits.[13] Martina Vandenberg, founder of the Human Trafficking Legal Center, noted, "We have such a chasm between rhetoric and reality," accusing the Administration of "undermining protections carefully built for trafficking victims over two decades."[14]

The legislative landscape seemed protective. Over two decades ago, Congress recognized the unique challenges faced by immigrant victims of trafficking by passing novel federal anti-trafficking legislation. In the Trafficking Victims Protection Act ("TVPA") of 2000, Congress noted that instead of finding refuge, immigrant victims "are repeatedly punished more harshly than the traffickers themselves" because they find themselves subject to both criminal penalties and harsh immigration enforcement efforts.[15] Legislators, thus, embraced the need to "protect[] rather than punish[]" trafficking victims[16] and established specialized protections, including T visas,[17] U visas,[18] and Continued Presence.[19]

---

the crosshairs, targeted with deportation or rendered more vulnerable to trafficking. *See* Susan Tiefenbrun, *The Saga of Susannah*, *A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2002*, 2002 UTAH L. REV. 107, 114 (2002) [hereinafter Tiefenbrun, *The Saga*] ("[I]mmigration laws that are zealously enforced in the destination countries in an effort to protect victims often have a negative effect on the very victims they seek to protect by requiring their deportation."); Julie Dahlstrom, *Trump's harsh immigration policies are a gift for human traffickers*, HILL (July 12, 2018), https://thehill.com/opinion/civil-rights/396781-trumps-harsh-immigration-policies-are-a-gift-for-human-traffickers [https://perma.cc/AT7S-V8P9] (describing how immigration enforcement efforts under the Trump Administration have rendered immigrant victims more vulnerable).

[13] Advocates observed that many immigrant victims, afraid of deportation and/or reprisals from traffickers, were unable to step forward to cooperate with law enforcement or to apply for important immigration protections. *See* Abigail Adams, *'I Thought I Was Going to Die.' How Donald Trump's Immigration Agenda Set Back the Clock on Fighting Human Trafficking*, TIME MAG. (Oct. 30, 2020), https://time.com/5905437/human-trafficking-trump-administration/ [https://perma.cc/DL35-9Y3Q].

[14] Contrera, *supra* note 11.

[15] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(17), 114 Stat. 1464 [hereinafter TVPA].

[16] *Id.* at § 102(b)(24).

[17] T nonimmigrant status has been called colloquially "T visas." For consistency, this article refers to T nonimmigrant status throughout this article as a "T visa," and U nonimmigrant status for victims of violent crime as a "U visa." For a discussion of the requirements to qualify for T visas, *see infra* Part I.C. This article focuses exclusively on T-1 visas, which are available to victims of a "severe form of trafficking," rather than derivative T visas. Therefore, this article uses T visa to refer to T-1 visas, unless otherwise noted.

[18] For a discussion of the requirements to qualify for U visas, *see infra* Part I.C.

[19] For a discussion about Continued Presence, *see infra* Part I.C.

Since 2000, however, annual T visa approvals for immigrant victims have remained dismally low.[20] Despite a cap of 5,000 available annually, T visa approvals for immigrant victims have never reached over 1,100 annually.[21] Moreover, T visa approval rates declined dramatically in the last five years.[22] For example, approval rates for immigrant victims fell from 71.88% in fiscal year 2015 to 57.21% in 2020.[23] At the same time, processing times for T visas have skyrocketed, as more applicants received requests for additional evidence and denials.[24]

These trends have had a significant impact on immigrant victims.[25] As Martina Vandenberg, Director of the Human Trafficking Legal Center, explained, "Trafficking victims are living in terror."[26] Emelia, an immigrant victim of sex trafficking, applied for a T visa after a decade of silence and fear.[27] U.S. Citizenship and Immigration Services ("USCIS"),

---

[20] *See* USCIS, FORM I-914, APPLICATION FOR T NONIMMIGRANT STATUS BY FISCAL YEAR, QUARTER, AND CASE STATUS: FISCAL YEARS 2008–2020, https://www.uscis.gov/sites/default/files/document/reports/I914t_visastatistics_fy2020_qtr4.pdf [https://perma.cc/49U3-AKK3] [hereinafter USCIS STATISTICS]; USCIS, Form 1-914 Application for T Nonimmigrant Status, Service-wide Receipts, Completions, and Pending, Service-wide Receipts, Approvals, and Denials Fiscal Years: 2002 Through 2013, https://www.uscis.gov/sites/default/files/document/data/I914T-I918_visastatistics_2012-nov.pdf. When referencing approval and denial rates for T visas, this article refers to USCIS data in USCIS STATISTICS, specifically the column entitled "[v]ictims of [t]rafficking," which provides the number of applications approved, denied, and pending. All approval or denial rates reference applications decided during the fiscal year, rather than applications received in a given year. *See id.*

[21] The only fiscal year that T visa approvals for victims of trafficking (not derivative family members) exceeded 1,000 was in 2020. *Îd*.

[22] *Id.*

[23] *Id.* The author has calculated the approval rates in this article as the number of "[v]ictims of [t]rafficking" with "approved" applications divided by the sum of the number of "victims of trafficking with "approved" and "denied" applications.

[24] *See, e.g.*, U.S. DEP'T OF STATE, 2020 TRAFFICKING IN PERSONS REPORT: UNITED STATES 518 (June 16, 2020), https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf [https://perma.cc/3TAH-L288] [hereinafter 2020 TIP REPORT] ("Advocates noted a continuing rise in the number of requests for additional evidence by adjudicators, which tends to increase processing times, and reported increased T visa denials that they believed improperly interpreted relevant statutes and regulations.").

[25] Abigail Abrams, *'I Thought I Was Going to Die.' How Donald Trump's Immigration Agenda Set Back the Clock on Fighting Human Trafficking*, TIME MAG. (Oct. 30, 2020), https://time.com/5905437/human-trafficking-trump-administration/ [https://perma.cc/DL35-9Y3Q] (describing a victim who "because of delays seemingly designed to deter new T visa applications and reduce the total number offered each year…finds herself in a prolonged legal purgatory").

[26] *Id.* (quoting Martina Vandenberg: "The Trump Administration's immigration policies have made foreign trafficking victims' lives more dangerous. Those policies have made it more difficult to escape. And those policies have made it more difficult to obtain relief.").

[27] This case is based on a client represented by the BU Law Immigrants' Rights and Human Trafficking Program. The name has been changed to protect client confidentiality, and the client has consented to the use of her information in this article.

the agency that adjudicates T visa cases, issued a denial notice to her, stating that it "is sensitive to what you have been through and acknowledges the help you have received in relation to your trafficking situation."[28] Nonetheless, USCIS denied Emelia's claim, claiming that her current presence in the United States was unrelated to the trafficking.[29] This finding came despite evidence of significant trauma and the need for ongoing mental health treatment to heal from the trafficking.[30]

Emelia story is not an outlier. During the first three months of 2020 when Emelia's case was decided, USCIS denied 50.00% of all T visa cases it adjudicated.[31] These denials included labor and sex trafficking cases. For example, USCIS also denied the T visa application of a Peruvian immigrant, known only as Jane Doe in federal pleadings.[32] Doe, an immigrant victim of labor trafficking, was recruited as a child to work in the United States, but upon arrival, her employers took her passport, paid her only $100 per month, and made her work long hours with no days off.[33] Doe's T visa was denied, and she was placed in removal proceedings.[34] Desperate to prevent her own deportation, the plaintiff filed a federal lawsuit against USCIS, challenging the agency's actions as "arbitrary and capricious."[35] Mercer Cauley, Doe's attorney, explained, "Basically the government has told her, 'Yes, you are a victim of trafficking, but we're going to deport you anyway.'"[36]

This Article examines why legislative efforts aimed at protection for immigrant victims of human trafficking are failing. Scholars have offered various explanations for low T visa numbers.[37] Some have

---

[28] Please see redacted denial notice (on file with author).
[29] *Id.*
[30] *See id.*
[31] *See* USCIS STATISTICS, *supra* note 21.
[32] Complaint at 6, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020).
[33] Complaint at 11, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020).
[34] Michael Gordon, *Lured to U.S. at 16, she sought visa for trafficking victims. Now she may be deported.*, CHARLOTTE OBSERVER (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://perma.cc/5E39-Y75B].
[35] *Id* at 4.
[36] *Id.*
[37] *See, e.g.*, Sabrina Balgamwalla, *Jobs Looking for People, People Looking for Their Rights: Seeking Relief for Exploited Immigrant Workers in North Dakota*, 91 N.D. L. REV. 483, 494–95 (2015) (describing the challenges that victims face demonstrating they meet the T visa requirements, including that they are a victim of a "severe form of trafficking" and in the United States "on account of" the trafficking, among other requirements); Jennifer Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010) (exposing the tensions and trade-offs between immigration policy choices and anti-trafficking efforts) [hereinafter Chacón, *Tensions*]; Marisa Silenzi Cianciarulo, *The Trafficking and Exploitation Victims Assistance Program: A Proposed Early Response Plan for Victims of International Human Trafficking in the United States*, 38 N.M. L. REV. 373, 376

observed how victims, especially those without legal representation, find it challenging to navigate the burdensome T visa requirements.[38] Others have tied low approval rates to a flawed federal framework that prioritizes prosecution over victim protection.[39] More generally, some have observed how the existing statutory framework allows pervasive myths—including racialized and gendered narratives about "rescue" and "escape"—to shape who is deserving of relief.[40]

(2008) [hereinafter Cianciarulo, *Proposed Early Response Plan*] (pointing to structural challenges in the protection framework and "unrealistic expectations" by law enforcement about what type of protection they can provide to immigrant victims); Dina Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 346 (2007) (arguing that the pronounced role of law enforcement in the T visa process has reduced the effectiveness of immigration protections for victims); Srikantiah, *supra* note 9 (arguing that agency regulations have narrowed T visa availability by focusing on prosecutorial goals of the "iconic victim").

[38] *See* U.S. DEP'T OF JUST. NAT'L INST. OF JUST. & OFF. FOR ACCESS TO JUST. WITH THE NAT'L SCI. FOUND., WHITE HOUSE LEGAL AID INTERAGENCY ROUND TABLE: CIVIL LEGAL AID RESEARCH WORKSHOP 21–22 (2016), https://www.ncjrs.gov/pdffiles1/nij/249776.pdf [https://perma.cc/6R3A-PX6T] (highlighting the challenges faced by victims when accessing legal aid and recommending more research dedicated to *pro bono* representation and outcomes); U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, OFF. FOR VICTIMS OF CRIME, OVC FACT SHEET: THE LEGAL RIGHTS AND NEEDS OF VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES (2015), https://ovc.ncjrs.gov/humantrafficking/Public_Awareness_Folder/Fact_Sheet/HT_Legal_Rights_Needs_fact_sheet-508.pdf [https://perma.cc/RVB5-GMBU] (describing significant unmet legal needs for victims of trafficking); WHITE HOUSE, COORDINATION, COLLABORATION, CAPACITY: THE FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES, 2013–2017 (2018), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/FederalHumanTraffickingStrategicPlan.pdf [https://perma.cc/35VZ-2SB7] ("While human trafficking victims may be eligible for T or U nonimmigrant status, which allows victims to remain and work in the United States and assist law enforcement authorities in the investigation or prosecution of human trafficking cases, many victims continue to face legal constraints challenging their recovery process.").

[39] *See, e.g.*, Balgamwalla, *supra* note 37, at 494 (describing how law enforcement's "gendered portrayals of trafficking" is a barrier for victims of trafficking and failed efforts to identify trafficking victims can result in incarceration or deportation); Cianciarulo, *Proposed Early Response Plan, supra* note 37 at 388 (arguing that the requirement that victims of trafficking cooperate with law enforcement "expos[es] the [human trafficking] victims to the skepticism and enforcement mentality of law enforcement officials [that] has proven antithetical to the goals of the T visa"); Srikantiah, *supra* note 9, at 160 ("On a structural level, agency regulations place the responsibility of identifying trafficking victims and assessing victims' cooperation with law enforcement in the hands of prosecutors and agents responsible for investigating traffickers.").

[40] *See, e.g.*, Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3022–23 (2006) [hereinafter, Chacón, *Misery*] (asserting that the TVPA's "unwillingness to extend protections to 'illegal workers' absent a showing of their 'innocence' embeds into the TVPA the same immigration and labor law policies that have created a haven for

This Article argues that these critiques, while important and correct, do not adequately explain declining T visa approvals. It posits that the actions of administrative actors at USCIS in the "shallow state" have played a formative role in curtailing protections.[41] While much scholarly attention has focused on the "deep state" and public acts of bureaucratic resistance to uphold the rule of law and basic human rights protections,[42] this Article examines a more subtle phenomena: the workings of the often-silent "shallow state."[43] Unlike the deep state, administrative actors in the shallow state leverage their knowledge and experience of the administrative system to engage in innovation that represses rights. This tendency can be more extreme when there is lack of executive oversight or even the tacit acquiescence or approval of the executive to undermine congressional intent and the administration of federal benefits programs.

This article traces how under the former Trump Administration, members of the shallow state enacted diverse, diffuse policies to impede immigrant applicants from accessing T visas.[44] It shows how, for example, USCIS issued a new policy in 2018 to place all denied T visa applicants immediately in removal (i.e., deportation) proceedings.[45] Contrary to over a decade of practice, this policy had an immediate chilling effect, increasing applicant fears of deportation, heightening the stakes, and discouraging immigrant victims from filing new T visa applications.[46] Meanwhile, quickly and with little notice, the agency tightened fee waiver standards, raised fees, and summarily rejected new applications that failed to comply with these new fee standards.[47] Around the same time, an online alert went out to applicants and attorneys announcing that any T visa applications would be quickly and quietly rejected if a single field was left blank.[48]

---

trafficking and migrant exploitation"); Haynes, *supra* note 37, at 346 ("[G]overnment officials appear to subscribe to several myths and imperfect syllogistic reasoning which prevent them from seeing a victim when he or she is standing in front of them.").

[41] See *infra* Part II.

[42] See *infra* Part II.B.

[43] This term was first coined by David Rothkopf in *The Shallow State*. *See* David Rothkopf, *The Shallow State*, FOREIGN POL'Y (Feb. 22, 2017), https://foreignpolicy.com/2017/02/22/the-shallow-state-trump/ [https://perma.cc/2T53-N4CK]. *See infra* Part II for a greater discussion of the "shallow state."

[44] Editorial Board, *Trump's immigration policies are straight out of dystopian fiction*, WASH. POST (Feb. 21, 2020), https://www.washingtonpost.com/opinions/trumps-immigration-policies-are-straight-out-of-dystopian-fiction/2020/02/20/4c335dfa-5361-11ea-b119-4faabac6674f_story.html [https://perma.cc/D27F-G5HL] [hereinafter *Dystopian Fiction*] ("Other moves, just as or more effective, are bureaucratic booby traps laid in arcane procedural byways.").

[45] *See infra* Part II.C.1 for a detailed discussion of this policy. This policy also applied to applicants for U visas who were victims of crime.

[46] *Id.*

[47] *See infra* Part II.C.2 regarding the fee waiver and "no spaces" policy.

[48] *See* Catherine Rampell, *This latest trick from the Trump administration is one of the most despicable yet*, WASH. POST (Feb. 13, 2020, 4:24 PM),

USCIS simultaneously began to issue more requests for additional evidence and denials to T visa applicants.[49] This trend came despite the fact that trafficking victims often lacked corroborative evidence and existing regulations required only that immigrant victims present "credible evidence" to meet certain requirements.[50] In the interim, processing times for T visas ballooned from 7.9 months in 2016 to 2.4 years in 2020.[51] These delays meant that immigrant victims had to wait, without legal status, for more than two years—some only to find their applications denied.

This article shows argues that these disparate policies worked in concert to create "minefields"[52] in the T visa application process and to frustrate the purpose of federal anti-trafficking law.[53] It acknowledges that these policies impacted other types of immigration applications beyond the T visa, but it examines the T visa context to show the devastating impact of these policies one particular population—immigrant victims of trafficking.

