

The U.S. Response to Human Trafficking: An Unbalanced Approach

Women's Commission for Refugee Women and Children

May 2007



Women's Commission for Refugee Women and Children

122 East 42nd Street

New York, NY 10168-1289

tel. 212.551.3115

fax. 212.551.3180

wcrwc@womenscommission.org

www.womenscommission.org

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MISSION STATEMENT

The Women's Commission for Refugee Women and Children works to improve the lives and defend the rights of refugee and internally displaced women, youth and children. The Women's Commission works in consultation with refugee women, youth and children. Through our advocacy, we ensure that their voices are heard in the halls of power and taken into account in the decision-making process. Our work contributes to long-term solutions, thereby lessening the likelihood of continuing cycles of conflict and displacement.

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NOTE REGARDING ANONYMOUS SOURCES

Many sources interviewed for this report requested anonymity in order to protect any funding that they may receive from the federal government. We have honored their request and indicate within the footnote when an anonymous source has provided information.

ACRONYMS AND ABBREVIATIONS

CIS	U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security
DHS	U.S. Department of Homeland Security
DOJ	U.S. Department of Justice
DUCS	Division of Unaccompanied Children's Services, Office of Refugee Resettlement, U.S. Department of Health and Human Services
HHS	U.S. Department of Health and Human Services
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act (of 1952)
IOM	International Organization for Migration
LEA	Law Enforcement Agency (Declaration)
NGO	Nongovernmental organization
OJP	Office of Justice Programs, U.S. Department of Justice
ORR	Office of Refugee Resettlement, U.S. Department of Health & Human Services
TIP	Trafficking in Persons
TVPA	Trafficking Victims Protection Act of 2000
TVPRA	Trafficking Victims Protection Reauthorization Act
URM	Unaccompanied Refugee Minors
UNHCR	United Nations High Commissioner for Refugees

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EXECUTIVE SUMMARY

“Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹

The United States’ anti-trafficking efforts formally began with the passage of the Trafficking Victims Protection Act (TVPA) of 2000. Since then, the U.S. Government has poured billions of dollars into prevention efforts overseas and prosecution and protection efforts at home. In many ways it provides a model to other countries that are trying to address human trafficking.

This report is focused on the United States’ efforts to protect trafficked persons found in the United States. Under the TVPA, protections, services and benefits are only offered to trafficked persons who are witnesses assisting law enforcement. This system presents its own challenges in accessing benefits and services, particularly due to law enforcement’s manipulation of the system. This is not a case of unforeseen implementation struggles that can be fixed. Instead, at issue is the entire conceptual framework of trafficking as a law enforcement issue and only a law enforcement issue.

The results of six years of this approach are becoming startlingly clear – few trafficked persons coming forward to work with law enforcement. Those who are discovered by law enforcement but refuse or are unable to recount their experiences are not offered any protections and are instead deported. This is an acute problem in particular for trafficked children.

The Women’s Commission for Refugee Women and Children (Women’s Commission) believes that this is an unbalanced approach and that the consequences are grave. While prosecuting traffickers is a just and necessary goal, it should not be accomplished at the expense of the trafficked person. Both objectives can be achieved successfully by adopting a rights-based approach, which entails providing protections to all trafficked persons. It is increasingly acknowledged and recognized even among law enforcement officials that a trafficked person who receives assistance is more likely, willing and able to work with law enforcement.

Another issue throwing trafficking protections off balance is the United States’ policy which focuses government trafficking efforts on eradicating prostitution, which it conflates with sex trafficking. Efforts at addressing contributing factors to trafficking are laudable but should not be pursued to the exclusion of other efforts. There is a need for immigration and labor reform that would yield dramatic results in protections for trafficked and exploited persons in the informal economy.

¹ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted by UN General Assembly (November 15, 2000) (entered into force, December 25, 2003) (hereinafter Trafficking Protocol), art. 3(a).

The current state of the immigration debate in the United States has also affected the debate on trafficking. Unfortunately, understandable concerns over national security have resulted in increasingly restrictive immigration policies that have led to an increase in immigration detention, more restricted access to asylum and the provision of benefits and increased vigilance at the borders. Stricter migration controls force migrants and refugees who are making life or death decisions to take even greater risks, decisions that often force them into the hands of traffickers. Asylum has been underused in the United States as a form of relief for persons who were victims of trafficking in their own countries and who can meet the criteria of fearing persecution. The United Nations High Commissioner for Refugees (UNHCR) has concluded that human trafficking may be used as a form of persecution and that trafficking could be the basis for a refugee claim where the State has been unwilling or unable to provide protection.²

The Women's Commission's recommendations therefore seek to bring balance to U.S. anti-trafficking efforts. They are rooted in a rights-based approach which can yield positive results for law enforcement and persons trafficked for all forms of trafficking (whether for sex or labor).

RECOMMENDATIONS

Based on the research and findings of this report, the Women's Commission makes the following recommendations:

Improve data collection to capture a more accurate and representative estimate of the number of trafficked persons in the United States. The United States is not counting the total number of trafficked persons coming forward, but only the number of witnesses by relying on the number of T Visas awarded. Government officials are perplexed by the low number, yet the numbers are reflective of the inadequacy of the system of protections established.

- Do not categorize and count trafficked persons as a “witnesses” but expand the scope of who is counted to include all trafficked persons identified (as listed on pages 12-13).
- Create a mechanism to collect the information of currently unreported cases of trafficked persons.
- Keep a balanced approach between labor and sex trafficking and trafficking of women, men and children.

Address all forms of trafficking. The U.S. government should adopt a balanced policy approach to all forms of trafficking so that no particular population is left unprotected. This would require attention to:

- encouraging state and local law enforcement efforts to pursue cases of all forms of trafficking;
- determining a location for human trafficking task forces outside of vice units in local police departments that can encourage pursuit of labor trafficking cases as well;
- investigating and prosecuting labor trafficking cases at the federal, state and local level in addition to sex trafficking cases;

² UNHCR, Guidelines on International Protection: Gender Related Persecution (2002).

- devoting funding toward trafficking services;
- addressing the lack of legal immigration options to fulfill the demand for laborers, the resulting underground economy creating immense opportunities for traffickers and visa restrictions that help facilitate trafficking;
- assuming leadership to create protections for the informal labor sector;
- addressing the universal demand for cheap labor; and
- encouraging corporate responsibility.

Continue public awareness efforts at all levels. The national campaign is trying to achieve too much and should reconsider where it is targeting its resources. It has proven ineffective at supporting and sustaining coalitions, which also appear to be duplicative with U.S. Department of Justice task forces. Also, the campaign does not function at a grassroots level and has therefore been unable to reach trafficked persons directly. There may be greater success if the approximately \$8 million were devoted to non-English media sources.

Amend continued presence as follows:

- Make continued presence mandatory to guarantee protection – currently it is discretionary which may lead some law enforcement to believe it is not necessary.
- Apply for continued presence within a defined time period – if law enforcement cannot make a determination as to victim and potential witness status they must apply for continued presence so that the trafficked person is not penalized while waiting; suggested time periods range from 15 to 90 days.
- Permit state and local law enforcement to request continued presence.
- Permit attorneys and advocates assisting trafficked persons to request continued presence.
- Alter determination from “is” a victim to “may be” a victim – the definitive language of “is” makes law enforcement hesitant, believing that they must be positive of their determination; this would make the language more consistent with “may be” a potential witness.

Amend certification as follows:

- Permit attorneys and advocates to apply for certification on behalf of the trafficked person to remove the potential for abuse of the process by law enforcement.
- Permit trafficked persons to apply directly for certification, which was under consideration in 2001.³
- Ensure that information about certification is included in local, state and federal law enforcement trainings; unlike continued presence, certification may be granted upon a request by local and state law enforcement officials in addition to federal authorities.⁴

³ U.S. Department of Health and Human Services, Office of Refugee Resettlement, State Letter SL01-13 (May 3, 2001) (“At this time, ORR is in the process of developing procedures under which an individual may apply for certification as a victim of a severe form of trafficking. Until formal procedures are developed, requests for certification are being handled on a case-by-case basis.”)