Part I examines the evolution of U.S. federal law regarding human trafficking and immigrant victims. It explores how the Congress first conceptualized criminal and immigration enforcement responses. Part I shows how, prior to the TVPA, immigrant victims remained unprotected and subject to harsh immigration measures. It then describes contemporary congressional efforts to remedy this problem by defining new trafficking

---

https://www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/Q8AJ-L2GH] ("The policy change, at first affecting just asylum applicants, was announced without fanfare on the USCIS website sometime in the fall.").

[49] *See* 2020 TIP REPORT, *supra* note 24, at 518.

[50] *See* 8 CFR § 214.11(d)(2)(i) (2020) ("An application for T nonimmigrant status must include… [a]ny credible evidence that the applicant would like USCIS to consider supporting any of the eligibility requirements set out in paragraphs (f), (g), (h) and (i) of this section.").

[51] Abrams, *supra* note 25.

[52] *Dystopian Fiction*, *supra* note 44 (describing administrative policies to make government forms "minefields, intentionally designed to entrap the unsuspecting"); Editorial Board, *This latest trick from the Trump administration is one of the most despicable yet*, WASH. POST (Feb. 13, 2020), https://www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/7BAD-A667].

[53] An October 2020 report to members of Congress called attention to the "underutilization" of the T visa program. CONGRESSIONAL RSCH. SERV., IMMIGRATION RELIEF FOR VICTIMS OF TRAFFICKING 12 (Oct. 18, 2020), https://crsreports.congress.gov/product/pdf/R/R46584 [https://perma.cc/3SPV-ZE6Q] [hereinafter IMMIGRATION RELIEF FOR VICTIMS] (documenting the failure of T visa approvals to reach the cap of 5,000 and encouraging policymakers to "look at factors that potentially contribute to what some observers consider to be underutilization of…[T nonimmigrant] status").

crimes and by establishing more robust immigration protections. Part I then explores how these specialized immigration benefits for trafficking victims have remained insufficient.

Part II introduces the concept of the shallow state. It examines how administrative actors, particularly at USCIS, have significantly curtailed statutory protections for immigrant victims. It catalogues the tactics employed by administrative actors in the T visa context and shows how low-level bureaucratic officials have transformed outcomes for immigrant victims. It also examines how plaintiffs have effectively challenged these policies through federal litigation.

Part III then provides recommendations to guide future efforts to improve adjudications of T visa applications and address harms caused by the shallow state under the former Trump Administration. This Part argues that existing immigration protections can still function well to protect victims, if there is sufficient agency and judicial review, oversight, training, and accountability.

I. CONTEMPORARY SOLUTIONS FOR IMMIGRANT VICTIMS

A. Early Tools to Address Human Trafficking

The Congress has long been concerned with human trafficking involving immigrant victims. Early congressional action, however, focused on criminal and immigration enforcement, rather than protection efforts.[54] In the early twentieth century, Congress, motivated in part by nativist reaction to rising immigration, sought to levy new criminal penalties against perpetrators of sex trafficking.[55] Instead of a protection framework for immigrant victims, Congress engaged in racialized and gendered immigration enforcement efforts.[56] These measures often had the effect of penalizing and excluding immigrants, and exposed the need for a broad protection framework, which Congress would not enact until 2000.[57]

---

[54] *See generally* Ann Wagner & Rachel Wagley McCann, *Prostitutes of Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 28–45 (2017) (describing the historical evolution of laws related to sex trafficking).
[55] *See id.*
[56] *See, e.g.*, Chacón, *Misery*, *supra* note 40, at 2980-81 (2006) ("As before, current anti-trafficking efforts are characterized by: the presumptive criminality of migrants; a willingness to sacrifice the protection of migrants in the furtherance of criminal prosecutions; a conflation of trafficking and prostitution; a racially biased conception of trafficking; and a dogged focus on interdiction efforts over internal enforcement and outreach.").
[57] *See infra* Part II.A.

DRAFT

In the early twentieth century, Congress took aim at sex trafficking in the guise of "white slavery."[58] Activists and politicians often drew racialized, sensationalized portraits of the "white slave trade."[59] As Congress, for example, focused on the plight of white, European women, kidnapped or forced into the sex trade, non-white immigrant women were targeted with harsh immigration measures.[60] For example, at the time, Congress largely viewed Chinese female immigrants as deviant and thus constructed regulatory and enforcement schemes to limit Chinese immigration into the United States.[61] In fact, the very first federal

---

[58] *See, e.g.*, Tiefenbrun, *The Saga*, *supra* note 13, at 131 (describing how the First Congress of the International Abolitionist Federation generated awareness of white slavery in 1877).

[59] The term "white slave traffic," is a heavily racialized term, focusing on the trafficking of White, predominantly Eastern European women, as distinguished from African slavery. *See, e.g.*, Jean Allain, *White Slave Traffic in International Law*, 1 J. TRAFFICKING HUM. EXPLOITATION 1, 6 (Feb. 1, 2017) (examining the international origins of the fight against "white slave traffic" at the 1902 International Conference on the White Slave Traffic). Historians have pointed to early criminal cases in the twentieth century of "white slavery" as powerful proof of the existence of white slavery. *See, e.g.*, RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA: 1900–1918 (1982). However, some scholars have argued that the concept of "white slavery" was exaggerated and mobilized instrumentally by early reformers to address a range of social issues. *See, e.g.*, BRIAN DONOVAN, WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM, 1887–1917 16 (2006) (examining how "[t]he white slavery genre provided a touchstone for a new set of racial and gender projects"); BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 140, 174 (1987) (arguing that "white slavery" was a rhetorical manifestation of concerns with a range of social issues, including economic inequality, "local government and police corruption from commerce," "the spread of venereal disease," and emerging views about the evolving sexuality of women).

[60] *See, e.g.,* Mara Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917*, 35 J. OF SOC. HISTORY 5, 17 (2001) (describing how at the height of the white slavery "scare," reformers "fought for a series of white slave traffic acts," including the Mann Act.); Chacón, *Misery*, *supra* note 40, at 3012 (outlining early twentieth century efforts by Congress that were "at base, anti-immigrant measures dressed in a cloak of morality" and noting that the Page Act, in particular, was "designed as a means of excluding Chinese immigration" using an "apparent moral agenda"); Mara Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917*, 35 J. OF SOC. HISTORY 5, 17 (2001) ("[S]cholars have emphasized the racialized cast of the white slavery narratives, even as they have discounted the white slavery scare as an almost Freudian manifestation of middle-class fears about urbanization, immigration, and women's increased mobility.").

[61] Early census efforts showed that a large percentage of Chinese women in the United States were involved in commercial sex, but scholars have critiqued such data. *Compare* Abrams, *supra* note 25, at 653 ("Census reports indicate that by 1870 there were upward of two thousand Chinese women living in San Francisco, and that a majority-somewhere in the neighborhood of seventy percent-were prostitutes.") with YONG CHEN, CHINESE SAN FRANCISCO, 1850–1943: A TRANS-PACIFIC COMMUNITY 75–87 (2000) (arguing that census takers failed to count individuals not involved in commercial sex); BENSON TONG, UNSUBMISSIVE WOMEN: CHINESE PROSTITUTES IN NINETEENTH-

immigration law, the Page Act, targeted certain Asian immigrants with exclusion from the United States for suspected involvement in commercial sex.[62]

Immigration law in the early twentieth century evolved to embody even more restrictive tendencies.[63] Indeed, Congress passed immigration measures in 1903 and 1907 targeting those involved in commercial sex.[64] These efforts were not uncontroversial.[65] At the time, even the Commissioner-General of Immigration opined about how, "[g]enerally virtuous when she comes to this country," the immigrant victim is "ruined and exploited because there is no adequate protection and assistance."[66] Instead of calling for protective measures, however, he advocated for more "drastic" immigration controls.[67]

CENTURY SAN FRANCISCO 15, 57 (1994) (providing countervailing estimates of Chinese prostitution).

[62] Act Supplementary to the Acts in Relation to Immigration (Page Law), ch. 141, 18 Stat. 477 (1875) (repealed 1974). *See* Abrams, *supra* note 25, at 641; Pooja R. Dadhania, *Deporting Undesirable Women,* 54 U.C. IRVINE L. REV. 53*,* 57 (2018). This article uses the term "commercial sex" to refer to "any sex act, on account of which anything of value is given to or received by any person," including both tangible and intangible items. *See* 18 U.S.C. § 1591(e)(3).

[63] Congress passed "An act to regulate the immigration of aliens into the United States" on March 3, 1903. Immigration Act of 1903, Pub. L. No. 57-162, § 1012, 32 Stat. 1213 (criminalizing importing individuals involved in commercial sex). On February 20, 1907, Congress revised the law in "An act to regulate the immigration of aliens into the United States," banning noncitizens from engaging in commercial sex within three years of entry. Immigration Act of 1907, Pub. L. No. 59-96, § 1134, 34 Stat. 898 (criminalizing importing individuals for commercial sex).

[64] *Id*.

[65] Dr. Maude Miner Hadden, for example, pointed out that immigrant women were "more easily exploited because of ignorance of American customs, language, and agencies to which they might turn for help. . . . They are cowed by threats of deportation [made by procurers]." KELLI ANN MCCOY, CLAIMING VICTIMS : THE MANN ACT, GENDER, AND CLASS IN THE AMERICAN WEST, 1910–1930S 40 (2010), https://escholarship.org/content/qt8f60q9gt/qt8f60q9gt.pdf [https://perma.cc/AQE5-FB7R] (citing MAUDE MINER HADDEN, QUEST FOR PEACE: PERSONAL AND POLITICAL (1968)). Jane Addams, another reformer, simply called for "a less punitive policy that protected immigrants from exploitation." *Id.* (citing JANE ADDAMS, NEW CONSCIENCE AND AN ANCIENT EVIL, 26, 35 (1912)).

[66] THE VICE COMM'N OF CHICAGO, THE SOCIAL EVIL IN CHICAGO 40 (4th ed. 1912). *See also* U.S. IMMIGRATION COMM'N, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. Doc. No. 61-747, at 342 (3rd Sess. 1910) (describing how the immigrant woman "is ignorant of the language of the country, knows nothing beyond a few blocks of the city where she lives, has usually no money, and no knowledge of the rescue homes and institutes which might help her").

[67] Wagner & McCann, *supra* note 54, at 724*.* For example, "[t]he Commissioner argued that existing immigration laws were 'not extensive and drastic enough in terms to effectively prevent further additions to the already large numbers of alien prostitutes and procurers in this country' and did not sufficiently regulate 'the free passage to and fro of those engaged in [trafficking].'" *See also* COMM'R GEN. IMMIGR., S. DOC. NO. 61-214, pt. 2, at 14 (3d Sess. 1910).

Shortly thereafter, Congress passed the White Slave Traffic Act of 1910, commonly known as the Mann Act.[68] The Mann Act created new federal criminal jurisdiction over commercial sex but failed to establish more robust protections for victims.[69] This move too faced some opposition. Kate Waller Barrett, a Special Agent of the United States Immigration Service, was convinced that immigrant victims needed protection from deportation.[70] She remarked that "[a] woman accused of prostitution must not be flung out of the country upon flimsy evidence, without due process of law."[71]

Throughout the twenty-first century, Congress remained concerned about labor trafficking practices "akin to slavery," including those involving immigrant workers.[72] The Thirteenth Amendment had prohibited slavery, involuntary servitude, and related practices, and many scholars argued that it embodied a broad guarantee of freedom beyond African slavery.[73] Nevertheless, the Thirteenth Amendment failed to embody any affirmative rights or protections for immigrant workers, such as freedom from deportation.[74]

---

[68] White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

[69] *Id.* Indeed, some immigrants deemed "helpful" in Mann Act cases at prosecution were eventually deported. *See* McCoy, *supra* note 65, at 151.

[70] *See* Egal Feldman, *Prostitution, the Alien Woman and the Progressive Imagination, 1910–1915*, 19 AM. Q. 199, 200 (1967).

[71] *Id.*

[72] *See, e.g.,* Maria Ontiveros, *Immigrants Rights and the Thirteenth Amendment*, 16 NEW LABOR FORUM 26, 27 (2007) ("[W]hen declaring slavery and involuntary servitude unconstitutional, the Amendment sought to affirmatively protect free labor by establishing a definition of free labor more expansive than the absence of chattel slavery.").

[73] *See* U.S. CONST. amend. XIII; *see also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 8 (1995) ("From the opening gavel, both sides in the legislative debates based their arguments on a common understanding that the Thirteenth Amendment would protect an expansive definition of freedom."). Lea VanderVelde through historiography has examined how the Amendment provided "charter for labor freedom," which sought to affirmatively protect the rights of labor "autonomy and independence." Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) [hereinafter VanderVelde, *Labor Vision*] (arguing that the Congressional debate embodied a "free labor" vision, and thus, the Amendment sought to improve the "cause of all working people," not only those subject to African slavery). Some scholars, however, have critiqued VanderVelde's expansive vision, calling this historiography "deeply flawed" and "significantly overstating" of the reach of the Thirteenth Amendment. *See, e.g.*, Pamela Brandwein, *The "Labor Vision" of the Thirteenth Amendment, Revisited*, 15 GEO. J.L. & PUB. POL'Y 13, 17 (2017) ("Multiple arrays of evidence support the conclusion that VanderVelde mistakes free labor for a discourse of class leveling and thus mistakes the Thirteenth Amendment as a charter for labor freedom.").

[74] *See, e.g.*, James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude*," 119 YALE L. J. 1474, 1478 (2010) ("[I]t prohibits two conditions—slavery and involuntary servitude—without specifying what rights are necessary to negate those conditions."). The Thirteenth Amendment, instead,

[DRAFT – *Please do not cite or circulate*]

In 1940, Congress passed enabling statutes pursuant to the Thirteenth Amendment to criminalize peonage, enticement into slavery, and sale into involuntary servitude.[75] These statutes would remain the primary criminal enforcement tools aimed at labor trafficking for decades. However, immigrant victims, even those who cooperated fully in federal prosecutions, often faced detention, deportation, and an uncertain future in the United States.[76]

B. Contemporary Efforts to Address Trafficking

In the 1990s, several high profile cases showcased the brutality of human trafficking and the imperfect tools available to shield immigrant victims from deportation.[77] In 1995, for example, government officials raided a complex where they found seventy-two Thai nationals working in slave-like conditions in residential duplexes in El Monte, California.[78] Recruiters forced victims to work while holding their passports and money.[79] The case was followed by a highly publicized labor trafficking case in 1997 in Jackson Heights, New York, involving fifty-seven deaf immigrants.[80] Renato Paoletti Lemus, the alleged boss of the operation, and his family members recruited Mexican immigrants through "promises of a sweeter life" in the United States.[81] Once the victims arrived, Lemus and his associates took their documents, forced them to work, and subjected them to emotional, physical, and sexual abuse.[82]

---

relied on Congress to "enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

[75] 18 U.S.C. §§ 1581, 1583–84 (2018).

[76] *See, e.g.*, KEVIN BALES & STEVEN LIZE, TRAFFICKING IN PERSONS IN THE UNITED STATES 70 (Nat'l Inst. Just., 2005), https://www.ncjrs.gov/pdffiles1/nij/grants/211980.pdf [https://perma.cc/6WX2-MMER] [hereinafter TRAFFICKING IN THE U.S.] (describing the use of detention and fear of removal to inspire immigrant victims to cooperate).

[77] *See* ALICIA PETERS, RESPONDING TO HUMAN TRAFFICKING: SEX, GENDER, AND CULTURE IN THE LAW 57–58 (2015).

[78] *Id.* at 57.

[79] Erin Blakemore, *20th-Century Slavery was Hiding in Plain Sight,* SMITHSONIAN MAG., July 31, 2020, 10:00 AM, https://www.smithsonianmag.com/smithsonian-institution/20th-century-slavery-california-sweatshop-was-hiding-plain-sight-180975441/ [https://perma.cc/8E3M-Y5WB].