⁴ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

Amend the T Visa as follows:

- Collect statistics on the number of applications received, approved and denied that are submitted with an LEA Declaration.
- Create mental health and potential retaliation exemptions from the law enforcement cooperation requirement.
- Change “extreme hardship involving unusual and severe harm” to the “extreme hardship” standard.
- Require law enforcement cooperation OR extreme hardship.
- Mandate that law enforcement provide a completed Law Enforcement Agency Declaration within a specific timeframe, for example, within 15 days of the first assistance rendered.
- Issue adjustment of status and U Visa regulations.

Create eligibility for benefits for all trafficked persons, not only witnesses, and eliminate the eligibility requirement that law enforcement determines whether a person is a “victim of trafficking.” Every service provider the Women’s Commission spoke with said that the TVPA’s greatest flaw is tying benefits to assisting law enforcement. There must be a fundamental acceptance of the human rights abuse that has occurred and that for some trafficked persons it would be a further abuse to report to law enforcement. There is too great a risk of retraumatization and retaliation. The report shows that trafficked persons are refusing to report to law enforcement when they learn of what the process entails. It forces trafficked persons to pursue an alternative form of immigration relief than the T Visa and struggle without the federal benefits. This is not a system of protection.

Provide benefits first, law enforcement cooperation second and voluntarily. A system of benefits first would greatly enhance protections of trafficked persons in the United States. It would reduce the rapid removal of individuals who are unable to recount their experience within the first few days of discovery. It would honor the human rights of trafficked persons. It would create stronger, more able and willing witnesses for law enforcement.

Provide unrestricted funding to service providers. Service providers are funded to assist only witnesses. Once a trafficked person decides not to report to law enforcement, the service provider can no longer assist that person with federal funding. This denies assistance to countless trafficked persons as reported by service providers. The absurdity can be illustrated by the example of domestic violence. Federal agencies fund service providers to assist persons who have suffered domestic violence, including battered immigrant women. Yet there is no requirement that the government first determines whether or not the person is a “victim” of domestic violence and thereby who can and cannot be assisted by the service providers. Again, this is not a system of protection. Furthermore, the government should also:

- continue to fund legal services to trafficked persons, which is essential to balancing law enforcement’s position of influence;
- fund dedicated trafficking shelters; and
- evaluate the per capita reimbursement system to determine whether it meets the needs of trafficked persons and service providers.

Amend the system of protections for trafficked children. Specific ways to increase and improve protections offered to trafficked children include:

- The Office of Refugee Resettlement (ORR) must remove the barriers through the MOU with DOJ and DHS that forces children to cooperate with law enforcement in order to receive benefits.
- Create and issue an interim eligibility letter immediately upon discovery of any potentially trafficked child to establish custody and services.
- Permit attorneys and advocates to request interim eligibility letters and eligibility letters on behalf of children.
- Do not place children in removal proceedings and the DUCS system until it can be confirmed that they are not trafficked.
- Establish dedicated trafficking shelters for potentially and confirmed trafficked children within the Unaccompanied Refugee Minors (URM) program.

Adopt and incorporate a rights-based approach to human trafficking to balance the current law enforcement approach. The framework to approach trafficking could be adopted from that used to protect refugees, which defines three possible durable solutions for those who have faced human rights violations: voluntary return that respects the safety and dignity of the person; local integration in the host country; or third country resettlement. According to this framework, the U.S. is failing to provide protections. The TVPA does not provide for return or resettlement and only offers integration to witnesses who must endure an arduous process for the benefit.

- Amend the TVPA to incorporate the durable solutions.
- Remove the current barriers to local integration.

BACKGROUND

THE WOMEN'S COMMISSION ASSESSMENT

The Women's Commission for Refugee Women and Children conducted an assessment of the United States' approach to addressing human trafficking, focusing on the legal and social measures in place to protect trafficked women and children in the United States. This assessment is part of a global study by the Women's Commission to explore the nexus between refugee protection and trafficking. The goal of the overall study is to offer concrete recommendations to policymakers on how to prevent and respond to trafficking in refugee populations, taking into account the needs and rights of trafficked persons who have fled persecution or armed conflict in their homelands.

The Women's Commission employs and recommends using the terminology "trafficked person" rather than "victim" to underscore a rights-based rather than a criminal perspective. The term "victim" is used only when referring to the specific language of the law.

INTERNATIONAL AND DOMESTIC LAWS PERTAINING TO THE PROTECTION OF REFUGEES AND TRAFFICKED PERSONS IN THE UNITED STATES

Legal protections afforded to trafficked persons are derived from international and domestic laws. This section will highlight the most relevant international and U.S. refugee and anti-trafficking law.

International Refugee Law

After World War II, the international community joined together to establish international standards for the protection of refugees. This effort resulted in a treaty known as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).⁵ The Refugee Convention imposes on countries the obligation to protect any individual found to have a well-founded fear of persecution on account of race, religion, nationality, political opinion or membership in a particular social group.⁶ It also prohibits the expulsion or return of refugees to a country where their lives or freedom would be threatened on the basis of these five criteria. This is known as the principle of *non-refoulement*.⁷

The Refugee Convention has been widely ratified, with 145 states party to either or both the Convention and the Protocol as of February 1, 2004, including the United States.⁸ The office of the UN High Commissioner for Refugees (UNHCR), as well as experts in the refugee field, consider the principle of *non-refoulement* to be customary international law, and thus binding on all countries, even if they are not a party to the treaty.⁹

Refugee protection is generally interpreted in the context of human rights law. As human rights standards have evolved over the years, the refugee definition has often been interpreted to cover violations of such rights. This has been true, for example, in cases involving gender- or age-related persecution.¹⁰

A similar trend has occurred in the consideration of trafficking as a human rights violation. Some countries have granted asylum to trafficked persons, an important acknowledgment of this growing human rights violation.¹¹ UNHCR has also taken the position that trafficking may

⁵ United Nations Convention Relating to the Status of Refugees, 189 UN Treaty Series 137 (opened for signature July 28, 1951); United Nations Protocol Relating to the Status of Refugees, 606 UN Treaty Series 267 (opened for signature January 31, 1967) (hereinafter Refugee Convention).

⁶ Refugee Convention, art. 1.

⁷ Refugee Convention, art. 33.

⁸ www.unhcr.org

⁹ See UNHCR, Agenda for Protection, Document a/AC.96/965/add.1 (endorsed by UNHCR Executive Committee, October 2002) (noting that the applicability of the principle of *non-refoulement* is embedded in international law); see also Conclusion No. 25, Executive Committee, UNHCR (1982) (noting that the principle of *non-refoulement* is progressively acquiring the character of a peremptory rule of international law); Summary Conclusions, Global Consultations Expert Roundtable, UNHCR and Lauterpacht Research Centre for International Law (July 2001) (concluding that *non-refoulement* is a principle of customary international law and applies to refugees irrespective of their formal recognition), found in Erika Feller, Volker Turk and Frances Nicholson, *Refugee Protection in International Law* (2003).

¹⁰ Alice Edwards, "Age and Gender Dimensions in International Refugee Law," found in Erika Feller, Volker Turk and Frances Nicholson, *Refugee Protection in International Law* (2003).

¹¹ See, e.g., *In the Matter of J-M-*, Executive Office for Immigration Review (1996) (granting Chinese trafficked

constitute a form of persecution that merits refugee protection if the country of origin is unable or unwilling to offer protection against such harm.¹² More recently, UNCHR released detailed guidelines on how and when trafficked persons are deserving of asylum protections.¹³ In the United States, asylum has not traditionally been seen as a form of relief for people who have been trafficked. Because of the business nature of human trafficking, the perpetrators are typically private individuals or criminal organizations. While government officials are often bribed or otherwise tangentially involved, showing sufficient action or acquiescence by these officials can be difficult. Regardless of these difficulties, and lack of precedent, U.S. immigration attorneys and immigration courts must make a more concerted effort to pursue asylum as a form of relief for persons who flee to the United States to escape trafficking and for those who have been trafficked as a form of persecution.¹⁴

International Anti-Trafficking Law

The international community has addressed trafficking in various international instruments. This includes a particular focus on the impact of trafficking on women and children, who constitute the vast majority of trafficked persons.