[80] PETERS, *supra* note 77, at 1–2; Deborah Sontag, *Dozens of Deaf Immigrants Discovered in Forced Labor*, N.Y. TIMES, July 20, 1997 (§ 1), at 1 https://www.nytimes.com/1997/07/20/nyregion/dozens-of-deaf-immigrants-discovered-in-forced-labor.html#:~:text=Four%20deaf%20and%20mute%20Mexicans,bunk%20beds%2C%20mattresses%20and%20sleeping [https://perma.cc/U9AX-6JWN].

[81] KEVIN BALES, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 124 (2009).

[82] *See, e.g.,* Joseph Fried, *2 Sentenced in Mexican Peddling Ring*, N.Y. TIMES at B3 (May 8, 1998), https://www.nytimes.com/1998/05/08/nyregion/2-sentenced-in-mexican-peddling-ring.html [https://perma.cc/RVY9-HKBG]; BALES, *supra* note 81, at 113.

Sex trafficking, too, was in the headlines.[83] In 1998, the *New York Times* publicized a fifty-two-count indictment against sixteen people, six of whom were from the same Cadena family, for "enslav[ing]" at least twenty women, some as young as fourteen, for over a year.[84] Immigrant women were recruited from Mexico to work in "landscaping, health care, housecleaning and restaurants."[85] Yet, upon arrival in the United States, the Cadenas forced their victims to have sex with men in agricultural migrant camps to repay their smuggling debt.[86] Those who tried to escape were beaten and sexually abused.[87]

These cases publicly highlighted the deficiencies of existing protection measures for immigrant victims.[88] In the El Monte trafficking cases, immigration officials initially detained and held victims in Immigration and Naturalization Service ("INS") custody.[89] Although eventually released after public protests, immigrant victims faced a long, uncertain battle against deportation.[90] One victim speaking at a criminal trafficking sentencing hearing, noted: "We were slaves . . . and we have nothing to show for it. I am very angry."[91]

These practices were, unfortunately, widespread.[92] A report, entitled "International Trafficking in Women to the United States," drew national attention to continued protection challenges for immigrant victims.[93] The report unearthed how victims were often detained and

---

[83] Mireya Navarro, *Group Forced Illegal Aliens into Prostitution*, *U.S. says*, N. Y. TIMES, Apr. 24, 1998, at A10, https://www.nytimes.com/1998/04/24/us/group-forced-illegal-aliens-into-prostitution-us-says.html [https://perma.cc/NS2Z-9JWR].
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] AMY O'NEILL RICHARD, CTR. FOR THE STUDY OF INTEL., INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 41–44 (1999), https://www.cia.gov/static/9dc85527075bc84f9e1f2eef0e7a0915/trafficking.pdf [https://perma.cc/U49S-MTJ7]; *see also* PETERS, *supra* note 77, at 2 (describing how in the Paoletti case, for example, "[p]ublic sympathy for the victim and the fact that many New Yorkers had encountered these very individuals in their daily commutes promoted the city to offer an enormous amount of public resources to the victims).
[89] Blakemore, *supra* note 79. In the Homeland Security Act of 2002, Congress discontinued the INS and created three agencies under a newly created Department of Homeland Security ("DHS"), including USCIS, Customs and Border Protection, and Immigration and Customs Enforcement. *See* OVERVIEW OF INS HISTORY, USCIS HISTORY OFFICE AND LIBRARY (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf.
[90] Erik Loomis, *Historian Erik Loomis on the El Monte Sweatshop Raid*, UNITE ALL WORKERS FOR DEMOCRACY, https://uawd.org/historian-erik-loomis-on-the-el-monte-sweatshop-raid/ [https://perma.cc/5JM2-2FRD].
[91] BALES, *supra* note 81, at 124.
[92] *See* RICHARD, *supra* note 88, at 35.
[93] *Id.*

placed in jails if they failed to voluntarily depart.[94] It also shed light on troubling practices of INS officials who—apparently uncomfortable with "playing favorites"—often conflated victims with "other undocumented immigrants," subjecting both groups to harsh immigration consequences.[95]

Law enforcement continued to rely heavily on an imperfect array of existing immigration benefits, including deferred action,[96] parole,[97] and S visas,[98] to protect against deportation. These ill-fitting remedies were often insufficient and difficult to navigate, leaving immigrant victims at the mercy of unsympathetic governmental officials.[99] As a result, victims were left in limbo, and some even faced deportation.[100]

For these reasons, many scholars and advocates called for the creation of a new, specialized form of immigration relief for trafficking victims, known as the T visa. This benefit, they argued, would allow law enforcement to have the assistance of "material witnesses" while also granting victims a "resting period" during which they could receive assistance without fear of deportation.[101] Well-known immigration advocates, such as Arthur Helton and Eliana Jacobs, proclaimed the great potential of the T visa.[102] Rather than envisioning the T visa as "humanitarian relief for those who have been abused," Helton and Jacobs

---

[94] *Id.* at 39 ("Currently, they say that many trafficking victims are placed in INS detention facilities and then deported. Those few trafficking victims, who are designated material witnesses in federal criminal cases brought against the traffickers, may be placed in the US marshals' custody and held in local jails.").

[95] *Id.* at 36.

[96] Deferred action provides access to a work permit and the deferral of removal, but it is not an immigration status. *Frequently Asked Questions*, USCIS (Feb. 4, 2021), https://www.uscis.gov/humanitarian/humanitarian-parole/frequently-asked-questions [https://perma.cc/LZX7-EZ6J] ("Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion.").

[97] Parole allowed victims to be admitted or enter for "urgent humanitarian reasons" and obtain work authorization, but it does not open up a pathway to permanent residency or citizenship. Immigration and Nationality Act, Pub. L. No. 116-252, § 212(d)(5)(A) (codified as amended at 8 U.S.C. § 1182).

[98] The S visa, colloquially referred to as the "snitch" visa, was established by Congress in 1994 pursuant to the Violent Crime and Law Enforcement Act of 1994. INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S) (1994). Congress provided 200 S visas per year to two categories of noncitizens: (1) those who provided critical information about a criminal enterprise or organization; and (2) those who possess information about terrorist activity. *See* RICHARD, *supra* note 88, at 41; s*ee also* Douglas Kash, *Rewarding Confidential Informants: Cashing in on Terrorism and Narcotics Trafficking*, 34 CASE W. RES. J. INT'L L. 231, 235 (2002).

[99] *See* RICHARD, *supra* note 88, at 39.

[100] *See id*. at 40–41 ("Due to the existing framework, trafficking victims often faced deportation, even before their cases were heard. Additionally, if victims were unable to receive a S visa, they faced deportation, and all victims experienced long waits throughout the entire process.").

[101] *See* RICHARD, *supra* note 88, at 42.

[102] *See* Arthur C. Helton & Eliana Jacobs, *Combating Human Smuggling by Enlisting the Victims*, 23 IN DEFENSE OF THE ALIEN 127 (2000).

noted that "[a] more powerful rationale would be to view the grant of immigration status as an incentive to enlist the victims in identifying and prosecuting traffickers."[103] The T visa, they argued, would be "a powerful new tool . . . made available to law enforcers in their efforts to curb clandestine trafficking networks."[104]

C. Federal Legislation to Protect Immigrant Victims

In 2000, Congress passed the Trafficking Victims Protection Act ("TVPA"), the first comprehensive federal human trafficking law.[105] Congress remained largely—although not exclusively—focused on "international human trafficking," involving immigrant victims.[106] The legislation took note that "[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders."[107] Similarly, Congress recognized trafficking as a "transnational crime with national implications" and acknowledged that "[t]o deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense."[108] The TVPA came just days after the United Nations General Assembly approved the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Trafficking Protocol").[109]

In the TVPA, Congress utilized a three-pronged approach, aimed at protection, prevention, and prosecution of trafficking both abroad and domestically.[110] Congress articulated new federal trafficking crimes and increased criminal penalties for a wide range of trafficking-related conduct.[111] In addition, legislators outlined new protections for immigrant

---

[103] *Id.*
[104] *Id.*
[105] *See* TVPA, Pub. L. No. 106-386, 114 Stat. 1464.
[106] *See* TVPA § 102(a); ANTHONY M. DESTEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 32–41 (2007) (examining how Congress was primarily concerned with immigrants trafficked into the United States in 2000 when passing federal anti-trafficking law).
[107] TVPA § 102(b)(1).
[108] H.R. REP. NO. 939, pt. 24 (2000).
[109] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].
[110] *See, e.g.*, Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 62 (2001) (examining the TVPA's three-tier approach addressing prevention, protection, and prosecution); Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 CARDOZO J.L. & GENDER 855, 876–77 (2006).
[111] Whereas sex trafficking cases had been previously charged often under the Mann Act or involuntary servitude statutes, the TVPA established the new federal sex trafficking crime to address commercial sex induced through force, fraud or coercion, unless involving a minor under eighteen years of age. *See* 18 U.S.C. § 1591 (2018). In addition,

victims. In particular, the TVPA established T visas for victims of trafficking, U visas for victims of violent crime, and "Continued Presence"[112] for victims of trafficking who were witnesses in a potential criminal trafficking investigation.[113] The legislation was bipartisan, and the immigration remedies thus embodied a dual purpose: to protect immigrant victims and to encourage victim cooperation with law enforcement.[114]

T Visas. Congress established T visas for victims of a "severe form of trafficking in persons."[115] The statute defined a "severe form of trafficking in persons" as distinct from federal trafficking crimes, to include both sex and labor trafficking.[116] A "severe form of trafficking in persons" meant:

- the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained fifteen years of age;[117] (or)
- 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.[118]

The definition, thus, was expansive, to include brazen acts of physical violence as well as more subtle forms of coercion, like deportation

---

responding to the Supreme Court's decision in *United States v. Kozminski*, Congress created the new crime of forced labor to address "labor or services" involving tactics of psychological coercion. *See id.* § 1589.

[112] Continued Presence is a form of deferred action that provides victims of a "severe form of trafficking in persons" who assist in a potential trafficking investigation. *See* 22 U.S.C. § 7105(c)(3)(A). It provides access to employment authorization and decreased prioritization for removal. CENTER FOR COUNTERING HUMAN TRAFFICKING, CONTINUED PRESENCE, https://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf (last visited: 06/04/2021).

[113] *See* TVPA, Pub. L. No. 106-386, §§ 107(c)–(e), 1513(c) 114 Stat. 1464, 1474, 1533 (2000) (codified in scattered sections of U.S.C.).

[114] *Id.* § 108(b)(2), 22 U.S.C. § 7106(b)(2) ("Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked").

[115] *See* INA § 101(a)(15)(T).

[116] *Id.*

[117] *See* 22 U.S.C. §§ 7102(11)–(12).

[118] *See* 22 U.S.C. § 7102(8).

threats.[119] It encompassed a wide range of exploitative practices across industries, including restaurants, agriculture, and domestic work.[120]

To qualify for a T visa, immigrant victims of a "severe form of trafficking" also had to meet a variety of other requirements.[121] They must also: (1) be physically present in the United States or territories "on account of" the trafficking; (2) have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking (unless under 15 years of age); (3) suffer extreme hardship involving unusual and severe harm upon removal; and (4) be admissible.[122] These requirements considerably narrowed the scope of who qualified. For example, in order to comply with a reasonable request from law enforcement, adult victims must report to law enforcement and request a special victim certification on Form I-914, Supplement B ("I-914B").[123] Yet, understandably, many victims, due to trauma, stigma, or fear of reprisals from the perpetrator, failed to report to law enforcement.[124] Also, law enforcement often lacked the training necessary to identify trafficking and refused to issue a signed I-914B.[125] Thus, victims often still faced an uphill battle to qualify for relief.

Despite these challenges, the benefits of the T visa were immense. Five-thousand T visas were available annually to victims and, when the

---

[119] *See* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 438 (2011) ("The TVPA supports a broad vision of coercion. It recognizes that in addition to physical force, psychological abuse and nonviolent coercion create an environment of fear and intimidation that may prevent a worker from leaving an exploitive work situation.").

[120] *See, e.g.*, TVPA at preamble ("Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models.").

[121] *See* INA § 101(a)(15)(T).

[122] TVPA §§ 107(e)(1), 107(e)(3).

[123] INA § 107(e)(1)(C)(i)(III), 114 Stat. 1464 at 1478; 8 C.F.R. § 214.11(a). While the I-914B was not required, it served as primary evidence of the victim's cooperation for many years. *See* 8 C.F.R. § 214.11(d)(3). The 2016 T visa regulations eliminated the distinction between secondary and primary evidence and provided that all evidence, including the victim's personal statement, should carry the same weight. Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg. 92299 (Dec. 19, 2016), https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29900.pdf [https://perma.cc/GV7X-HWVB]. In later reauthorizations, Congress clarified that applicants who were victims when they were under 18 and those who met a limited trauma exception need not respond to a reasonable request for assistance with law enforcement to qualify. *See supra* note 122.

[124] *See, e.g.,* Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims*, 7 U. Md. L.J. Race, Religion, Gender & Class 23, 25 n.9 (2007) (noting how the law enforcement requirement is "a giant task when one knows that law enforcement can deport").

[125] See, e.g., Haynes, *supra* note 37, at 21 (describing how lack of training for those in the field contributes to reduced identification of victims).

program began, processing times were only six months.[126] T visa applicants were eligible work authorization.[127] They could petition for certain family members and had an eventual pathway to citizenship.[128] T visa recipients also could receive the same public benefits as refugees, including specialized case management and vocational assistance.[129] These federal benefits served as an essential lifeline for many victims, who otherwise lacked access to basic necessities necessary for survival.

U Visas. In the TVPA, Congress also established U visas for victims of certain violent crimes, including human trafficking.[130] Like the T visas, immigrant victims not only had to be victims of certain qualifying crimes but also had to meet other requirements to qualify.[131] In particular, applicants must show that: (1) they were victims of a qualifying crime under state or federal law; (2) the crime violated U.S. law or occurred in the United States; (3) the victims suffered a substantial injury related to the crime; (4) they had information about the crime; (5) they were helpful in the investigation or prosecution of the crime;[132] and (6) they were admissible in the United States.[133] Qualifying crimes included a range of violent crimes, including (but not limited to) trafficking, sexual exploitation, involuntary servitude, the slave trade, and prostitution.[134]

10,000 U visas were available annually, but the cap was regularly reached.[135] As a result, U visa applicants often waited seven to ten years for a visa to become available, as opposed to one or two years in the T visa context.[136] U visa recipients, like T visa recipients, qualified for work

---

[126] *See, e.g.,* Adams, *supra* note 13 (Quoting Jean Bruggeman, Executive Director of Freedom Network USA, as saying: "Before we had six to 12 months to wait, but it was a waiting period that was tinged with hope").

[127] INA § 214.11(c)(1), (d)(11); 8 C.F.R. § 245.23(a).

[128] TVPA § 105(e)(1); 107(e). Victims are eligible to petition to reunify in the United States with certain family members, including spouses and children under 21 for adult victims and even certain siblings and parents for children applicants. *See* INA § 101(a)(15)(T)(ii).

[129] 22 U.S.C. § 7105(b)(1)(E)(i)(II)(aa) ("Federal agencies shall expand benefits and services to victims of severe forms of trafficking in persons in the United States, and aliens classified as a nonimmigrant under section 1101(a)(15)(T)(ii) of title 8, without regard to the immigration status of such victims.").

[130] *See id.* § 101(a)(15)(U)(iii).

[131] *See id.* § 101(a)(15)(U)(i).

[132] As in the T visa context, Congress required applicants to report the crime and assist in the investigation and/or prosecution of the crime. *Id.* § 101(a)(15)(U)(i)(III). However, unlike the T visa context, the applicant *must* receive U nonimmigrant status certification, without which they simply could not qualify. *See* 8 C.F.R. § 214.14(c)(2)(i).

[133] *Id.*

[134] *Id.*

[135] *Id.* § 214.14(d); Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J. OF LAW AND FEM. 273, 277 (2018).