The Convention on the Rights of the Child requires states to take steps to prevent the abduction, sale or trafficking of children for any purpose.¹⁵ It also calls upon states to protect children from all forms of sexual exploitation and abuse.¹⁶ The United States and Somalia are the only two countries that have not ratified the Convention. However, the United States ratified the Convention's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in December 2002 and the Optional Protocol on Children in Armed Conflict in January 2003.

The Convention on the Elimination of All Forms of Discrimination against Women requires states to institute measures to suppress all forms of trafficking in women. It also calls upon them to prevent exploitative prostitution,¹⁷ and to ensure healthy and safe working conditions for women.¹⁸ The United States is one of the few countries in the world not to have ratified the Convention, though it is a signatory. The Convention has received periodic consideration by the Senate Committee on Foreign Relations. Most recently, it was recommended by the Committee

person asylum). Immigration and Refugee Board of Canada, Case V5 -02904 (1997) (noting that international refugee protection would be a hollow concept if it did not offer protection to Ukrainian trafficked person).

¹² UNHCR, *Guidelines on International Protection: Gender-Related Persecution* (2002).

¹³ UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (April 7, 2006).

¹⁴ UNHCR, Bureau for Europe Policy Unit, *Combating Human Trafficking; overview of UNHCR Anti-Trafficking Activities in Europe* (2005).

¹⁵ Article 34, Convention on the Rights of the Child, opened for signature November 20, 1989, entered into force September 2, 1990.

¹⁶ Article 35, Convention on the Rights of the Child, entered into force September 2, 1990.

¹⁷ Article 6, Convention on the Elimination of All Forms of Discrimination against Women, entered into force September 3, 1981.

¹⁸ Article 11, Convention on the Elimination of All Forms of Discrimination against Women, entered into force September 3, 1981.

for full Senate ratification in July 2002, subject to a series of reservations and declarations. The Congressional session ended that year without any action taken by the Senate.

In November 2000, the UN General Assembly adopted the Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, to the Convention Against Transnational Crime (the Trafficking Protocol).¹⁹ The protocol entered into force on December 25, 2003. As delineated in Article 2, the purpose of the Trafficking Protocol is to prevent and combat trafficking in persons, with special attention to women and children; to protect and assist victims of trafficking, with full respect for their human rights; and to promote cooperation among countries that have ratified the protocol in order to achieve those objectives.

At the time this report went to print, 117 countries had signed the Trafficking Protocol, and 106 had fully ratified it. The United States ratified it on December 3, 2005.²⁰

The Trafficking Protocol lays out the first internationally accepted definition of trafficking as: *...the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.*²¹

Furthermore, the Protocol clarifies that the consent of a person to trafficking is irrelevant if threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person is used.²² It also states that the recruitment, transportation, transfer, harboring or receipt of a child under age 18 for exploitation is trafficking even if it does not involve any of the means defined.²³

The Trafficking Protocol requires that countries facilitate the safe return of their trafficked nationals and residents.²⁴ It also requires the receiving country that is returning a trafficked person to do so with due regard for the safety of the trafficked person and the status of any relevant legal proceeding related to the trafficking.²⁵ The protocol mandates that governments, to the extent possible, strengthen border controls to detect and prevent trafficking.²⁶ This includes

¹⁹ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted by UN General Assembly (November 15, 2000) (entered into force, December 25, 2003) (hereinafter Trafficking Protocol).

²⁰ United Nations Office on Drugs and Crime, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, www.unodc.org.

²¹ Trafficking Protocol, art. 3(a).

²² Trafficking Protocol, art. 3(b).

²³ Trafficking Protocol, art. 3(c)-3(d).

²⁴ Trafficking Protocol, art. 8.

²⁵ Ibid.

²⁶ Trafficking Protocol, art. 11.

training immigration and other law enforcement officials to prevent trafficking, to prosecute traffickers and to protect the rights of trafficked persons.²⁷

Human rights organizations and experts have criticized the Trafficking Protocol for its relatively weak language on the rights and assistance needs of trafficked persons.²⁸ For example, the protocol requires a state party to protect the confidentiality of trafficked persons *in appropriate cases and to the extent possible under its domestic laws*. It urges a state party *to consider* implementing programs to address the physical, psychological and social recovery of victims, especially provision of appropriate housing, counseling, medical care, material assistance and employment, educational and training opportunities. It encourages a state *to endeavor* to address the physical safety of victims, and *to consider* adopting measures to permit victims to remain temporarily or permanently in their territories. Finally, it notes that return of trafficked persons *shall preferably be voluntary*.

This language is non-binding rather than mandatory in nature. This weakness in part reflects the fact that the protocol was negotiated under the auspices of the UN Crime Commission, a body whose mandate is grounded in law enforcement rather than human rights.²⁹ However, regardless of whether they are a party to the Trafficking Protocol, countries are obligated under international human rights instruments to protect the rights of trafficked persons. Article 14 of the Trafficking Protocol, moreover, contains a savings clause that notes that the protocol should not be interpreted to undermine state obligations under human rights, humanitarian or refugee law, including the principle of *non-refoulement*.

U.S. Anti-Trafficking Law

The U.S. anti-trafficking law derives from the Trafficking Victims Protection Act of 2000 (TVPA),³⁰ subsequently reauthorized in 2003³¹ and 2005.³² This legislation has been dubbed comprehensive and a model for other countries because it addresses prevention, prosecution and protection measures.³³ The prevention prong consists of grants for education, outreach, public awareness initiatives and economic alternative programs overseas.³⁴ In fiscal year 2005, the United States issued grants totaling \$95 million, which funded 266 international anti-trafficking programs in 101 countries.³⁵ The prosecution prong increased sentencing, modified existing slavery statutes, and created new sex trafficking, forced labor and document withholding

²⁷ Trafficking Protocol, art. 10.

²⁸ See, e.g., Ann D. Jordan, International Human Rights Law Group, *The Annotated Guide to the Complete UN Trafficking Protocol* (May 2002); Anne Gallagher, "Trafficking, Smuggling, and Human Rights: Tricks and Treaties," *Forced Migration Review* #12, February 2002; also Interview with Bandana Pattanaik, Global Alliance Against Trafficking in Women (April 26, 2004).

²⁹ Ann D. Jordan, International Human Rights Law Group, *The Annotated Guide to the Complete UN Trafficking Protocol* (May 2002).

³⁰ Pub. L. 106-386, 114 Stat. 1464 (2000).

³¹ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. 108-193, 117 Stat. 2875 (2003).

³² Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, 119 Stat. 3558 (2005).

³³ Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L. J. 29 (2001) (providing legislative history of the measures included and lost).

³⁴ Pub. L. No. 106-386, 114 Stat. 1466, 1474 (2000).

³⁵ U.S. Department of Justice, *Attorney General's Annual Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons Fiscal Year 2005* 21 (June 2006).

offenses.³⁶ The protection prong created benefits for trafficked persons who cooperate with law enforcement.³⁷

Overall, the TVPA is dominated by law enforcement tools and the legislative history is illustrative of this point. The TVPA originated in federal prosecutors having limited ability to prosecute involuntary servitude and slavery cases. In 1988, the U.S. Supreme Court case *U.S. v. Kozminski*³⁸ interpreted the involuntary servitude statute to require actual physical force, that is, striking or beating to compel labor. Prosecutors, however, increasingly encountered cases where there was no physical force and instead there were subtler methods of control such as threats against family members, threats of deportation and withholding passports. These methods were just as effective at compelling labor but were insufficient for a prosecution because there was no physical force.

Prosecutors also often lost their primary evidence and the entire case because the victim/witnesses were being deported. This occurred frequently because the enslaved persons were often undocumented and deported when found by law enforcement. Yet another limiting factor for prosecutors was the victim/witnesses' reluctance or inability to cooperate with a prosecution. They were often destitute, traumatized, terrified of speaking out against the person who held them, undocumented, unable to work legally and far from home. They had little incentive to remain in that difficult situation.