[136] *See* HUM. RTS. INITIATIVE N. TEX. & SMU JUDGE ELMO B. HUNTER LEGAL CTR., *Flawed Design: How the U Visa is Revictimizing the People It Was Created to Help* (Dec. 1, 2020),

authorization and had an eventual pathway to citizenship.[137] However, unlike the T visa, the U visa recipients were not eligible to expansive federal public benefits.[138] Thus, the T visa remained often the best option for trafficking survivors who could meet the federal definition of trafficking.

Continued Presence. Congress also established a new, temporary pathway to work authorization for immigrant victims whom law enforcement identified as potential witnesses in a criminal trafficking investigation.[139] Continued Presence was a stopgap measure to allow immigrant victims to have quick access to protection while they decided whether to pursue a T visa and/or waited for their application to be processed.[140] Unlike the T visa, victims could not apply on their own for Continued Presence.[141] Rather, federal law enforcement had to effectively sponsor the application.[142] Once eligible, victims could receive deferred action,[143] a work permit, and access to federal public benefits for two years.[144] Thus, it often provided an important measure to prevent T visa applicants from being in limbo, unable to work and subject to deportation, while their T visa applications were pending.

D. A Flawed Federal Framework

The TVPA represented a significant step forward for immigrant victims, but in the first ten years of the program, significant barriers remained.[145] Fewer than 300 T visas were issued in the initial years of the

---

https://storymaps.arcgis.com/stories/629a772b95e14b3aa05941ae309909f0 [https://perma.cc/T3YP-4ZJ7] ("Because of the cap, people filing a U visa petition today can expect to wait 7 to 10 years for approval."); *Check Case Processing Times*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ [https://egov.uscis.gov/processing-times/] (last visited Aug. 28, 2020).

[137] *Id.* § 214.14(c)(7).

[138] *See* 22 U.S.C. § 7105(b).

[139] *See* 22 U.S.C. § 7105(c)(3)(A). Continued Presence was available to any individual who was "a victim of a severe form of trafficking and a potential witness to such trafficking." *Id.*

[140] Bo Cooper, *A New Approach To Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L. J. 1041, 1052 (2002).

[141] *See* 22 U.S.C. § 7105(c)(3)(A)(i).

[142] *Id.*

[143] USCIS defines deferred action as "a discretionary determination to defer a deportation of an individual as an act of prosecutorial discretion." USCIS, Frequently Asked Questions (2021), https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions (last visited: 05/11/2021).

[144] CONTINUED PRESENCE, USCIS, https://www.dhs.gov/sites/default/files/publications/blue-campaign/19_1028_bc-pamphlet-continued-presence.pdf [PERMA] (last accessed: Mar. 13, 2021).

[145] *See* INA §§ 101(a)(15)(T) & (U)(iii).

program.[146] Similarly, Continued Presence approvals remained low.[147] And while U visa grants skyrocketed, relatively few were issued to immigrant victims of trafficking.[148] Congress responded by easing obstacles within the T visa program for immigrant victims.[149] In legislative reauthorizations in 2003 and 2008, Congress made a further exception for children from fifteen to eighteen years of age from the requirement to respond to a reasonable request from law enforcement.[150] Congress also added a new trauma exception to this requirement, available to any victim who "is unable to cooperate with such a request due to physical or psychological trauma."[151] Moreover, Congress extended Continued Presence to two years and allowed noncitizens to qualify if they filed a federal civil lawsuit against their perpetrator.[152] Further, USCIS issued regulations to further ease T visa requirements and encourage more victims to apply.[153]

---

[146] *See* CHRISTAL MOREHOUSE, COMBATING HUMAN TRAFFICKING POLICY GAPS AND HIDDEN POLITICAL AGENDAS IN THE UNITED STATES AND GERMANY 117 (2009) (stating that in 2002, the first year where data was available, and 172 victims were granted T visas, 453 applications were submitted, and thirteen were denied). U visa approvals, or U interim relief as it was called until regulations were issued in 2009, were higher, but it is unknown how many, if any, were provided to trafficking victims. *See also* chart with compiled statistics from Trafficking in Persons Reports issued annually by the U.S. Department of State (on file with author). While U visa grant rates grew substantially, the U.S. government failed to track which, if any, were related to trafficking crimes. *See* 2020 TIP report, *supra* note 24, at 519.

[147] *Id.* at 117.

[148] *Id.*

[149] *See* TVPA, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of U.S.C. as amended at 8 U.S.C.§ 8, 22); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(3)(A), 117 Stat. 2875, 2878 (2003) [hereinafter TVPRA of 2003]; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter "TVPRA of 2008"].

[150] *Id*.

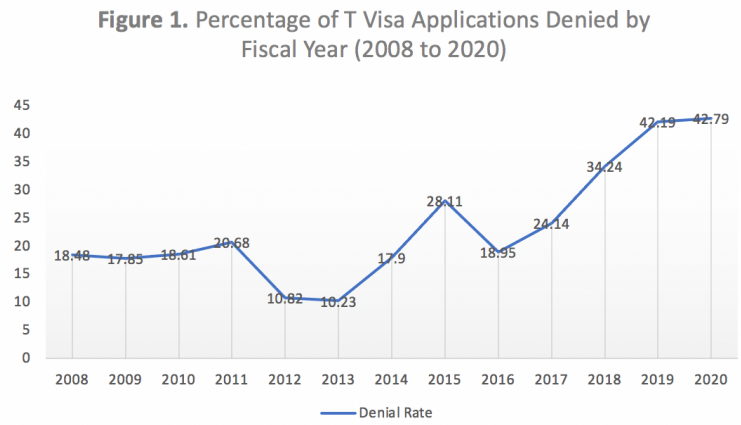
[151] INA § 101(a)(15)(T)(iii); 8 C.F.R. § 214.11(h)(1)(3)(ii) ("An alien who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, is not required to comply with such reasonable request.").

[152] 22 U.S.C. § 7105(c)(3) (2000) (stating that Continued Presence is available to "a potential witness to such trafficking" and that "the Secretary of Homeland Security may permit the alien to remain in the United States to facilitate the investigation and prosecution of those responsible for such crime"), 28 C.F.R. § 1100.35.

[153] *See* Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg. 92266 (Dec. 19, 2016), https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29900.pdf [https://perma.cc/GV7X-HWVB].

DRAFT

Despite these important efforts, T visa approvals[154] for victims only inched upward slightly. [155] The maximum T visas issues in one year were 1,040.[156] However, even as T visa application rates have increased slowly over the past decade, approval rates have steadily declined in recent years.[157] The T visa approval rate for cases adjudicated in fiscal year 2016, for example, was 81.04 %, but this dropped to 57.8% in 2019, and 57.21% in 2020.[158] The chart[159] below illustrates the rising denial rates for applicants for T visas since 2008:



Perhaps surprisingly, however, applications for T visas have steadily increased since 2000.[160] In fiscal year 2015, applications for T visas reached over 1,000 for the first time since the program began, and these numbers have continued to increase steadily in the past few years.[161] For example, whereas USCIS only received 541 T visa applications in fiscal year 2010, this number rose to 1,242 and 1,110, in 2019 and 2020,

---

[154] T-1 visas are awarded to victims of a "severe form of trafficking," as opposed to T-2, T-3, T-4, T-5, and T-6 visas for derivative family members. This article primarily focuses on approval rates for T-1 visas for victims of trafficking. Thus, throughout, the article uses the term "T visa" as a shorthand for T-1 visa.

[155] *See* USCIS STATISTICS, *supra* note 21.

[156] *Id.*

[157] *Id.*

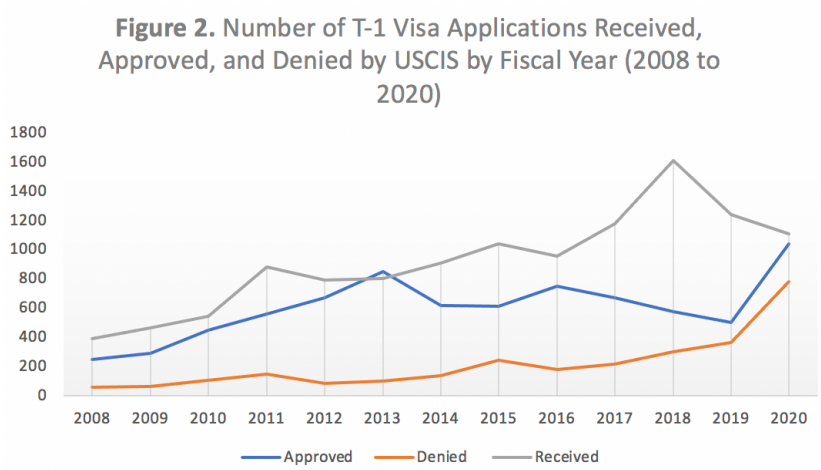
[158] *Id.*

[159] This figure is based on data available from USCIS. *See* USCIS STATISTICS, *supra* note 21. The percentage represents the number of T visa cases for victims of trafficking adjudicated each fiscal year. The rate is calculated by dividing the number of cases for victims of trafficking denied during a fiscal year by the sum of the number of cases approved and denied each fiscal year.

[160] *Id.*

[161] *Id.*

respectively.[162] The chart[163] below is illustrative of the number of applications received, approved, and denied since 2008:



Declining T visa approval rates have surprisingly coincided with increased identification of and greater access to *pro bono* legal representation for victims. In the past four years, federally-funded providers have provided services to more immigrant victims of trafficking.[164] The number of immigrant victims and derivative family members identified by certain government-funded programs steadily increased from 915 in 2013, to 1,612 in 2018, and 1,573 in 2019.[165] At the same time, the number of new immigrant victims of trafficking served by programs funded by the U.S. Department of Justice rose from 1,009 in 2013 to 5,090 in 2019.[166] Simultaneously, the number of immigrant children of trafficking identified by the U.S. Department of Health and Human Services increased from 50 in 2009 to and 892 in 2019.[167]

The federal government also poured new, unprecedented funding into *pro bono* legal representation for victims of trafficking.[168] In fiscal year 2017, the U.S. Department of Justice provided new and sweeping

---

[162] *Id.*

[163] This figure was created by the author based on data available from USCIS. *See* USCIS STATISTICS, *supra* note 21.

[164] This data was compiled by the author based on data available from annual Trafficking in Persons Reports issued by the U.S. Department of State (on file with author).

[165] *Id.*

[166] *Id.*

[167] *Id.* The U.S. Department of Health and Human Services issues Interim Assistance and Eligibility Letters to minor victims of a severe form of trafficking. *See* Eligibility Letters, Office on Trafficking in Persons, https://www.acf.hhs.gov/otip/victim-assistance/eligibility-letters (last accessed 05/10/2021). Such victims are then eligible to receive the same public benefits and services as those with refugee status. *Id.*

[168] *See Awards Listing*, OFF. FOR VICTIMS OF CRIME (2020), https://ovc.ojp.gov/funding/awards/list [https://perma.cc/5R9M-QRJM]. This included the initiation of new grants to provide specialized services and resulted in $9.11 million over the following four years. *Id.*

funding of over 8.8 million dollars to establish the Crime Victim Justice Corps,[169] funding 62 new attorney fellows to represent victims.[170] The federal government also gave significant funding to the Coalition Against Slavery and Trafficking ("CAST"), a national anti-trafficking NGO, to formalize training and a technical assistance program to improve outcomes in T visa cases.[171] As a result, in 2018, CAST trained 337 attorneys in 30 states, and responded to 900 individual requests for technical assistance, a 15% increase from 2017.[172] Yet, despite greater potential access to free representation, T visa approvals continued to decline.

E. Rationales for Insufficient Protection

Scholars have identified diverse rationales for the low T visa numbers.[173] Dina Haynes has described how Congress, by requiring adult

---

[169] CRIME VICTIM JUSTICE JUST. CORPS: LEGAL FELLOWS PROGRAM PURPOSE, OFFICE OFF. FOR VICTIMS OF CRIME, https://external.ojp.usdoj.gov/SelectorServer/awards/pdf/award/2017-MU-MU-K131/2017-40441-DC-VF/2017 [https://perma.cc/2HR2-ARA4].

[170] *See* Allie Yang-Green, *Supporting Human Trafficking Survivors Through Civil Legal Aid*, EQUAL JUSTICE WORKS (Jan. 11, 2021).

[171] *Id.*

[172] COAL. TO ABOLISH SLAVERY & TRAFFICKING, 2018 IMPACT REP. at 21, http://www.castla.org/wp-content/themes/castla/assets/files/Cast-Impact-Report-2018.pdf [PERMA].

[173] *See, e.g.*, Haynes, *supra* note 37 (asserting that the emphasis on prosecution and criminal investigations combined with the lack of training by law enforcement limited the ability of actors to protect immigrant victims); Srikantiah, *supra* note 9 (arguing that administrative officials and law enforcement impermissibly limited the availability of the T visa by focusing on the "iconic" victim, placing too much emphasis on law enforcement cooperation); Ivy C. Lee. & Mie Lewis, *Human Trafficking from A Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT'L L. & POL'Y 169, 171 (2003) (describing how the twofold congressional focus on prosecution and protection "impacts the kinds of relief that trafficked persons may receive"); Ivy Lee, *An Appeal of a T Visa Denial*, 14 GEO. J. ON POV. L. & POL'Y 455 (2007) (analyzing a T visa denial); Cianciarulo, *Proposed Early Response Plan*, *supra* note 37 (describing how law enforcement's unrealistic expectations of immigrant victims ability and desire to cooperate imperils victim protections); Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826, 835–40 (2007) (providing recommendations to overcome persistent challenges in the T visa framework); Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL'Y 309 (2008) (documenting how child victims of sex trafficking face immense challenges obtaining T visas, despite relaxed requirements for victims under 18). Not all scholars, however, were overtly critical of the TVPA's approach to anti-trafficking protections. *See, e.g.*, Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 278–79 (2006–2007) (noting the "positive impact of the TVPA on the enactment of anti-

victims to cooperate with law enforcement, undermined the efficacy of the T visa.[174] Law enforcement agents remain, in many ways, the gatekeepers for immigration protection, and the prominent role of policing has prevented many victims from accessing protection.[175] Law enforcement often was insufficiently trained and unattuned to more subtle forms of trafficking.[176] Most immigrant victims also have not been found "chained to a bed in a brothel," and thus often unidentified and unable to access protection.[177]

Building on Haynes' insights, Jayashri Srikantiah has also examined how Congress, in establishing the T visa, envisioned a simplistic, passive "iconic" victim.[178] Congress "contemplate[d] a victim of sex trafficking who passively waits for rescue by law enforcement, and upon rescue, presents herself as a good witness who cooperates with all law enforcement requests."[179] This embrace of simplistic victim narratives, embedded in the statutory and regulatory framework, has thus led to insufficient identification by law enforcement and adjudicators.[180]

Scholars too have drawn attention to the incompatibility of immigration enforcement and anti-trafficking agendas.[181] Jennifer Chacón has observed that the "line between voluntary migrants who participate in

---

trafficking legislation in foreign countries" and comparing domestic practices with other countries, like Belgium, Italy, and the Netherlands, which had fewer available protections for immigrant victims).

[174] Haynes, *supra* note 37, at 346 ("There are consequences to having such an emphasis on prosecution that not only works to the detriment of victims but also undermines the intent of the TVPA.").

[175] *Id.*

[176] *Id.*

[177] *Id.* at 349 (describing how viewing trafficking through the lens of law enforcement can "exacerbate the tendency of U.S. government personnel to treat trafficked persons as criminals, particularly when the victim does not fit into the expected mold of being rescued after being found chained to a bed in a brothel"). Haynes also described challenges that law enforcement faced in identifying victims when they often "subscribe[d] overtly or covertly to unhelpful myths about the nature of victims and criminals." *Id.* at 349.