The TVPA, therefore, was created to fix *Kozminski*, provide temporary immigration status to keep victim/witnesses in the country, and provide victim/witnesses with incentives to cooperate with law enforcement. It is a law rooted in law enforcement. These incentives and their law enforcement objectives are discussed fully in the following sections.

Demographics

In 1999, the first in-depth report on trafficking in the United States estimated that approximately 45,000 to 50,000 women and children were trafficked annually into the United States.³⁹ The study further revealed that trafficking occurred for many purposes, including domestic servitude, adoption, marriage, prostitution, construction, agriculture and manufacturing.⁴⁰ Like many countries, the United States was struggling with how to create effective deterrents to committing the crime and encourage trafficked persons to come forward. As discussed in the previous section, the TVPA attempted to address these issues through measures on prevention, prosecution and protection.

Over the years since that first report and the passage and implementation of the TVPA, the United States has been collecting data on the incidence of trafficking within its borders. In 2005, the U.S. Government revised its estimate to be between 14,500 and 17,500 people trafficked

³⁶ Pub. L. No. 106-386, 114 Stat. 1466, 1486 (2000).

³⁷ Pub. L. No. 106-386, 114 Stat. 1466, 1474 (2000).

³⁸ 487 U.S. 931 (1988).

³⁹ Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* (Nov. 1999).

⁴⁰ *Ibid.*

annually into the United States.⁴¹ This estimate is discussed in detail in the next section. The most recent data indicates that trafficked persons are most often found, in order of prevalence, in prostitution, domestic work, agriculture, sweatshop factories, restaurant and hotel work, and entertainment.⁴² They came to the United States from more than 49 countries⁴³ and the majority are found in the states of California, New York and Texas.⁴⁴ With a burgeoning problem with trafficking as a destination country, however, the U.S. Government has only determined 675 people to have been trafficked.⁴⁵

U.S. EFFORTS TO FIND TRAFFICKED PERSONS

ESTIMATED NUMBER OF TRAFFICKED PERSONS

The U.S. Government estimates that annually between 600,000 and 800,000 people are trafficked across international borders⁴⁶ and between 14,500 and 17,500 people are trafficked into the United States.⁴⁷ These figures have generated much critique and skepticism. Service providers expressed concern that the government's methodology is unclear⁴⁸ and that the government estimates are conservative.⁴⁹ For example, the estimates do not account for internal trafficking; the U.S. Government's focus on border crossing is unclear because it is not a requirement under the TVPA or the Protocol. Underscoring the service providers' statements, the Government Accounting Office reports that the estimates are "questionable" for three reasons:

- 1) weak methodology – the process may not be replicable or reliable because just one person working part-time developed the estimates and did so without documenting his work;
- 2) unreliable country data – the quality of information varies in the availability and comparability; and
- 3) grave inconsistency in the number of trafficked persons found versus estimated.⁵⁰

⁴¹ U.S. Department of State, *Trafficking in Persons Report 7* (June 2005).

⁴² Free the Slaves & Human Rights Center, University of California, Berkeley, *Hidden Slaves: Forced Labor in the United States* 14 (Sept. 2004).

⁴³ Heather J. Clawson, Caliber, an ICF International Company, *Providing Services to Victims of Human Trafficking: How Far Have We Come?* U.S. Department of Justice, National Conference on Human Trafficking: What We Know and How We Can Work Together, New Orleans, LA (Oct. 3, 2006) (presenting data collected from service providers in 2005).

⁴⁴ U.S. Department of Justice, *Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2005* 4 (Sept. 2006).

⁴⁵ Homer Wetherby, Vermont Service Center, U.S. Department of Homeland Security (July 10, 2006).

⁴⁶ U.S. Department of State, *Trafficking in Persons Report 7* (June 2005).

⁴⁷ U.S. Department of State, *Trafficking in Persons Report 6* (June 2006).

⁴⁸ Interview with Elissa Steglich, Heartland Alliance (June 30, 2005). Interview with Jolene Smith, Free the Slaves (July 12, 2005). Interview with Florrie Burke, Safe Horizon (Aug. 4, 2005). Interview with Suzanne Tomatore, City Bar Justice Center (July 15, 2005).

⁴⁹ Interview with Suzanne Quinn, Florida Freedom Partnership (June 17, 2005). Interview with Abigail Price, International Rescue Committee (July 14, 2005).

⁵⁰ Government Accounting Office, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad* 10-21 (July 2006).

Given that the magnitude of the trafficking problem is central to allocating the appropriate level of resources, proper, reliable estimates are critical. The U.S. State Department reports that new estimates are being developed currently that should provide for a more reliable and transparent methodology. While this will hopefully address an improvement of the weak methodology, unreliable country data will continue to plague and impact the estimates. There are also concerns remaining about the third critique, the inconsistency in the number found versus the estimate, particularly with regards to trafficking into the United States.

Since 2000, the United States has counted just 675 people as trafficked persons.⁵¹ There are numerous reasons proffered for the great discrepancy between 675 found in *five years* and up to 17,500 estimated *per year*, and more specifically why so few have been found. The number, 675, does not accurately capture the number of trafficked persons in the United States because they are a very narrowly defined group. They are people who have received a T Visa, a form of immigration relief conditioned upon assistance to law enforcement, who have been deemed to meet the TVPA definition of a victim of trafficking. This means that the following trafficked persons are not counted:

- persons who apply for and receive another form of immigration relief;
- persons who require no immigration relief;
- persons who decline to report to or assist law enforcement;
- persons who are U.S. citizens;
- persons who cannot meet the evidentiary requirements of a T Visa;
- persons whom law enforcement declare are not potential witnesses;
- persons who are released by law enforcement because they are not the best witnesses of the group;
- persons who are deemed to be potential witnesses and receive certification (i.e. refugee benefits, discussed later) but are subsequently denied a T Visa; and
- persons whose T Visa is denied because law enforcement refuses to offer support for the T Visa application.

There is no mechanism to capture the information of these currently unreported cases of trafficked persons – not from law enforcement or service providers. Improving data collection and expanding the scope of who is counted beyond T Visa awards would be a good start to a more accurate figure.

The number of trafficked persons found is low, according to service providers, because of numerous reasons that trafficked persons may not be coming forward:

- reluctance to report being trafficked because of fear of their captors, law enforcement, deportation or stigmatization;⁵²
- lack of awareness of protections available further exacerbates their fears and reluctance to come forward to authorities;⁵³
- isolation from the community who could assist them and media sources that could inform them of assistance available;
- inability to cooperate with law enforcement due to severe traumatization;⁵⁴

⁵¹ Homer Wetherby, Vermont Service Center, U.S. Department of Homeland Security (July 10, 2006).

⁵² Interview with Suzanne Quinn, Florida Freedom Partnership (June 17, 2005).

⁵³ ANONYMOUS (June 16, 2005).

⁵⁴ Interview with Judy Okawa, The Center for Traumatic Stress Studies (Oct. 17, 2006).

- desire to forget what happened and move forward with their lives;
- availability of an immigration option that is *not* conditioned upon law enforcement cooperation and therefore more attractive;
- fear that even if they assist and apply for a T Visa that they may be deported if the application is denied;
- fear of a trafficker's retaliation against their family or themselves upon cooperation with law enforcement;
- fear of a trafficker's retaliation upon seeing their T Visa application;
- deportation of unidentified trafficked persons;
- detention of unidentified trafficked persons;
- absence of a nationwide grassroots campaign focused on outreach to potentially trafficked persons; and
- lack of law enforcement training and awareness at all levels of command and jurisdiction.

The policy implications of this list are extensive. It demonstrates how far the United States has to go in order find trafficked persons, encourage them to come forward for assistance and then offer them protections.