[178] Srikantiah, *supra* note 9, at 177 (describing how the regulations and agency implementation of the TVPA envision a prototypical victim with several characteristics: (1) the victim is a woman or girl trafficked for sex; (2) law enforcement assesses her to be a good witness; (3) she cooperates fully with law enforcement investigations; and (4) she is rescued instead of escaping from the trafficking enterprise).

[179] *Id.*

[180] *Id.* Other scholars, including Sally Green and Bridgette Carr, have further explored these deficiencies, highlighting how the T visa failed to work even for the most vulnerable. *See* Green, *supra* note 173; Bridgette Carr, *Examining the Reality of Foreign National Child Victims of Human Trafficking in the United States*, 37 WASH. U. J.L. & POL'Y 183 (2011) (examining the challenges for child victims to obtain T visas). They have pointed to the fact that even trafficked children, a quite vulnerable and compelling population, often cannot effectively access the T visa. *Id.* at 313.

[181] Chacón, *Tensions*, *supra* note 37 (exposing the trade-offs between immigration enforcement and anti-trafficking efforts).

smuggling schemes and unwilling trafficking victims" is "murky at best" and "has been vigilantly policed."[182] Thus, often the very efforts to root out trafficking reinforce concepts of migrant criminality and thus increase the vulnerability of immigrant victims.[183] This critique has been borne out under the former Trump Administration as advocates argued that heightened immigration enforcement efforts increased the vulnerability of immigrant victims to trafficking and resulted in an "increasing number of foreign national survivors . . . afraid to report their cases to law enforcement, pursue immigration options, or seek services . . . .".[184]

II. THE "SHALLOW STATE"

A. Trafficking and the "Shallow State"

These scholarly critiques, while important, fail to adequately explain the recent decline in T visa approvals for victims. This Part asserts that recent declining T visa approval rates have been largely driven by administrative actors, who have erected considerable new roadblocks within the T visa application process. Law and society scholars have shown how administrative, enforcement, and adjudicatory actors play a significant role shaping legal protections.[185] Despite "law on the books," the actions of administrative, adjudicatory, and enforcement actors can deeply impact "law in action."[186] While not unique to trafficking cases, this phenomenon is especially apparent in the T visa context because administrative and law enforcement officials play a formative role in shaping outcomes.[187] This Part focuses on how such low-level administrative actors operated in recent years to erect new barriers for immigrant victims of trafficking within the T visa application process and to erode avenues for protection.

---

[182] *Id.* at 1615.
[183] *Id.* (describing how immigration enforcement efforts, often under the guise of combating trafficking, have had "the perhaps unintended effect of reinforcing migrants' vulnerability to exploitation and made them more vulnerable to exploitation").
[184] *See* 2020 TIP Report, *supra* note 24, at 519.
[185] *See, e.g.*, Lauren Edelman & Mark Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIO. 479 (1997).
[186] *See* Leisy Abrego & Sarah Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, LAW & POL'Y 265, 266 (2015) (citing Roscoe Pound, *Law in Books and Law in Action,* 44 AM. L. REV. 12 (1910)).
[187] This article focuses primarily on administrative, rather than enforcement, actors and their role in limiting immigration protections. However, law enforcement also plays a considerable role in shaping outcomes in the T visa context.

B. The "Shallow State" Defined

In 2017, David Rothkopf, a professor of international relations, defined the term "shallow state"[188] to refer to "the antithesis of the deep state."[189] The term "deep state" has been the subject of much scholarly discussion for decades, but it gained traction under the Trump Administration, as scholars and journalists observed how career bureaucrats allegedly worked to undermine the objectives of the executive.[190] Scholars had applied the term "deep state" originally to executive officials but more recently it has evolved to apply to a wider range of actors, including intelligence, national security, and bureaucratic personnel. [191] These figures, many argued, can effectively leverage power built over years "to advance their goals regardless of the whims or wants of elected public officials."[192]

Legal scholarship has painted a quite polarized picture of deep state actors.[193] As Rebecca Ingber has observed, some scholars have opined about the dangers of a deep state, "conjur[ing] images of shadowy, powerful bureaucrats, evoking and stoking fears of the power that has

---

[188] *See* Rothkopf, *supra* note 43. Other journalists and scholars have added texture to the portrait of the "shallow state." *See, e.g.*, Rex Nutting, *The Shallow State is thriving under Trump*, MARKETWATCH (Apr. 24, 2018), https://www.marketwatch.com/story/the-shallow-state-is-thriving-under-trump-2018-04-24 [https://perma.cc/XC5T-SD3U] (defining the term as: "a withering of the government's capabilities"); Danielle Shulkin & Julia Brooks, *Loyalty Above All: The "Shallow State" of the Trump Administration*, JUST SEC., Nov. 2, 2020, https://www.justsecurity.org/73226/loyalty-above-all-the-shallow-state-of-the-trump-administration/ [https://perma.cc/TK5F-G4HE] (describing the "shallow state" as characterized by "hollowing" out of expertise with many senior positions left open and others filled "whose most significant attribute appears to be political loyalty to [President Trump] rather than deep experience and professional excellence.").

[189] Rothkopf, *supra* note 43.

[190] *Id. See, e.g.,* Frank Bruni, *The Deep State Is on a Roll*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/opinion/trump-fauci-deep-state.html [https://perma.cc/VLL7-XM4N] (describing Anthony Fauci as part of the "deep state," which is engaged in a "righteous defense against the corruption of democracy").

[191] Rothkopf, *supra* note 43; *see* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 143 (2018); s*ee also* MARC AMBINDER & D.B. GRADY, DEEP STATE: INSITE THE GOVERNMENT SECRECY INDUSTRY 4 (2013); MIKE LOFGREN, THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT 34–36 (2016); Peggy Noonan, *The Deep State*, WALL ST. J. (Oct. 28, 2013, 9:10 PM), https://www.wsj.com/articles/BL-233B-134 [https://perma.cc/83Q5-GCHJ]. A wide range of scholars have been concerned about power outside of the national security apparatus wielded by unelected bureaucratic actors in the administrative state. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 17 (2008) (examining the constitutional origins of a unitary Executive).

[192] Rothkopf, *supra* note 43.

[193] *See* Ingber, *supra* note 197, at 143.

accrued in the executive branch's national security bureaucracy."[194] Others have viewed the deep state as a source of "benevolent internal constraints," providing an important check on the Executive and a safeguard for the "legitimacy of the administrative state."[195]

Rothkopf, however, warned of the rise of a different phenomenon—the shallow state. The shallow state, as he conceived it, refers to administrative officials who "actively eschew[ed] experience, knowledge, relationships, insight, craft, special skills, tradition, and shared values."[196] These actors, unlike the deep state, use the administrative state and their knowledge of decision- and rulemaking instrumentally to *serve* the objectives of the Executive. They often remain untethered to statutory or regulatory goals and texts, and they mobilize their knowledge and skills to undermine the statutory regime.[197]

C. Immigration Law and the "Shallow State"

This article is particularly focused on the actions of low-level bureaucrats working to the immigration context.[198] It deploys the term

---

[194] *Id.* at 144.

[195] *See id.* at 142–44.

[196] Rothkoft, *supra* note 43.

[197] *See* Sarah Isgur, *Opinion: We in the 'Shallow State' Thought We Could Help. Instead, We Obscured the Reality of a Trump Presidency,* WASH. POST (Dec. 23, 2020).

[198] While not the focus of this article, scholars and journalists have also defined the shallow state as hollowing out of the agency and the lack of competency in administrative agencies. *See* Shulkin & Brooks, *supra* note 194. Critics remarked how President Trump appointed less competent, less experienced officials, such as Stephen Miller, Kirstjen Nielsen, and Ken Cuccinelli, to prominent roles within the immigration system. *See id.* Some of these political appointments, such as that of Ken Cuccinelli and Chad Wolf, the former director of USCIS, have been patently unlawful and later found by federal district courts to violate the Federal Vacancies Reform Act. *See id.; see also* James Doubek, *Judge Says Ken Cuccinelli Was Appointed Unlawfully To Top Immigration Post*, NPR (Mar. 1, 2020), https://www.npr.org/2020/03/01/811023475/judge-says-ken-cuccinelli-was-appointed-unlawfully-to-top-immigration-post [https://perma.cc/W8KC-LR3B]; Dennis Romero, *Federal judge rules acting DHS head Chad Wolf unlawfully appointed, invalidates DACA suspension*, NBC NEWS (Nov. 14, 2020), https://www.nbcnews.com/politics/immigration/federal-judge-rules-acting-dhs-head-chad-wolf-unlawfully-appointed-n1247848 [https://perma.cc/Y5Y5-3WRV]. Meanwhile, some critics have observed an overall brain drain, as experienced officials have left USCIS and the immigration court system, hollowing out the agency and reducing its capacity to effectively adjudicate immigration applications. *See, e.g.,* TRAC, MORE IMMIGRATION JUDGES LEAVING THE BENCH (July 13, 2020), https://trac.syr.edu/immigration/reports/617/ [https://perma.cc/EKX9-CBK7] ("Turnover [in immigration judges] is the highest since records began in FY 1997 over two decades ago."); Louise Radnofsky, *High Turnover Roils Trump's Immigration-Policy Ranks*, WALL ST. J. (June 12, 2019), https://www.wsj.com/articles/high-turnover-roils-trumps-immigration-policy-ranks-11560355978 [https://perma.cc/SK7F-KDP5] ("In the past two months, almost every top job on immigration policy has turned over once—and in some cases, twice—with the administration at times employing creative maneuvers to get officials in place.").

"bureaucrat" to refer to frontline workers in an administrative agency.[199] Sociologists have defined "bureaucrat" in an expansive sense, including a broad range of professional workers, including technocrats, policy makers, and front-line or "street level" decisionmakers.[200] United by a common culture, these bureaucrats have considerable knowledge and expertise.[201] They also have broad discretion and exercise considerable power within the administrative agency.[202] In the immigration context, while bureaucratic actors can be found in various agencies at the U.S. Department of Homeland Security, this article focuses on bureaucratic actors at USCIS. USCIS officers adjudicate immigration applications and implement agency guidance. In these roles, they have power to decide the fates of immigrant applicants and also informally shape policy that leads to large-scale administrative change.

Often, bureaucrats are pictured as rather parochial office workers—resistant to change—and often responsible for repressive policies.[203] Yet, recent literature has painted a more optimistic view of bureaucrats.[204] Bureaucrats can engage in "bottom up" innovation that positively impacts rights claims and resists presidential encroachment. Indeed, as Michael Lipsky observed, street level actors can have such significant discretion that they function as "policymakers in their

---

[199] Michael Lipsky, STREET-LEVEL BUREAUCRACY: DILEMNAS OF THE INDIVIDUAL IN PUBLIC SERVICES xi, 3 (reprt. 2010).

[200] *Id.*

[201] *Id.*

[202] MAX WEBER, BUREAUCRATIC THEORY 1393 (1978) ("In a modern state the actual ruler is necessarily and unavoidably the bureaucracy, since power is exercised neither through parliamentary speeches nor monarchial enunciations but through the routines of administration."); Larry B. Hill, *Who Governs the American Administrative State? A Bureaucratic-Centered Image of Governance*, 1 J. OF PUB. ADMIN. RESEARCH & THEORY 261, 266 (1991) ("[B]ureaucracy is a significant actor in the governance process, and the bureaucratic actor is able to rely upon a set of strategic advantages and power bases… and exercises an important degree of discretion."); Lipsky, *supra* note 199 at 13 ("The policy-making roles of streetlevel bureaucrats are built upon two interrelated facets of their positions: relatively high degrees of discretion and relative autonomy from organizational authority.").

[203] *See, e.g.,* Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL. REV. 83, 83 (2017) ("In the 1940s and 1950s, the federal administrative state was a powerful engine of discrimination against homosexuals, with bureaucratic officials implementing anti-gay policies that reinforced homosexuals' subordinate social and legal status.").

[204] *See, e.g.,* George, *supra* note 203 (describing how bottom up innovation can improve LGBTQ+ rights claims); Tatiana Camelia Dogaru, *Street-Level Bureaucrats as Innovative Strategists: An Analytic Approach*, 12 J. OF PUB. ADMIN. 51 (2017) (demonstrating how street level bureaucracy can be beneficial as such actors can effectively adapt policy as they implement it); *compare* Richard Weatherley and Michael Lipsky, *Street-level Bureaucrats and Institutional Innovation: Implementing Special Education Reform*, 47:2 HARV. ED. REV. 171 (1977) [hereinafter *Street-level Bureaucrats*] (examining how street level actors resisted special education reform in Massachusetts).

respective work arenas."[205] Marie-Amélie George, for example, has observed how bureaucratic actors, despite top down policies restricting the rights of LGBTQ+ individuals, worked to cement more protective policies and practices.[206] Similarly, in the immigration context, Joseph Landau has observed how bureaucratic actors in the Obama Administration worked creatively to implement prosecutorial discretion initiatives by channeling feedback upwards to mid- and top-level officials to quickly improve protections for immigrants.[207]

Bottom up innovation clearly has some benefits.[208] It allows bureaucratic actors to marshal on-the-ground experience and make better decisions on individual matters because they can weigh the unique facts before them. Bureaucrats also can share lessons upwards to influence policy makers and tweak policies that are not working effectively.[209] In addition, bottom up action can contribute to "administrative common law," the common corpus of law and policy within the administrative agency.[210]

Despite these considerable advantages, however, there are drawbacks to bottom up bureaucratic innovation. While low-level bureaucrats can mobilize their knowledge and expertise to support policies that protect minority rights, they can also support repressive policies. As Landau acknowledges, innovation by bureaucratic actors is not a "one-way racket."[211] Rather, it is capable of "produc[ing] a set of very different, immigrant-unfriendly directives as opposed to the current, more immigrant-affirming ones."[212] Indeed, the very same practices of low-level

---

[205] *Street-level Bureaucrats*, *supra* note 199, at 172.

[206] George, *supra* note 203, at 84-85 ("[B]y the mid1980s many bureaucrats had become incidental allies, subverting bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools.").

[207] Joseph Landau*, Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L. J. 1173 (2016) (arguing that this on-the-ground experimentation led to better results, as officers could exercise discretion and engage in subregulatory guidance to improve initiatives quickly and effectively).

[208] I define "bottom up" action to occur when frontline workers, exercising the discretion given to them by the agency and top-down directives, shape policies on the ground and then, communicate with mid- or top-level officials to shape policy.

[209] *See, e.g.,* Hill, supra note 201, at 268 (describing how bureaucratic actors are influenced by extrabureaucratic actors, but they also can "act so as to influence the other actors"). As Landau points out, low-level actors may, at times, favor subregulatory or nonlegislative rules of notice-and-comment rulemaking, which although less transparent, can result in quicker, beneficial outcomes. Landau, *supra* note 207, at 1232. He offers the example of bureaucratic action during the Obama administration to issue sub regulatory guidance on Deferred Action applications that ultimately benefited immigration applicants. *Id.*

[210] Landau, *supra* note 207, at 1233-34 ("Perhaps most significant is that frontline officers can report the effectiveness of their experimentation up the chain of command and better enable policymakers to make positive choices regarding ex ante and ex post controls across entire agencies or even entire regulatory fields.").

[211] *Id.* at 1232.

[212] *Id.*

bureaucratic actors that can encourage innovation, like the replacement of notice-and -comment rulemaking with subregulatory or nonlegislative rules, can fuel unlawful, harmful policies, especially without effective oversight.[213]

It is against this landscape that we view the shallow state. The shallow state is characterized by low-level bureaucratic actors who are mobilized or encouraged by an Executive. They are engaged in innovation, but of a type that represses or limits rights, and without sufficient oversight. It is in this context that administrative actors at USCIS under the Trump Administration deployed subregulatory guidance and exercised discretion to reject, delay, and deny immigration applications. It is here that these same actors experimented with new policies to add friction to the immigration application process. And when some policies were found to be unlawful, these actors were able to quickly pivot and try new policies and practices to achieve similar results.