Another concern with the trafficking estimates is whether the number adequately reflects the ratio of people trafficked for sex versus labor and the ratio of women trafficked versus men trafficked. The U.S. Government estimates that of the 600,000 to 800,000 persons trafficked internationally annually 80 percent are women and girls of which 70 percent are trafficked for sex.⁵⁵ The estimate may simply reflect what we are looking for. The Government Accounting Office reports that worldwide data collection is generally focused on women and children trafficked for sex to the exclusion of other forms of trafficking, which are therefore underreported and underrepresented in estimates.⁵⁶

Sex Trafficking

The U.S. estimates may also be skewed by the Bush Administration's anti-trafficking policy, which focuses government efforts on sex trafficking and conflates sex trafficking with prostitution.⁵⁷ The U.S. Government cannot claim to have comprehensive trafficking legislation and a comprehensive approach when it is puts forth a government-wide policy to focus efforts on prostitution. There is no denying that research and policies based in fact on prostitution, sex tourism and demand for sex should be a *part* of a comprehensive strategy; the problem is that it is the only strategy in the United States currently.

⁵⁵ U.S. Department of State, *Trafficking in Persons Report 5* (June 2006).

⁵⁶ Government Accounting Office, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad* 15 (July 2006). Additionally, a gender bias impacts the estimates; women and children are more readily viewed as trafficked persons whereas men are viewed as migrant workers or victims of labor exploitation.

⁵⁷ Susan A. Cohen, "Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning," *The Guttmacher Report on Public Policy* (Feb. 2005). Elisabeth Bumiller, "Evangelicals Sway White House on Human Rights Issues Abroad," *New York Times* (Oct. 26, 2003)

The Bush Administration's anti-trafficking policy was formally established by a December 2002 National Security Presidential Directive. Curiously, the directive is not publicly available and it is unclear why; it would be valuable to review since this document directs all U.S. Government anti-trafficking efforts and resources. It is described in numerous government documents as providing evidence of the link between prostitution and trafficking, that legalized or tolerated prostitution increases demand for sex trafficking,⁵⁸ and in order to combat trafficking the U.S. Government has adopted a strong position against legalized prostitution.⁵⁹ After an extensive literature review, to date, there is no empirical data linking legalized prostitution and increased demand for sex trafficking. In fact, the International Organization for Migration will soon release four studies on prostitution in which they searched for links to trafficking but the data shows that prostitution and sex trafficking are distinct.⁶⁰

Funding trends are illustrative of the government's anti-prostitution approach under the policy directive. For example, under the guise of trafficking, the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005 authorizes \$25 million grants to state and local law enforcement to investigate and prosecute buyers of commercial sex.⁶¹ There is also a trend to fund trafficking task forces – 42 total with \$21 million – located within local law enforcement vice squads.⁶² As a result, some local task forces have focused exclusively on prostitution,⁶³ making no distinction between prostitution and sex trafficking and not pursuing labor trafficking cases. Additionally, there is a trend away from funding anti-trafficking efforts and toward funding efforts against commercial sexual exploitation.⁶⁴ Therefore, massive resources are aimed at prostitution broadly, rather than targeting efforts at sex trafficking and all other forms of trafficking.

Additionally, U.S. Department of Justice prosecutors confirm that the Administration has directed their office to make sex trafficking prosecutions a priority.⁶⁵ Over the past five years, 75

⁵⁸ U.S. Department of State, *Fact Sheet: The Link Between Prostitution and Sex Trafficking*, <http://www.state.gov/documents/organization/38901.pdf>.

⁵⁹ White House Press Release, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003) <http://www.whitehouse.gov/news/releases/2003/02/20030225.html>.

⁶⁰ Remarks by Richard Danziger, International Organization for Migration, Washington, D.C. (Nov. 2, 2006).

⁶¹ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, 119 Stat. 3558 (2005).

⁶² U.S. Department of Justice, *Attorney General's Annual Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons Fiscal Year 2005* 23 (June 2006) (reporting that 32 task forces have been formed with \$13 million). U.S. Department of Justice, Press Release, *Attorney General Alberto R. Gonzales Announces Enhanced Programs to Combat Human Trafficking* (Oct. 3, 2006) (announcing 10 more task forces funded with \$8 million). Interview with Florrie Burke, Safe Horizon (Aug. 4, 2005). Interview with Joy Zarembka, Break the Chain Campaign (Oct. 18, 2006). Interview with Katherine Kaufka, National Immigrant Justice Center (Nov. 10, 2006).

⁶³ ANONYMOUS (from three different organizations) (Oct. 18, 2006).

⁶⁴ See later section entitled "Government-funded Services." As examples, see two grant announcements from the Office of Juvenile Justice Delinquency Prevention at the U.S. Department of Justice: 1) Building Community Capacity to Reduce the Commercial Sexual Exploitation of Children and Youth (#1328) and 2) Research on the Commercial Sexual Exploitation of Children and Youth (#1330). Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, 119 Stat. 3558 (2005) (authorizing \$5 million in 2006 and 2007 to the Department of Health and Human Services (HHS) for a grant program to "develop, expand, and strengthen victim service programs for victims of domestic trafficking," a "pilot program to establish residential treatment facilities in the United States for minor victims of domestic trafficking.").

⁶⁵ ANONYMOUS (Nov. 3, 2006).

percent of the trafficking prosecutions have been sex trafficking.⁶⁶ The striking result is that service providers are hesitant to advise persons trafficked for labor to report to law enforcement; if law enforcement is not interested in the case, the trafficked person receives no benefits and may be put into removal proceedings.⁶⁷ **The risks of reporting outweigh the potential benefits. Persons trafficked for labor are left unprotected and the phenomenon is underreported, making sex trafficking appear to be more prevalent.**

The effects of the policy directive are echoed and reinforced by Congress's efforts through the reauthorizations of the TVPA. In 2003, the TVPRA established the requirement that any organization receiving federal government funds sign a statement that they do not "promote, support, or advocate the legalization or practice of prostitution."⁶⁸ The clause is detrimental to many worthwhile and critical projects, particularly those for HIV prevention.⁶⁹ The requirement's constitutionality is currently under review in the U.S. Court of Appeals for the District of Columbia Circuit.⁷⁰ In 2005, the TVPRA focused on commercial sexual exploitation of U.S. citizens, referencing runaway and homeless youth, and authorized \$10 million in appropriations to the issue.⁷¹

The dangers therefore of this limited policy are apparent. Funding and other resources are diverted away from other forms of trafficking where it is also needed. Persons trafficked for all other forms of labor are virtually ignored and unprotected, particularly men who are predominantly found within labor trafficking. A more balanced approach that addresses and commits resources to all forms of trafficking is required. For example, the lack of legal immigration options to fulfill the demand for laborers, the resulting underground economy creating immense opportunities for traffickers, and visa restrictions all contribute to increased trafficking. Addressing some of these issues would benefit all trafficked and exploited persons. Protections are needed for the informal labor sector that address the universal demand for cheap labor and encourage corporate responsibility. Attention and resources to all issues would create a more balanced and comprehensive approach to trafficking in the United States.

Public Awareness

Prior to 2006, the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) funded more than 30 organizations to provide services and to conduct outreach to trafficked persons. More recently, the government has restructured its grantmaking for trafficking; service providers are reimbursed for their assistance to trafficked persons and there is no longer a funded

⁶⁶ U.S. Department of Justice, *Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2005* (June 2006).

⁶⁷ ANONYMOUS (Oct. 18, 2006).

⁶⁸ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 2885 (2003)

⁶⁹ Susan A. Cohen, "Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning," *The Guttmacher Report on Public Policy* (Feb. 2005).

⁷⁰ *DKT International, Inc. v. United States Agency for International Development, et al.*, No. 05-CV-01604 (D.D.C. May 26, 2006) (Sullivan, J.).

⁷¹ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, 119 Stat. 3558 (2005) (authorizing \$5 million in 2006 and 2007 to HHS for a grant program to "develop, expand, and strengthen victim service programs for victims of domestic trafficking," a "pilot program to establish residential treatment facilities in the United States for minor victims of domestic trafficking").

outreach or public awareness component. Funding for outreach came through two specific “street outreach” grants from HHS.⁷²

In 2004, the Department of Health and Human Services (HHS) launched a \$10 million nationwide public awareness effort called the “Rescue and Restore Victims of Human Trafficking” campaign. To date, the campaign’s focus has been on educating healthcare providers, social service organizations, and the law enforcement community through the campaign website and distribution of brochures and posters.⁷³ The campaign also establishes local coalitions who use and distribute the campaign materials and creates paid advertisements and public service announcements to persuade trafficked persons to come forward.

The campaign has operated primarily as a media blitz where events are staged and a coalition is loosely formed, but there is no sustained effort, support or goals for the coalitions.⁷⁴ In recognition of this reality, the Office of Refugee Resettlement (ORR) recently awarded contracts to four organizations to try to revitalize and provide funding to coalitions in Florida, Southern California, Minnesota and Wisconsin.⁷⁵ Another issue facing the coalition effort is what its role is vis-à-vis the DOJ funded task forces. ORR stated that in just the last few months, it has decided the coalitions should focus on how they can help law enforcement, which primarily is through identification and strengthening services.⁷⁶

Other challenges have arisen in implementing the campaign. In Phoenix, Arizona, confidential client information was released to the media, putting the client in jeopardy.⁷⁷ In Atlanta, Georgia, staff members’ names were released to the public, putting the staff members in jeopardy. Oftentimes the long-standing service providers in the cities where campaigns are initiated were not contacted to be a partner.⁷⁸ Given the many issues that have arisen around implementation, service providers were surprised and somewhat disappointed when the new campaign contract was awarded to the incumbent public relations firm.⁷⁹

While one of the stated goals is to persuade trafficked persons to come forward, it is not clear that such efforts are reaching victims directly. Efforts have instead been targeted at people who may come in contact with a trafficked person or at the general public. One service provider

⁷² See grant announcement at <http://www.acf.hhs.gov/grants/open/HHS-2004-ACF-ORR-ZV-0006.html>. \$1 million supports 18 organizations’ street outreach efforts. U.S. Department of Health and Human Services, Press Release, *Over \$1.5 Million Awarded to Aid Victims of Human Trafficking* (Sept. 26, 2006) available at http://www.acf.hhs.gov/news/press/2006/Human_trafficking_Sept_28.htm. An additional 18 awards were made. Interview with Christa Stewart, The Door (Nov. 8, 2006) (recommending that outreach must be coupled with services to persuade trafficked persons to leave the trafficker, receive assistance and even report to law enforcement, but grantees are directed not to provide case management).

⁷³ Campaign to Rescue and Restore Victims of Human Trafficking at <http://www.acf.hhs.gov/trafficking>.

⁷⁴ ANONYMOUS (Nov. 10, 2006) (describing the coalitions as ineffectual without goals and training and the Campaign overall as too ambitious).

⁷⁵ Interview with Ken Tota, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Oct. 25, 2006). Interview with Vanessa Garza, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Nov. 16, 2006).

⁷⁶ Interview with Vanessa Garza, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Nov. 16, 2006).

⁷⁷ Interview with Melynda Barnhart, International Rescue Committee (Oct. 27, 2006).

⁷⁸ Interview with Joy Zarembka, Break the Chain Campaign (Oct. 18, 2006).

⁷⁹ Ibid.

stated that she has been exposed to the HHS campaign only at professional trafficking conferences.⁸⁰ Service providers tend to agree that rather than the Campaign's broad, general awareness efforts, grassroots awareness campaigns are the best way to educate trafficked persons about the assistance available to them. It is only truly local efforts that are likely to penetrate the isolation endured by trafficked persons, such as non-English newspaper and radio and distributing inconspicuous items containing a hotline number,⁸¹ such as brocade lipstick cases and matchbooks distributed in New York City Chinatowns and prayer cards distributed among Latino populations.

Additionally, campaign materials highlight a toll-free Trafficking Information and Referral Hotline (1-888-373-7888) where trafficked persons can be referred to the nearest nongovernmental organization (NGO) for help.⁸² According to Gil Ortiz, the HHS Hotline Director, the hotline receives an average of 200 calls per month.⁸³ However, the number of calls from actual trafficked persons, or advocates representing actual trafficked persons, is "very, very small."⁸⁴ Most of the callers are private citizens who want to discuss a labor issue or immigration problem. Some calls involve people who have suffered some sort of exploitation but not human trafficking.⁸⁵

Overall, more than \$20 million over a four-year period will have been spent on numerous activities and priorities related to the Rescue and Restore Campaign with unclear results. Clear goals, focused efforts and fewer priorities could yield greater identification of trafficked persons.⁸⁶

U.S. EFFORTS TO PROTECT TRAFFICKED PERSONS

PROTECTION

The TVPA offers protections to witnesses, not all trafficked persons, as incentives to cooperate with law enforcement. Woefully low numbers of trafficked persons coming forward, reports of deportations and manipulation of the system by law enforcement demonstrate that the system of incentives must be amended. The TVPA's law enforcement focus must be balanced with a rights-based approach. The three main protections –continued presence, certification and the T Visa – will be discussed in turn to demonstrate the difficulties trafficked persons are encountering while trying to access these benefits.

⁸⁰ Interview with Suzanne Tomatore, City Bar Justice Center (July 15, 2005).

⁸¹ Ibid.

⁸² Covenant House, *U.S. Selects Covenant House to Operate National Hotline for Trafficking Victims*, available at http://www.covenanthouse.org/about_pr_20040226-trafficking_hotline.html.

⁸³ Interview with Gil Ortiz, Covenant House Neline and Human Trafficking Hotline (July 26, 2005).

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Interview with Vanessa Garza, Office for Refugee Resettlement, U.S. Department of Health and Human Services (Nov. 16, 2006) (explaining that ORR has a small annual budget and spreads itself thin with everything it tries to accomplish).

Continued Presence

Continued presence⁸⁷ was created so that undocumented trafficked persons could lawfully live and work in the United States to support themselves while assisting with an investigation or prosecution. It is literally the government authorizing the person's continuing stay in the United States – temporary legal status and work authorization. To receive continued presence, federal law enforcement submits a request to the U.S. Citizenship and Immigration Service (CIS) of the U.S. Department of Homeland Security, after determining that the individual is a “victim of a severe form of trafficking and a potential witness to such trafficking.”⁸⁸ Service providers report that this system of continued presence does not take into account:

- Trafficked persons may not always be willing or able to assist in an investigation or prosecution, particularly when there are resulting mental health issues.⁸⁹
- Only federal law enforcement can make a request which excludes state and local authorities from being able to apply to assist the trafficked person.
- Trafficked persons may be assisting state or local law enforcement that may not want the involvement of federal authorities; without federal involvement the application for continued presence is not possible.
- Law enforcement is withholding their request for continued presence to ensure the continuing cooperation of the witness.
- The continued presence process is relatively unknown to law enforcement.
- Law enforcement waits until investigation and/or prosecution is complete before making a determination that the person is indeed a victim.
- When granting continued presence, CIS informs the U.S. Immigration and Customs Enforcement (ICE) which is responsible, among other things, for deportation.
- Even experienced advocates have extreme difficulty in getting law enforcement to complete the continued presence request.⁹⁰
- Trafficked persons are sometimes not referred to appropriate services or informed of their rights until the investigation is complete.⁹¹
- The lengthy process sometimes precludes trafficked persons from receiving emergency services.⁹²

Service providers proposed several recommendations to amend the continued presence process, which the Women's Commission fully supports:

- Make continued presence mandatory to guarantee protection – currently it is discretionary which may lead some law enforcement to believe it is not necessary.

⁸⁷ Pub. L. No. 106-386, 114 Stat. 1466, 1477 (2000); 22 U.S.C. 7105(c)(3) (2004).

⁸⁸ Ibid.

⁸⁹ Hussein Sadruddin, Natalia Walter and Jose Hidalgo, *Immigration in the Twenty-First Century: Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 397-98 (2005).

⁹⁰ Interview with Suzanne Tomatore, City Bar Justice Center (July 15, 2005) (noting that the process can be “like pulling teeth”).

⁹¹ Ibid.

⁹² Interview with Abigail Price, International Rescue Committee (July 14, 2005) (explaining that without being able to offer immediate benefits and services, trafficked persons are at risk of falling back in the hands of traffickers). Interview with Suzanne Quinn, Florida Freedom Partnership (June 17, 2005). Interview with Florrie Burke, Safe Horizon (Aug. 4, 2005).