Under the Trump Administration, bureaucratic actors used these tactics to restrict access to important immigration benefits, ranging from asylum to T visas to Deferred Action for Childhood Arrivals ("DACA"). The T visa context is but one example, but it is a particularly strident example, as former President Trump publicly expressed his deep commitment to trafficking victims. Yet, privately, the Administrative oversaw low-level administrative actors to significantly erode protections for immigrant victims.

D. Tactics of the "Shallow State"

> "We've had the Trafficking Victims Protection Act since 2000. In those 19 years, an entire infrastructure has been constructed to support trafficking survivors. And piece by piece, the Trump administration is eroding and undermining that edifice of protection."[214]
>
> -Martina Vandenberg, Human Trafficking Legal Center

This Part examines the tactics of administrative actors within the shallow state in the T visa context. It highlights a number of strategies used by such actors, including: (1) increasing the stakes for immigrant victims; (2) rejecting new applications; (3) causing delay; (4) increasing requests for evidence and denials based on misinterpretations of law and

---

[213] *Id.* (arguing that under the Obama Administration, the president exercised careful control over low-level bureaucrat but warning that this oversight might not always be present).

[214] *How Trump Is 'Destroying Protections' for Victims of Human Trafficking*, WORLD POL. REV. (July 2, 2019), https://www.worldpoliticsreview.com/insights/27998/under-trump-human-trafficking-protections-have-weakened [https://perma.cc/PR9J-DG52].

regulations; and (5) expanding the role of "darkside discretion." This Part shows how these actions of the "shallow state" have worked in concert to undermine the T visa program and harm immigrant victims of trafficking.

1. Heightened Stakes

In 2018, USCIS raised the stakes for all immigrant victim applying for a T visa. Previously, if applicants were denied a T visa, they were not placed in removal (deportation) proceedings.[215] This policy, in place for over fifteen years, encouraged immigrant victims, who may be fearful of deportation, to come forward and apply for immigration protection.

However, in November 2018, USCIS quickly reversed course. In a policy memorandum, USCIS announced that applicants who were denied T visas would be issued a Notice to Appear ("NTA"), the charging document in immigration court, and placed in removal proceedings.[216] This policy change came amidst new guidance by Immigration and Customs Enforcement ("ICE") dramatically altering enforcement priorities and making clear that no one, including immigrant victims, was off the table in terms of immigration enforcement.[217] ICE, established by Congress in 2003, was historically the enforcement branch of the U.S. Department of Homeland Security,[218] but this new guidance effectively transformed USCIS, the benefit-granting agency into an enforcement agency.[219]

---

[215] USCIS, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS, PM-602-0050.1 (June 28, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf [https://perma.cc/E3HH-L2KV]; U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT: UNITED STATES 488 (June 2019), https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf [https://perma.cc/R9G5-5E5F] [hereinafter 2019 TIP REPORT] ("As of November 2018, DHS may issue NTAs to individuals following the denial of a T visa or denial of adjustment of status from a T visa to permanent resident status, if such individuals are unlawfully present at that time of denial.").

[216] *Id.*

[217] *See* DHS, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/FUA4-8S2C] (expanding border security and enforcement efforts); DHS, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/TG47-GGGA] (describing new policies to significantly expanding immigration enforcement priorities).

[218] *See supra* note 88 regarding the agencies within the Department of Homeland Security.

[219] *See, e.g.,* Joshua Breisblatt, *USCIS Is Slowly Being Morphed Into an Immigration Enforcement Agency*, IMMIGRATION IMPACT (Jul. 9, 2018),

The policy had an immediate chilling effect.[220] Applications for T visas decreased by 23 percent after the announcement.[221] Meanwhile, USCIS began to issue NTAs and place applicants in removal proceedings.[222] Martina Vandenberg, founder of a leading national anti-trafficking NGO, called the risk of deportation "a game-changer."[223] She noted that it "totally changes the analysis of whether or not it's worth it for any trafficking victim to cooperate with law enforcement."[224] Deborah Pembrook, a trafficking survivor who assists survivors with T visa applications, stated, "We hear time and time again: Why would I risk myself? Why would I risk my family?"[225]

2. Rejection

As USCIS increased the risk of deportation, the agency also exerted greater control over the entry point for new T visa applications. It did this by strenuously policing the content, substance, and format of T visa applications. In particular, USCIS issued two new policies that increased the burden on initial T visa applicants. One policy reduced access to fee waivers, and the other required that all blanks on the application be filled. Applications that failed to meet these new requirements were summarily rejected.[226]

Fee Waiver Policy. In 2018, USCIS abruptly tightened the qualifications for waivers and increased the filing fees for certain applications associated with the T visa.[227] While the T visa itself does not

---

https://immigrationimpact.com/2018/07/09/uscis-guidance-immigration-benefit/#.YLqD7TZKj-Z (describing the NTA memo as a "major shift in how USCIS operates" because "USCIS was never meant to be tasked with immigration enforcement").

[220] *See, e.g.*, AM. IMMIGR. LAWS. ASSOC., AILA POLICY BRIEF: NEW USCIS NOTICE TO APPEAR GUIDANCE (Doc. No. 18071739, Aug. 8, 2018) ("The new NTA policy will also have a chilling effect on legal immigration in general, discouraging many people who are eligible for immigration benefits from applying out of fear they will be subject to unjustified enforcement."); *see also Dystopian Fiction*, *supra* note 44 ("[Since then,] [a]pplications for the special visas have nose-dived.").

[221] Contrera, *supra* note 11.

[222] *See* Breisblatt, supra note 219 (describing how immediately following the issuance of the NTA guidance USCIS began issuing NTAs, whereas previously this was the duty of ICE).

[223] *See* Gordon, *supra* note 34.

[224] *Id*.

[225] Contrera, *supra* note 11.

[226] Due to lack of transparency, the exact impact on T visa applicants is unknown. However, USCIS has disclosed initial data in response to FOIA litigation to show that in the U visa context, there was a dramatic increase in rejections. *See infra* notes 252 to 254.

[227] *See* 8 U.S.C. § 1255(l)(7); U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC, PM602-0011.1, FEE WAIVER GUIDELINES ESTABLISHED BY THE FINAL RULE OF USCIS FEE SCHEDULE: REVISIONS TO ADJUDICATOR'S FIELD MANUAL (AFM) CHAPTER 10.9, AFM Update AD11-26 (2011) [hereinafter FEE WAIVER GUIDELINES] (describing eligibility criteria for fee waiver requests, including evidence of very low-income). In the summer of 2018, "[n]umerous practitioners . . . reported a significant increase in fee

require a fee, many applicants must submit a "waiver of inadmissibility" with the T visa application.[228] This waiver, as of this writing, requires a filing fee of $930.[229]

Many trafficking victims depended heavily on fee waiver applications as a means to access the T visa because they could not otherwise afford the filing fee of $930. Since the TVPA was passed, USCIS has had a generous practice of granting fee waivers to trafficking victims.[230] T visa applicants, for example, have historically been able to

---

waiver denials from the Vermont Service Center in . . . U visa . . . applications." Letter from Cecelia Friedman Levin, Sr. Pol'y Couns., ASISTA, to Maureen Dunn, Chief, Fam. Immigr. and Victim Prot. Div., U.S. Citizenship & Immigr. Servs., Dep't of Homeland Sec. (July 30, 2018), https://drive.google.com/file/d/1Sq_CtrhuAiiKGayzsT9wQld3ZglmFfFK/view [https://perma.cc/N8PQ-DPPN]; s*ee, e.g.*, ASISTA, PRACTICE ADVISORY: FEE WAIVERS FOR VAWA SELF-PETITIONS, U AND T VISA APPLICATIONS (2018), https://asistahelp.org/wp-content/uploads/2018/09/ASISTA-Practice-Advisory-Fee-Waivers.pdf [https://perma.cc/99LE-DDAB] [hereinafter ASISTA FEE WAIVERS] ("Practitioners nationwide have recently reported significant rates of fee-waiver denials from the Humanitarian Division of the Vermont Service Center."); IMMIGRANT LEGAL RES. CTR., FEE WAIVERS AND THEIR IMPACT ON IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND OTHER CRIMES (2018), https://www.ilrc.org/sites/default/files/resources/fee_waiver_report.pdf [https://perma.cc/Z7Y2-XNVK] ("[In 2018,] [a]dvocates for survivors throughout the country reported high numbers of fee waiver request rejections, in cases that clearly met established fee waiver eligibility criteria.").

[228] *See* ASISTA FEE WAIVERS, *supra* note 222; ASISTA, USCIS FEE RULE & THE IMPACT ON SURVIVOR-BASED PROTECTIONS (August 4, 2020) at 3, https://asistahelp.org/wp-content/uploads/2020/08/Fee-Rule-Survivor-Protections.pdf ("VAWA self-petitioners, and U and T visa applicants must often file ancillary forms that do have significant fees, which would rise exponentially . . . .").

[229] U.S. CITIZENSHIP AND IMMIGR. SERV., INSTRUCTIONS FOR FORM I-192. APPLICATION FOR ADVANCE PERMISSION TO ENTER AS A NONIMMIGRANT, https://www.uscis.gov/sites/default/files/document/forms/i-192instr.pdf [https://perma.cc/T7SJ-HM93] (last updated Dec. 2, 2019).

[230] ASISTA FEE WAIVERS, *supra* note 227, at 1 (citing INS, Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13061, 13069 (Mar. 29, 1996), https://www.gpo.gov/fdsys/pkg/FR-1996-03-26/pdf/96-7219.pdf [https://perma.cc/9USL-KTJY]; *see also* New Classification for Victims of Criminal Activity; Eligibility for ''U'' Nonimmigrant Status; Interim Rule 72 Fed. Reg. 53014, 53021 (Sept. 17, 2007), https://www.gpo.gov/fdsys/pkg/FR-2007-09-17/pdf/E7-17807.pdf [https://perma.cc/45HJ-7JWN]; Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg 92266, 92288 (Dec. 19, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-29900.pdf [https://perma.cc/5AEW-WG6N] (discussing fee waiver history in T visa context). In 2008, Congress required that the Department of Homeland Security allow certain applicants, including applicants for T visas, to qualify for fee waivers in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, § 201(d)(7) (2008). By regulation, USCIS further specified that discretionary fee waivers are available if the requestor cannot pay the fee and that such a waiver must

qualify for a fee waiver by demonstrating that they received a means-tested benefit,[231] have income less than 125% of the federal poverty guidelines, or meet other criteria.[232] However, on September 27, 2018, USCIS announced that it planned to revise the fee waiver form—Form I-912, Request for Fee Waiver.[233] At the same time, USCIS announced a plan to significantly raise the fees for immigration applications. The proposed amendment summarily prohibited applicants who receive a means-tested benefit from qualifying for a fee waiver.[234] USCIS stated, in support of this policy, that the rationale was "inconsistent income levels being used" by states to determine eligibility for means-tested benefits.[235]

Advocates, lawyers, scholars, and activists raised significant concerns about the proposed fee waiver policy.[236] They warned that the rule would have dramatic implications, significantly reducing application rates.[237] Several commentators also noted that "the language runs counter to existing law" as Congress explicitly exempted T visa applicants from fees.[238] Others described how the new fee guidance would make victims more vulnerable to abuse, as they will have "turn to jobs with exploitative employers or back to traffickers" to pay their filing fees.[239] USCIS, however, refused to change course and began implementation of the policy.

---

be "consistent with the status or benefit sought"—thus might not be appropriate if the underlying immigration benefit requires that the immigrant demonstrate, for example, a "substantial financial investment." 8 C.F.R. § 103.7(c)(1).

[231] 8 C.F.R. § 103.7(c)(1).

[232] USCIS, INSTRUCTIONS FOR REQUEST FOR FEE WAIVER 4–5 (last updated: 10/15/2019), https://www.uscis.gov/sites/default/files/document/forms/i-912instr-pc.pdf [https://perma.cc/L8BD-79NW] (describing the eligibility standards for USCIS fee waivers).

[233] USCIS, PROPOSED I-912 FEE WAIVER FORM REVISION (Sept. 27, 2018), https://www.uscis.gov/news/alerts/proposed-i-912-fee-waiver-form-revision [https://perma.cc/QSK9-D8WV].

[234] Allison Davenport, *Fee Waivers: Status of Proposed Changes*, ASISTA 3 (2019), https://www.ilrc.org/sites/default/files/resources/fee_waiver_update-final-12.16.19.pdf [https://perma.cc/ZDD3-CE9K].

[235] Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 83 FR 49120, 49121 (Sept. 20, 2018).

[236] *See* Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions 84 Fed. Reg. 26137, 26138 (June 5, 2019) (providing notice of what changes the agency was making); U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46794-889 (Aug. 3, 2020) (summarizing and responding to comments submitted during notice-and-comment rulemaking process).

[237] *See* IMMIGR. POL'Y LAB, *Reducing Red Tape Allows More People to Become Citizens for Free*, https://immigrationlab.org/project/reducing-red-tape-allows-people-become-citizens-free/ [https://perma.cc/YUN2-576U] (forecasting decrease by 10 percent of citizenship applications).

[238] *See* 85 Fed. Reg. at 46810.

[239] *Id.* at 46816.

DRAFT

In 2019, immigrant advocacy organizations filed three federal lawsuits challenging the new fee waiver policy as unlawful.[240] Public Citizen, representing Northwest Immigrant Rights Project, alleged that the new fee waiver form violated the Administrative Procedure Act ("APA") due to its failure to undergo notice-and-comment rulemaking.[241] Plaintiffs further asserted that the new fee waiver guidance was arbitrary and capricious in violation of the APA, and violated provisions of the Immigration and Nationality Act ("INA").[242] On October 8, 2020, the federal court ruled in favor of the plaintiffs, granting plaintiffs' motion for a preliminary injunction and issuing a stay of the rule's effective date.[243] The court ruled in favor of the plaintiffs and found that they were likely to succeed on the claim that the rule was arbitrary and capricious under the APA.[244] As a result of the injunction, USCIS stopped applying the new fee waiver guidance.[245]

"No Spaces" Policy. Within weeks of this national injunction, USCIS issued a new, simple online alert:[246] effective immediately, USCIS would reject all applications that had a blank field, even if the field was not applicable.[247] This "no spaces" policy required that all blank fields be completed with "N/A" or "None." As justification, USCIS cited federal regulations that require that "applications filed with USCIS must be

---

[240] *See* City of Seattle v. DHS, No. 3:19-CV-07151-MMC (N.D. Cal. Dec. 11, 2019); Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs., No. CV 19-3283 (RDM), 2020 WL 5995206 (D.D.C. Oct. 8, 2020), appeal dismissed, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021).; Project Citizenship v. DHS, No. 1:20-cv-11545-NMG (D. Mass. Sept. 17, 2020).

[241] Complaint for Declarative and Injunctive Relief, Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs., No. CV 19-3283 (RDM), 2020 WL 5995206 (D.D.C. Oct. 8, 2020).

[242] *Id.*

[243] Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs., No. CV 19-3283 (RDM), 2020 WL 5995206 at 75 (D.D.C. Oct. 8, 2020) (order granting preliminary injunction).

[244] *Id.*

[245] Docket, Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs., No. CV 19-3283 (RDM), 2020 WL 5995206 (D.D.C. Oct. 8, 2020).

[246] *See* Catherine Rampell, *This latest trick from the Trump administration is one of the most despicable yet*, WASH. POST (Feb. 13, 2020, 4:24 PM), https://www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/Q8AJ-L2GH] ("The policy change, at first affecting just asylum applicants, was announced without fanfare on the USCIS website sometime in the fall."). The "no spaces" policy applied initially to asylum and U visa applications, then eventually to T visa applications. *Id.* USCIS also extended the "no spaces" policy to law enforcement certifications, stating that certifying officials also could not leave a field blank, or the entire T or U visa applications would be rejected. *See, e.g.*, *T visa USCIS alert*, *supra* note 248.