- Apply for continued presence within a defined time period – if law enforcement cannot make a determination as to victim and potential witness status they must apply for continued presence so that the trafficked person is not penalized while waiting; suggested time periods range from 15 to 90 days.
- Permit state and local law enforcement to request continued presence.
- Permit attorneys and advocates assisting trafficked persons to request continued presence.
- Alter determination from “is” a victim to “may be” a victim – the definitive language of “is” makes law enforcement hesitant, believing that they must be positive of their determination; this would make the language more consistent with “may be” a potential witness.

Certification

Certification⁹³ is a process administered by the Office for Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services. Under the TVPA, trafficked persons are eligible for any federal or state benefits and services for which a refugee would be eligible.⁹⁴ To receive these benefits, ORR issues certification letters to adults and eligibility letters to persons under age 18. However, certification letters are only issued upon a grant of continued presence, a bona fide T Visa or an approved T Visa, all of which are contingent upon law enforcement cooperation.⁹⁵

As described with continued presence, creating a system of benefits dependent upon law enforcement often leaves trafficked persons without benefits. There is frequently a large time gap between when the trafficked person is discovered and a) when law enforcement learns that benefits are available; b) when law enforcement refers the trafficked person to an NGO that can advocate for these benefits; c) when or if law enforcement applies for continued presence; and d) the six months to a year before certification can be issued through the T Visa process.

Service providers suggest that certification be issued within 48 hours of identification so that the individual has benefits while law enforcement makes its determinations. This is consistent with receiving certification with a bona fide T Visa; there is an understanding that the benefits will be a great help while the person waits for the case to be adjudicated.

Additional recommendations to amend the certification process include:

⁹³ Pub. L. No. 106-386, 114 Stat. 1466, 1476 (2000); 22 U.S.C. 7105(b)(1)(E) (2004). State Letter #01-13 from Carmel Clay-Thompson, Acting Director, Office of Refugee Resettlement to State Refugee Coordinators, National Voluntary Agencies, Other Interested Parties, *The Trafficking Victims Protection Act of 2000 available at* <http://www.acf.hhs.gov/programs/ofa/traffic/stateltr.htm>. State Letter #04-12 from Nguyen Van Hanh, Director, Office of Refugee Resettlement, to State Refugee Coordinators, National Voluntary Agencies, Other Interested Parties, *The Trafficking Victims Protection Reauthorization Act of 2003 – Eligibility for Federally Funded or Administered Benefits and Services to the Same Extent as Refugees Extended to Certain Family Members of Victims of a Severe Form of Trafficking in Persons available at* <http://www.acf.hhs.gov/programs/orr/policy/sl04-12.htm>.

⁹⁴ These benefits primarily include Refugee Cash Assistance, Refugee Medical Assistance, Medicaid, Social Security Insurance, Food Stamps, Job Corps, Refugee Matching Grant Program and Temporary Assistance for Needy Families.

⁹⁵ A bona fide T Visa determination is not a decision or approval of a T Visa, but an acknowledgement that the application is complete and upon a brief review appears to meet the legal requirements.

- Permit attorneys and advocates to apply for certification on behalf of the trafficked person to remove the potential for abuse of the process by law enforcement.
- Permit trafficked persons to apply directly for certification, which was under consideration in 2001.⁹⁶
- ensure that information about certification is included in local, state and federal law enforcement trainings; unlike continued presence, certification may be granted upon a request by local and state law enforcement officials in addition to federal authorities.⁹⁷

T Visa

A T Visa⁹⁸ provides three years lawful temporary non-immigrant status and employment authorization. After three years, a T Visa holder may apply for permanent residency, which leads to citizenship. The United States is currently the only country that offers the possibility of permanent residency to trafficked persons.

A T Visa applicant⁹⁹ must meet the following five eligibility requirements,¹⁰⁰ proving that s/he:

1. is a victim of a severe form of trafficking;
2. has complied with any reasonable request for assistance from local, state or federal law enforcement in the investigation or prosecution of the trafficking acts;
3. is physically present in the United States on account of such trafficking; and
4. would suffer extreme hardship involving unusual and severe harm if removed from the United States.

As noted earlier in this report, 675 T Visas have been issued in a five year period although 5,000 are available each year. Recent evaluative results of 18 ORR street outreach grantees confirm the great difficulty trafficked persons attaining a T Visa. Results show “a small fraction, 3.9%, of victims found will yield individuals who receive a visa.”¹⁰¹ Service providers report that so few people have received T Visas primarily because of the de facto requirement of law enforcement cooperation. For instance, the T Visa application includes a form called a “Law Enforcement

⁹⁶ U.S. Department of Health and Human Services, Office of Refugee Resettlement, State Letter SL01-13 (May 3, 2001) (“At this time, ORR is in the process of developing procedures under which an individual may apply for certification as a victim of a severe form of trafficking. Until formal procedures are developed, requests for certification are being handled on a case-by-case basis.” Interview with Ken Tota, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Oct. 25, 2006) and Interview with Vanessa Garza, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Nov. 16, 2006). Neither Ken Tota nor Vanessa Garza had heard of this possibility of an individual applying for certification. Ms. Garza went on to state that “we take a very hard line that ORR’s job is to certify adults who cooperate with law enforcement” and that DOJ and DHS make the “victim” determinations according to the MOU between the agencies.

⁹⁷ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

⁹⁸ Pub. L. No. 106-386, 114 Stat. 1466, 1477 (2000); 8 U.S.C. 1101(a)(15)(T) (2004).

⁹⁹ An applicant age 21 or older may apply for her spouse and children. An applicant younger than 21 may apply for her parents and siblings. 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2006).

¹⁰⁰ 8 C.F.R. § 214.11 (2003). These regulations govern all aspects of the T Visa.

¹⁰¹ Presentation by Alison L. Darrell, Calvin Edwards & Company, at the U.S. Department of Health and Human Services Conference on Survivors of Sex Trafficking, Washington, D.C. *Trafficking Victim Outreach Grant: The Results* (Sept. 28, 2006).

Agency Declaration” or “LEA Declaration” where law enforcement states that the person is indeed a victim and has cooperated with the investigation or prosecution.¹⁰² While not required, the LEA Declaration is considered primary evidence – something akin to a golden ticket – of victim status and cooperation with law enforcement, two of the application’s eligibility requirements. Without the LEA Declaration, there is a seemingly much higher burden of proof to overcome.¹⁰³

Since this LEA Declaration can ultimately determine a grant or denial of a T Visa, a law enforcement agency wields a significant amount of power over the witness. Service providers report cases where law enforcement withholds the LEA Declaration to ensure the continuing cooperation of the witness. Others report that law enforcement claims the purpose of withholding the LEA Declaration until the end of the case, which is sometimes years, is because T Visa applications are discoverable to the trafficker. They withhold the LEA Declaration so that there are no potentially inconsistent statements in writing within the T Visa application. This ensures the witness will not submit an application because it is more likely to be unsuccessful without the LEA Declaration..

The U.S. Government does not keep statistics on how many T Visa applications submitted without a Law Enforcement Agency Declaration have been awarded and denied.¹⁰⁴ However, attorneys nationwide preparing the applications claim that only a handful are submitted without the Law Enforcement Agency Declaration – only when there is overwhelming, compelling additional evidence.¹⁰⁵ This information must be collected and released so that there is greater transparency about whether secondary evidence is being considered properly.

It is also necessary to have statistics on the status of the investigation or prosecution when the application is submitted. Are the majority of them submitted at the conclusion of a prosecution? How many are submitted when there is only an investigation and no prosecution? By law, the standard is cooperation with an investigation OR prosecution. So, for example, if a trafficked person assists with an investigation but there is not enough evidence for a prosecution, an LEA Declaration should still be completed and honored.