[247] *Id.*

properly completed, submitted, and executed in accordance with the applicable form instructions."[248]

Advocates decried the policy as disastrous for immigrant victims.[249] Some argued that the policy was colored by bad intent, transforming immigration forms into "minefields, intentionally designed to entrap the unsuspecting."[250] Others argued that the "no spaces" policy lacked a cogent policy rationale and would harm the most vulnerable by immediately (and without notice) rejecting their applications.[251] USCIS, however, maintained that the policy was consistent with its authority to determine what constituted a "completed" application.

The exact impact on T visa applicants is still unknown because USCIS has yet to release the number of T visa applicants who experienced rejections due to the policy or respond to a FOIA request by the author. However, evidence in the U visa context signals the scope of the impact.[252] In the first three months of the policy, approximately 98% of U visa petitions were rejected within three months of the new "no spaces" policy.[253] Within nine months, almost 12,000 U visa petitions were

---

[248] USCIS, *Application for T Nonimmigrant Status*, https://www.uscis.gov/i-914; *see* 8 CFR 103.2(a)(1); 8 CFR 103.2(b)(1). In particular, in guidance posted on the USCIS website, "you must provide a response to all required questions, even if the response is "none," "unknown," or "n/a." U.S. DEP'T OF HOMELAND SEC., OMBUDSMAN ALERT: USCIS PUBLISHES ALERT FOR FORM I-914 (March 24, 2020) [hereinafter *T visa USCIS alert*]. The guidance noted that applications for T visas will be rejected "that has, for example, an empty field for gender, other names used, marital status, current immigration status, information about a spouse or child, or tables not completed where appropriate." *Id.*

[249] *See, e.g.*, Charles Davis, *Bureaucracy as Weapon: how the Trump Administration is Slowing Asylum Case*s, GUARDIAN (Dec. 23, 2019), https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers [https://perma.cc/A9WK-NUZW] (describing how the new "no spaces" policy had a devastating impact on asylum applicants).

[250] *See Dystopian Fiction*, *supra* note 46.

[251] For example, on February 6, 2020, ASISTA, a national advocacy organization, described the implications of the USCIS policy, noting that "this significant shift in policy and practice creates enormous hardship for survivors and their families, and strains valuable resources for service providers." ASISTA, PRACTICE ADVISORY: USCIS FORM ALERT: BLANK SPACES ON FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, at 7 (Feb. 2020), https://asistahelp.org/wp-content/uploads/2020/02/I-918-Practice-Alert-3.pdf [https://perma.cc/K4MX-Y85N] [hereinafter ASISTA Practice Advisory]; ASISTA Letter to Mark Koumans & Michael Dougherty Feb 6, 2020 (noting how USCIS failed to provide "any justification or rationale for this drastic and sudden change, which needlessly undermines a survivor's access to critical immigration benefits designed by a bipartisan majority in Congress for their protection").

[252] *ASISTA & Urban Justice Center, Practice Advisory: Insight into USCIS's Application of the "No-Blanks" Policy to U-Visa Petitions* at 2, AM. IMMIGR. LAW. ASS'N (Doc. No. 20112341) (Nov. 23, 2020), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-advisory-insight-into-usciss-application [https://perma.cc/M74V-K23F] [hereinafter AILA Blank Space Practice Advisory].

[253] *Id.*

returned.[254] While such applicants could reapply, some missed important filing deadlines; for others, it further delayed their pursuit for protection.

On November 19, 2020, NGOs filed a federal lawsuit challenging the "no spaces" policy.[255] In *Vangala v. USCIS*, plaintiffs alleged that the "no spaces" policy "led to absurd and unfairly prejudicial results."[256] They further asserted the policy violated the APA by failing to subject to engage in notice-and-comment rulemaking.[257] Plaintiffs also argued that it was "arbitrary and capricious."[258] The litigation was successful, as it prompted settlement negotiations with USCIS.[259] USCIS eventually agreed to stop implementation of the "no spaces" policy, beginning on December 24, 2020, and President Biden swiftly repealed the policy upon entering office.[260] However, these changes did little to erase the harm already experienced by applicants.

3. Delay

As USCIS raised the bars to entry, the agency significantly slowed the adjudication process for T visas. From 2015 to 2019, the processing times for adjudication increased dramatically from 7.99 months to 17.9 months.[261] As of May 10, 2021, USCIS estimated the processing time for T visas as seventeen months to twenty-nine months.[262] Delays meant that immigrant victims of trafficking, most without access to employment authorization, had to both survive and avoid deportation for even longer, in order to potentially receive a T visa.

The USCIS Ombudsman's Office found the increased processing times alarming. In a 2020 report to Congress, the office noted that adjudication delays were generally a "critical question."[263] The Office pointedly asked USCIS to describe more transparently how it was

---

[254] *Id.*

[255] Class Action Complaint for Injunctive and Declaratory Relief at 2, Vangala v. USCIS, No. 3:20-cv-08143 (N.D. Cal. filed Nov. 19, 2020).

[256] *Id.* at 2.

[257] *Id.* at 3.

[258] *Id.*

[259] AM. IMMIGR. LAWS. ASS'N, *Practice Alert: USCIS Agrees to Stop Rejecting Applications and Petitions for Blank Spaces as of December 28, 2020* (Doc. No. 20122100, Dec. 28, 2020), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/uscis-blank-spaces [https://perma.cc/6LBY-Z88Y].

[260] *Id.*

[261] See chart on file with author based on analysis of U.S. Department of State Trafficking in Persons Reports.

[262] *Check Case Processing Times*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ [https://egov.uscis.gov/processing-times/] (last visited Aug. 28, 2020).

[263] OFFICE OF THE CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN, ANNUAL REPORT TO CONGRESS 8 (2020), https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.

"managing benefits applications from vulnerable populations (such as victims of human trafficking), where prolonged waiting periods could potentially endanger the applicant's safety."[264] Many trafficking victims risked losing access to time-limited specialized case management services for trafficking survivors as the processing times extended.[265] Victims in removal proceedings found it more challenging to obtain continuances and stave off a potential removal order. Some were even removed. At the same time, many victims, who were vulnerable to revictimization and reprisals from traffickers, were left more vulnerable to exploitation.[266]

4. Narrow Misinterpretation

As T visa applicants faced delay and new risks of removal, USCIS issued more requests for evidence and more denials, rigidly interpreted existing standards, contrary to existing law and regulations.[267] USCIS demanded greater evidence to meet existing standards and, in some cases, interpreted existing law to establish a *de facto* statute of limitations, effectively limiting who could qualify for the T visa. For example, Emelia, a victim of sex trafficking, waited over ten years to apply for the T visa because she was not aware of the T visa and also faced immense trauma, stigma, and shame.[268] Despite evidence that victims of trafficking often delay initial reporting, due to stigma and shame, USCIS responded by denying her application because she failed to report to law enforcement or apply for the T visa immediately after her victimization.[269]

Emilia's case was not unique. Advocates noted a particularly pronounced shift in adjudication trends in 2017 related to the "on account of" requirement.[270] To qualify for a T visa, the applicant must

---

[264] *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SECURITY, USCIS RESPONSE TO THE CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN'S 2020 ANNUAL REPORT TO CONGRESS 3 (2020).

[265] 2020 TIP Report, *supra* note 24, at 518 ("Advocates expressed concern with lengthy and increasing T visa processing times, citing added vulnerabilities for survivors who lack legal status or whose time-limited support services expire.").

[266] *Id.*

[267] 2019 TIP REPORT, *supra* note 215, at 487 ("NGOs reported increased obstacles to obtaining a T visa, noting a rising number of requests for additional evidence by adjudicators, including requests that referred to outdated regulations, and called for improved training for adjudicators."); 2020 TIP Report, *supra* note 24, at 518 ("Advocates again reported increased obstacles to obtaining a T visa.").

[268] Emelia is a pseudonym for a client who was represented by the BU Law Immigrants' Rights and Human Trafficking Program. Her name has been changed to protect her identity.

[269] Redacted denial notice on file with author.

[270] *See* Complaint at 10, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020) (In 2017, without any formal announcement or rule-making process, Defendant USCIS started denying bona fide T visa applications, like the applications denied above, claiming the applicant needs to prove that the trafficking was the reason the applicant was still in the

show that she is in the United States "on account" of the trafficking.[271] This ground requires that the victim demonstrate that they have been:

> physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence *on account of* the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking.[272]

Whereas USCIS previously interpreted this requirement broadly, the agency transformed this requirement into a *de facto* statute of limitations, denying applications for survivors of trafficking who failed to file their T visa application within a few years of escaping their trafficking experience.[273]

USCIS has historically interpreted the "on account of" requirement broadly to mean that the trafficking occurred in the United States and that the victim has not departed from the United States since the trafficking occurred.[274] USCIS, in 2017, however, without notice or guidance, moved to dramatically narrow its interpretation of the "on account of" ground.[275] In particular, USCIS interpreted the requirement as a filing deadline, in the absence of any statutory or regulatory guidance.[276]

This troubling shift came after 2016 agency regulations that decreased the burdens on applicants to meet the "on account of" requirement. Previously, to meet the "on account of" ground, applicants had to show they had no "clear chance to leave the United States, or an

---

United States.") Advocates also reported unlawful requests and denials related to other T visa requirements. *See* 2019 TIP REPORT, *supra* note 215, at 487 (describing how advocates have documented increased requests and denials in cases involving polyvictimization, such as domestic violence and human trafficking, as well as on the "on account" of ground).

[271] INA §101(a)(15)(T)(i).

[272] INA § 101(a)(15)(T)(i)(l) (emphasis added).

[273] *See* Corie O'Rourke, Cory Sagduyu, and Katherine Soltis, *Present Yet Unprotected: USCIS's Misinterpretation of the T Visa's Physical Presence Requirement and Failure to Protect Trafficking Survivors*, 3 AILA LAW JOURNAL 53, 54 (April 2021) (describing the *de facto* statute of limitations "despite the absence of any explicit T visa filing deadline in the TVPA or federal regulations").

[274] 8 CFR § 214.11(g)(2002).

[275] *See* Gordon, *supra* note 34 (quoting Mercer Cauley, the immigration attorney representing a victim whose T visa was denied, as saying, "They're using a technicality to revictimize a victim").

[276] *See* O'Rourke, *supra* note 273, at 57 ("USCIS has (1) imposed a de facto filing deadline, (2) ignored a regulatory change that removed the previous requirement that T visa applicants show they did not have an 'opportunity to depart' the United States, (3) failed to adopt a trauma-informed approach, and (4) failed to take into consideration key provisions of the physical presence requirement.").

'opportunity to depart.'"[277] The regulations eliminated this requirement, recognizing that previous narrow interpretations of the "on account" ground were "burdensome, vague, and may frustrate congressional intent."[278] The change made it easier for applicants to meet the "on account of" standard.[279]

Yet, in 2017, without notice, USCIS unilaterally moved to restrict interpretation of the "on account of" ground.[280] The exact contours of this change is unknown because USCIS failed to acknowledge any interpretation shift or to respond to the author's Freedom of Information Act ("FOIA") requests regarding the change.[281] However, anti-trafficking advocates observed that in cases that would have "soared through," applicants received scathing requests for evidence, some of them pages long.[282] They observed that some included *ultra vires* language, contravening the regulations regarding the "on account of" requirement. [283] For example, some RFEs stated that the victim must have been "recently" liberated by a law enforcement agency, while regulations only note that the person has to be "liberated by" such an agency and include no time limit.[284] Also, the USCIS Administrative Appeals Office

---

[277] *See* 8 CFR § 214.11(g)(2). Pursuant to this standard, USCIS may consider "circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers." *Id.*

[278] Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg. at 92274 ("Commenters also opposed the requirement that a victim who escaped the traffickers and remains in the United States must show he or she had no clear chance to leave, asserting it is burdensome, vague, and may frustrate congressional intent to protect victims."). Some changes responded to statutory changes in the TVPRA. *See* INA § 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II) (establishing that immigrant victims who depart the United States and re-entry related to the law enforcement investigation may still qualify for T visas).

[279] *Id.* Also, those who left the United States but re-entered were prohibited from meeting the "on account of" requirement, even if their re-entry was to assist law enforcement. *Id.*

[280] *See* Complaint at 9, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020) ("In 2017, without any formal announcement or rule-making process, Defendant USCIS started denying bona fide T visa applications, like the applications denied above, claiming the applicant needs to prove that the trafficking was the reason the applicant was still in the United States.").

[281] *See* FOIA requests on file with author.

[282] *How Trump Is 'Destroying Protections' for Victims of Human Trafficking*, *supra* note 208. (quoting Martina Vandenberg, who stated, "[R]equests for evidence are much more aggressive. Cases that, in the past, might have soared through are now prompting multiple-page demands for additional evidence").

[283] The change came absent any statutory authority for a filing deadline. While adult trafficking survivors victimized prior to October 28, 2000, were required to file their T visa applications before January 31, 2003, this filing deadline was eliminated by USCIS via regulation in 2017. 81 Fed. Reg 92266, 92301-02 (Dec. 19, 2016). Even when this filing deadline existed, Congress carved out exceptions, including severe trauma that prevented the victim from applying, recognizing the challenges faced by victims of trafficking. 8 C.F.R. § 214.11(d)(4) (2002).

[284] *See* O'Rourke, *supra* note 273, at 58.

("AAO"), the body that handles T visa appeals, saw a rise in appeals "on account of" requirement.[285]

At least one plaintiff challenged the new "on account of" interpretations in federal court.[286] In August 2020, a T visa applicant, who was denied based on the "on account of" ground, filed a federal lawsuit in the Western District of North Carolina.[287] The complaint alleged that the new USCIS interpretation was *ultra vires* and violated notice and comment provisions of the APA.[288] The applicant, known only as "Jane Doe," was recruited by a couple in Georgia from Peru to work as a domestic worker.[289] Eventually, she escaped, but it took her over ten years to come forward and apply for a T visa.[290] In response, USCIS denied her application in February 2020, claiming that she was no longer in the United States "on account" of the trafficking.[291] While the plaintiff eventually withdrew the lawsuit,[292] the agency has yet initiate any change in the "on account of" interpretation or publicly acknowledge its existence.

5. "Darkside Discretion"

USCIS also threatened to deliver another deadly blow for T visa applicants by changing its standards on discretion in July 2020.[293] These

---

[285] *See* O'Rourke, *supra* note 273, at 54 ("Appeals to the Administrative Appeals Office (AAO) involving physical presence rose sharply following this change in interpretation, amounting to nearly one-half of all T visa appeals in 2020."); Complaint at 8, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020) ("A review of the AAO decisions concerning USCIS' denial of T visas based on the presence 'on account of' requirement shows an increase in appeals filed in 2019requesting [sic] *de novo* review of the agency's application of the law in this matter."); *see, e.g.*, Matter of E-T-M-, ID# 3385363 (AAO May 8, 2019) (unpublished) ("AAO overturned USCISs denial and found that the Applicant's continuous physical presence was directly related to her past trafficking as described at 8 C.F.R. § 214.1 l(g)(l)(iv)."); Matter of D-A-A-, ID# 2987735 (AAO Apr. 3, 2019) (unpublished) (finding that USCIS had erred in denying the claim, noting that evidence that the applicant's significant trauma, including "post-traumatic stress disorder (PTSD) relating to his trafficking," "trichotillomania (hair-pulling disorder)," and "major depressive disorder, severe, which interferes with his daily life" was sufficient to meet the "on account of" standard).

[286] *See generally* Complaint, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020).

[287] *See id.* at 9.

[288] *Id.* at 4.

[289] *See* Gordon, *supra* note 34.

[290] *Id.*

[291] *See* Complaint at 6, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020).

[292] *See* Docket, Doe v. Wolf, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020). The author filed two Freedom of Information Act requests with USCIS, dated August 7 and 21, 2020, and as of the date of this writing, has not received a response. (requests on file with author).

[293] On July 15, 2020, USCIS published discretion guidance impacting a variety of immigration applications at USCIS-PM E.8. *See also* USCIS, *Policy Alert: Applying Discretion in USCIS Adjudication* (July 15, 2020),

new discretion standards, imposed significant, new eligibility requirements on applicants, above and beyond existing statutory or regulatory requirements.[294] They represent a dramatic shift from prior guidance, previously in the Adjudicator's Field Manual, that encouraged adjudicators to look to case law and avoid "arbitrary" or "inconsistent" decisions based on discretion.[295]

Congress intended for the T visas to be a non-discretionary immigration benefit.[296] Thus, if an applicant meets the statutory requirements for the T visa, USCIS must grant the benefit. However, T visa applicants were not completely free from the ambit of discretion. Most T visa applicants trigger grounds of inadmissibility because they entered without inspection, had a prior removal order, or engaged in commercial sex, among other reasons.[297] Thus, they separate from the T visa application must submit a waiver of inadmissibility to receive the T visa. This waiver of inadmissibility, unlike the T visa, is expressly discretionary and thus governed by new guidance on discretion.[298]

Scholars have long critiqued the role of discretion in immigration cases.[299] Shoba Sivaprasad Wadhia, for example, coined the term "darkside discretion" to refer "to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for a remedy, but is denied by an adjudicator unfairly in the exercise of discretion."[300] She argued that discretion should "center on humanitarian concerns and be informed by compassion;" thus, discretion as a general matter should be "exercised favorably toward the noncitizen" rather than being designed as a mechanism to deny or deter immigrant applicants.[301]

However, USCIS's new changes to the Adjudicator's Field Manual make the exercise of discretion by adjudicators more complicated, and

---

https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf [https://perma.cc/3YV9-KFY5].

[294] *See* Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion*, IMMIGRANT LEGAL RESOURCE CENTER (March 2021), https://www.ilrc.org/sites/default/files/resources/sweeping_changes_in_uscis_policy_manual_for_discretion_3.19.21.pdf ("The changes represent an attempt to impose new substantive eligibility requirements on applicants that do not exist in the governing statutes or regulations.").

[295] *See* USCIS Adjudicator's Field Manual (AFM) 10.15 ("Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstance.").

[296] A non-discretionary benefit is one for which USCIS must grant if the applicant meets the statutory requirements.

[297] *See generally* 8 U.S.C. §1182(a) for inadmissibility grounds.

[298] *See* 8 C.F.R. § 212.4(c)(1)(viii).

[299] Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 369 (2020).

[300] *Id.*

[301] *Id.* at 367.

substantially increase the burdens on applicants.[302] For example, the new guidance requires that adjudicators use a 22-factor analysis to make any discretionary decision, including in the T visa waiver context.[303] It requires that the immigrant's file contain a record of the officer's deliberations and the weight given to each factor, whether positive or negative.[304] It failed to center humanitarian concerns or encourage officers to exercise discretion favorably for crime victims.

Advocates described the discretion policy as "USCIS's latest attempt to leverage bureaucracy to limit access to protections."[305] In a comment from 79 organizations serving immigrant survivors, they noted "deep[] concern[] about the myriad ways this guidance will foreclose such survivors from the humanitarian relief that Congress specifically created for them, putting them at risk of continued harm."[306] Advocates described how the new discretion policy ran counter to congressional intent, as Congress "aim[ed] to spare survivors from being forced to choose between living with abuse and facing deportation and possible separation from their children."[307] The new guidance also contradicted recent regulations, issued in 2016, wherein the Department of Homeland Security (DHS) "acknowledge[d] that victims of trafficking in persons are an especially vulnerable population."[308] These "special circumstances of victims," they argued, should be explicitly weighed when deciding waiver applications.[309]

Significantly, the policy specifically failed to acknowledge that trafficking victims—and other vulnerable populations--are more likely to trigger negative discretionary factors or have difficulty proving positive

---

[302] USCIS, *Policy Alert: Applying Discretion in USCIS Adjudication* (July 15, 2020), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf [https://perma.cc/3YV9-KFY5].

[303] *Id.* The policy made clear that "[f]or benefits involving discretion, a discretionary analysis is a separate component of the adjudication of the benefit request; it is typically assessed at the end of the review, after an officer has determined that the requestor meets all other applicable eligibility requirements." *Id*. at 1.

[304] *Id.*

[305] *Id.*

[306] 79 Org. on Behalf of Immigrant Survivors of Domestic Violence, Sexual Assault, Hum. Trafficking and other Abuses, Joint Comment Submitted in Response to USCIS Policy Manual Chapters on Applying Discretion in USCIS Adjudications, 1 USCIS-PM E.8 and 10 USCIS-PM A.5 at 1 (Aug. 14, 2020), https://umdsafecenter.org/wp-content/uploads/2020/09/Joint-Comment-USCIS-Policy-Manual-USCIS-Policy-Manual-Applying-Discretion-in-USCIS-Adjudications-1-USCIS-PM-E.8-and-10-USCIS-PM-A.5-Aug.-14-2020.pdf [https://perma.cc/NYD7-LU7M].

[307] *Id.* at 2. Significantly, commenters argued that the discretion policy "undercut[s]" this intent "by creating additional documentary requirements based on overbroad discretionary factors and by imposing requirements outside the statutory framework for survivor-based cases." *Id.*

[308] *See* Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg. at 92284.

[309] *Id.*

factors, merely due to their victimization. Scholars have long recognized that victims of sex trafficking, for example, often criminal history related to their trafficking or past involvement in commercial sex, both of which may trigger inadmissibility. Yet, the new policy asks adjudicators to expressly consider and weigh "evidence regarding respect for law and order, good character, and the intent to hold family responsibilities."[310] The guidance further provides no exceptions for victims of trafficking or other populations who may, by virtue of their victimization, be less likely to demonstrate "good character." Similarly, the policy asks adjudicators to consider the "applicant or beneficiary's value and service to the community,"[311] without noting how victims, especially those who have been isolated by virtue of their victimization, cannot easily demonstrate community engagement.

III. CONSTRAINTS ON THE "SHALLOW STATE"

The USCIS tactics described above were remarkably effective at altering the T visa application process. T visa applicants faced longer wait times, increased risk of rejection, additional requests for evidence, a new *de facto* statute of limitations, and heightened risk of denial. If denied, applicants faced a heightened risk of deportation. Some were even placed in removal proceedings. Also, the policies injected uncertainty about outcomes, and thus had a chilling impact, discouraging new immigrant victims from applying for protection.

In light of these changes, the federal courts, at times, functioned as an effective constraint on unlawful administrative action by the shallow state. Judicial review exposed some of the USCIS actions as unlawful, provided redress for harmed applicants, and in some contexts, stopped the practice altogether. In the context of the fee waiver policy, federal litigation resulted in a national injunction, which temporarily halted the practice and allowed applicants to continue to receive needed fee waivers.[312] Similarly, as plaintiffs challenged the "no spaces" policy, USCIS agreed to engage in settlement negotiations that, at least temporarily, stopped implementation of the policy.[313]

However, federal litigation was also an imperfect remedy. It took time. It required that the immigrant victims had access to *pro bono* legal representation, which was not always available. Some applicants were placed in removal proceedings; others were ordered removed.[314] Those in removal proceedings had to defend against deportation, some without viable other forms of relief. The deported were no longer eligible to pursue the T visa and thus left without

---

[310] *See* USCIS, *Chapter 8: Discretionary Analysis,* at 8 (Dec. 15, 2020), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8 [https://perma.cc/38QV-3S8M].
[311] *Id* at 7.
[312] See *supra* Part II.C.2.
[313] *Id.*
[314] O'Rourke, *supra* note 273, at 65 ("There have been reports of survivors with pending T visa applications or appeals being removed from the United States.")

avenues for redress. Thus, while an important check, judicial review was insufficient alone to fully address the harms visited on immigrant victims.

To address these ongoing gaps in protection, swift action is still needed. President Joe Biden immediately took steps in the right direction. On his first day in office, DHS rescinded the June 2018 policy memorandum, which called for denied T visa applicants to be placed in removal proceedings.[315] USCIS then ended the "no spaces" policy.[316]

Yet, additional efforts are needed. USCIS must end interpretations of the "on account of" interpretation that are unlawful and amend discretion policies to take account of the lived realities of immigrant victims. USCIS should speed up adjudication of T visa applications. Also, improved oversight, training, public engagement, and individual remedies are essential to remedy efforts by the shallow state and restore trust in the T visa program. In particular, this article recommends: (1) an investigation by the DHS Office of Inspector General ("OIG"), an independent body that can identify and address mismanagement, fraud, and abuse in DHS operations; (2) additional agency oversight by the Office of the Citizenship and Immigration Services Ombudsman ("Ombudsman"); (3) increased USCIS training and engagement; and (4) remedies for individuals harmed by unlawful USCIS policies.

DHS OIG Investigation. An October 2020 report to Congress urged policy makers to investigate how barriers within the application process may be leading to "underutilization" of the T visa program.[317] DHS OIG, thus, should respond by conducting a complete, thorough audit of the T visa application process.[318] This audit process must evaluate any barriers that applicants face in accessing the T visa program. The audit should include a review of all correspondence among USCIS officials regarding these new policies and guidance, as well as interviews with USCIS officials and site visits with the USCIS Vermont Service Center, the office where T visa applications are decided.

The audit should unearth any restrictive unlawful interpretations, such as the "on account of" standard. It should involve physical file reviews to compare case file information to determine compliance with statutory and regulatory guidance.[319] At the conclusion of the investigation, OIG should provide

---

[315] *See* U.S. DEP'T OF HOMELAND SECURITY, REVIEW OF AND INTERIM REVISION TO CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL POLICIES AND PRIORITIES 5 (Jan. 20, 2021).
[316] USCIS, USCIS CONFIRMS ELIMINATION OF "BLANK SPACE" CRITERIA (April 1, 2021), https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria [https://perma.cc/2NZP-T5R9].
[317] IMMIGRATION RELIEF FOR VICTIMS, *supra* note 53, at 1.
[318] DHS is well-situated because it has the authority and experience engaging with USCIS related to human trafficking. *See* OFF. OF INSPECTOR GEN., ICE AND USCIS COULD IMPROVE DATA QUALITY AND EXCHANGE TO HELP IDENTIFY POTENTIAL HUMAN TRAFFICKING CASES, (OIG-16-17 2016), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-17-Jan16.pdf [https://perma.cc/BC74-FHVG] (conducting an audit examining how Immigrant & Customs Enforcement and USCIS could "improve data quality and exchange" to improve identification of trafficking cases).
[319] *Id.* at 16.

recommendations for improving the T visa application process and addressing any harms identified associated with past unlawful policies. The OIG should report directly to Congress, which has the authority to address any obstacles identified legislatively or through other means.

Agency Oversight. The USCIS Ombudsman also has authority to engage in oversight. The Ombudsman should identify any T visa applicants harmed by unlawful policies and recommend, in appropriate cases, to USCIS how to rectify any harms, especially of policies deemed unlawful by federal courts. For example, for applicants who had T visas improperly rejected due to the fee waiver and "no spaces" policy, the Ombudsman should move expeditiously to request that USCIS reinstate the initial date of receipt of the application. This move will ensure that the rejection does not delay the ultimate adjudication of their T visa application and will not negatively impact the eligibility of derivative family members.[320]

Furthermore, the Ombudsman should encourage applicants who have received erroneous denials or requests for evidence to contact their office for review. If the adjudicatory practice is found to be unlawful, such as the "on account of" interpretation, the Ombudsman should assist applicants to refile or reopen their cases with USCIS. The Ombudsman also should investigate whether there is any evidence of gross misapplication of law. In such cases, the Ombudsman already has the power expeditiously to intervene with USCIS in individual cases and encourage that USCIS reopen such cases. Finally, the Ombudsman should report any findings related to the T visa application process in its annual report to Congress.

Increased USCIS Training, Transparency, and Engagement. In addition, USCIS must improve training for adjudicators who decide T visa cases. Importantly, USCIS should institute annual, specialized training to the adjudicators assigned to adjudicating T visa claims. Currently, all T visa applications are decided by a specialized unit at the Vermont Service Center. It is essential that these officers receive additional training on: (1) existing statutory and regulatory requirements; (2) challenges that immigrant victims of trafficking may face when gathering evidence; (3) the "any credible evidence" requirement for immigrant victims applying for T visas; and (4) evolving federal case law interpreting relevant statutes and regulations relevant to trafficking. This regular, specialized training will ensure that officers are equipped to make consistent, lawful decisions.

Moreover, USCIS should improve public transparency and accountability. USCIS must engage in notice-and-comment rulemaking as required by the APA for all new policies and provide stakeholders with an adequate opportunity to raise concerns early in the process. USCIS also should respond in a timely manner to FOIA Requests filed to obtain USCIS policies, guidance, and correspondence. In addition, the USCIS Vermont Service Center should increase engagement with the public, including immigrant victims, stakeholders, and advocates. USCIS

[320] For example, T visa applicants under 21 at time of filing may qualify for certain derivative family members, and thus, if the application is receipted in after the applicants 21st birthday, the applicant may lose eligibility for certain family members.

should restart regular stakeholder calls. In such calls, USCIS should report regularly about data related to T visas, provide any updates in policies and trends, and respond directly to concerns from the public. This engagement helps to ensure that USCIS learns if new policies negatively impact T visa applicants.

Individual Remedies. Finally, it is essential that T visa applicants harmed by these policies have available remedies. For those who successfully bring federal lawsuits, a federal court may order relief to either individual(s) or class members harmed by the policy.[321] However, many impacted immigrant victims may be difficult to reach, fearful, and without legal representation.[322] Thus, USCIS should consider affirmative ways to identify and assist any immigrant victims negatively impacted by unlawful practices.

Remedies include reinstating the initial filing date of any applications that were rejected unlawfully by the fee waiver or "no spaces" policy. If a federal court were to find that the "on account of" interpretation violates the INA, applicants harmed by this interpretation should be permitted to reopen their T visa applications and associated waiver applications without cost. In addition, any erroneously denied T visa applicants who were deported from the United States should be permitted to file a motion to reopen with the Executive Office for Immigration Review based on equitable tolling. Also, unlawfully denied T visa applicants with final orders of removal should be granted an automatic stay of removal and be able to qualify for a motion to reopen based on the agency's erroneous interpretation.[323] While exceptional measures, these measures are important to ensure that no further harm occurs to immigrant victims, and to reestablish trust in the T visa program for prospective applicants.

CONCLUSION

In October 28, 2020, a report to members of Congress took note of the underutilization of the T visa program.[324] It encouraged policy makers to investigate how elements of the application process "impede victims from applying for T status or create difficulties for victims."[325] As this article has shown, policies of the "shallow state" have erected new barriers in the T visa

---

[321] See *supra* Part II.C.2.

[322] Krystin Roehl & Logan Schmidt, *The Shocking Lack of Due Process for Immigrants*, VERA INSTITUTE OF JUSTICE (2020), https://www.vera.org/blog/target-2020/the-shocking-lack-of-due-process-for-immigrants [https://perma.cc/7BDD-9U8Q] (describing the profound lack of access to *pro bono* representation for immigrant victims).

[323] Equitable tolling is a concept that allows an applicant to file a motion to reopen after the relevant statute of limitations if they did not discover the circumstances giving rise to the claim until after the filing deadline has passed. If the agency engaged in an unlawful policy or interpretation that resulted in the denial, the applicant should automatically qualify for a motion to reopen based on equitable tolling.

[324] *See* IMMIGRATION RELIEF FOR VICTIMS, *supra* note 53, at 12.

[325] *See id*.

process. These obstacles are diffuse and often hidden. These policies have acted, at times, as "minefields" to trap the vulnerable and expose them to deportation. They have done lasting harm to applicants and to the legitimacy of the T visa program.

The harms of the past four years cannot be undone swiftly. A new Administration must not only roll back such policies but also engage in a careful, comprehensive examination of any barriers within the T visa program. These efforts to unearth the shallow state must be accompanied by engagement, oversight, and transparency to restore trust and ensure that the T visa program remains viable. They must also be swiftly and publicly. Only such quick action will restore trust and ensure that victims will step out of the shadows to take a chance on their own protection.