The T Visa most certainly is a law enforcement tool with no avenue for pure humanitarian relief. Service providers advocate amending the T Visa to allow for both. They hope that this will eliminate law enforcement’s abuse of the process as well as open up relief to many other deserving trafficked persons. For instance, in the most severe of trafficking cases, the trafficked person may not be willing or able to assist law enforcement because there are resulting mental health issues or potential retaliation by the trafficker.¹⁰⁶ One way in which to remedy this is to

¹⁰² U.S. Citizenship and Immigration Service, Department of Homeland Security, Form I-914 Application for T Nonimmigrant Status available at <http://www.uscis.gov/graphics/formsfee/forms/files/i-914.pdf> (see Supplement B-Declaration of Law Enforcement Officer for Victim of Trafficking in Persons).

¹⁰³ Interview with Suzanne Tomatore, City Bar Justice Center (July 15, 2005) (stating that it is rare that she submits a T Visa application without an LEA Declaration and even then she shows that the applicant was willing to cooperate).

¹⁰⁴ George Murphy, Vermont Service Center (Sept. 21, 2006).

¹⁰⁵ Interview with Suzanne Tomatore, City Bar Justice Center (July 15, 2005).

¹⁰⁶ Interview with Elissa Steglich, Heartland Alliance (June 30, 2005) (asking trafficked persons to cooperate with law enforcement is in some cases tantamount to asking them to risk the lives of their family members). Hussein

establish certain exemptions from the T Visa requirement of law enforcement cooperation, including mental health and potential retaliation.

Service providers also advocate for requiring either law enforcement cooperation OR extreme hardship rather than both.¹⁰⁷ This would allow law enforcement to continue to offer incentives to cooperate while also protecting trafficked persons who have compelling reasons not to return home, such as potential retaliation. This would be consistent with a human rights approach to trafficking. Additionally, the T Visa application's "extreme hardship involving unusual and severe harm" is a stricter standard under U.S. immigration law than "extreme hardship." It is unclear why trafficked persons would need a more stringent test. Service providers advocate changing the standard to "extreme hardship."

Another important recommendation service providers made was for the U.S. Government to issue regulations on the adjustment of status for T Visa holders as well as on the U Visa. As noted earlier, after three years a T Visa holder may apply for permanent residency. Without regulations, T Visa holders are unable to adjust their status. This has a great effect on their rights and benefits under the law, including the immigration of their family members and the ability to travel outside the country. Regarding the U Visa, a form of immigration relief for noncitizen crime victims, the delay in regulations impacts the relief trafficked persons have available to them. Service providers hope that the lessons learned from the T Visa will have an impact on how the U Visa application and process is structured.

Law Enforcement Approach

The United States law enforcement approach of cooperation and then services is at odds with the needs of trafficked persons. Consequently, the approach is not working as evidenced by service providers' accounts of their clients' refusal to report to law enforcement upon learning what cooperation entails.¹⁰⁸ This approach replicates the trafficking experience because offering incentives to cooperate is a form of coercion. It establishes a power relationship where law enforcement, just as the trafficker did, is deciding whether the trafficked person will have access to even the most basic of needs like shelter and food.¹⁰⁹ Just as the trafficker believes a person is only valued for her labor, the law enforcement approach treats a trafficked person as only valued for her information – without the information there is no reason to help.¹¹⁰

The law enforcement approach is also in conflict with the mental capacity of many trafficked persons immediately after they are released from trafficking. Abraham Maslow's Hierarchy of Needs is a method of treatment with self-actualization at the top and basic survival needs like

Sadrudin, Natalia Walter and Jose Hidalgo, *Immigration in the Twenty-First Century: Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 405-406 (2005).

¹⁰⁷ ANONYMOUS (June 13, 2005).

¹⁰⁸ ANONYMOUS (Oct. 18, 2006).

¹⁰⁹ Interview with Judy Okawa, The Center for Traumatic Stress Studies (Oct. 17, 2006) (describing law enforcement's control over benefits and services as a repeating of the control the trafficker held over the person which continues their exploitation).

¹¹⁰ Interview with Judy Okawa, The Center for Traumatic Stress Studies (Oct. 17, 2006).

shelter, food and safety at the bottom.¹¹¹ The theory is that without meeting the lowest, most basic needs, the person will not be able to achieve higher cognitive levels. The nature of law enforcement work requires immediate and detailed accounts of the trafficking; however, trafficked persons need basic services and crisis counseling before speaking with law enforcement. The early interviews in particular result in retraumatization, the exacerbation of the trauma symptoms such as anxiety and the sense of danger, memory problems and a disjointed account that creates credibility concerns.¹¹² It is not surprising that law enforcement may not attain the information they seek. As a result, law enforcement cannot determine that the individual is trafficked and the person is then deported. **A trafficked person is much more likely to be an effective witness that results in a prosecution if they do not feel coerced and if they have had the opportunity to get the basic social services they need.**

Service providers report that deportation of trafficked persons is still common, despite the TVPA's purported purpose to end this practice. In an Albany, New York case, service providers were provided advance notice from law enforcement of a pending raid where they anticipated recovering 95 trafficked persons who would need housing and services prepared.¹¹³ Newspapers reported the raid as a trafficking case, yet the 95 persons were not referred for services and are thought to have been deported.¹¹⁴ A raid of 11 massage parlors in the San Francisco, California, Bay Area recovered approximately 100 women. After interviewing all of the women over a 48-hour period, less than one-third were certified as trafficking victims; the remaining women were put into removal proceedings.¹¹⁵ In yet another case, one of 75 persons in an El Paso case revealed the details of her trafficking; everyone who remained silent was deported.¹¹⁶ This practice of rapid removal if identification cannot be made within a short time makes it highly unlikely that proper determinations are being made.¹¹⁷

The United States must adopt a balanced approach that yields more humane treatment of trafficked persons as well as an increased number of investigations and prosecutions. Service providers agree that benefits and services should be made available to all trafficked persons, regardless whether or not they choose to help law enforcement. If trafficked persons receive services first, then they will be less traumatized and more likely to recover.¹¹⁸ The better the recovery, the more likely and able a trafficked person may be to participate in an

¹¹¹ Maslow, A., & Lowery, R. (1998). *Toward a psychology of being* (3rd ed.). New York: Wiley & Sons.

¹¹² Interview with Judy Okawa, The Center for Traumatic Stress Studies (Oct. 17, 2006). Hussein Sadruddin, Natalia Walter and Jose Hidalgo, *Immigration in the Twenty-First Century: Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 405-406 (2005).

¹¹³ Remarks Prepared by Julianne Duncan, U.S. Conference of Catholic Bishops, for the Senior Policy Operating Group on Trafficking in Persons, Washington, D.C. (Feb. 9, 2005).

¹¹⁴ *Ibid.*

¹¹⁵ ANONYMOUS (Oct. 18, 2006).

¹¹⁶ Interview with Melynda Barnhart, International Rescue Committee (Oct. 27, 2006).

¹¹⁷ Remarks Prepared by Julianne Duncan, U.S. Conference of Catholic Bishops, for the Senior Policy Operating Group on Trafficking in Persons, Washington, D.C. (Feb. 9, 2005). Interview with Florrie Burke, Safe Horizon (Nov. 8, 2006) (describing this practice as occurring most often in large cases where the population must be divided into trafficked versus non-trafficked in a short amount of time).

¹¹⁸ Hussein Sadruddin, Natalia Walter and Jose Hidalgo, *Immigration in the Twenty-First Century: Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 399 (2005) ("The greater the degree of social support, the lower the risk of long-term mental health consequences.")

investigation or prosecution.¹¹⁹ In the worst cases, where the trauma experienced was so severe the individual will never function as a credible witness, there is no protection; these trafficked persons are also deserving of protections and services.¹²⁰

GOVERNMENT-FUNDED SERVICES

The TVPA and its subsequent reauthorizations provided funding for services. Until 2006, this funding was distributed to service providers in the form of grants. The Office of Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services awarded approximately \$14.95 million in grants to nonprofit organizations to provide services and outreach to trafficked persons. Likewise, the Office for Victims of Crime (OVC) at the U.S. Department of Justice awarded approximately \$10 million to 25 organizations.¹²¹ The services were to include temporary housing, transportation needs, legal assistance and case management to help trafficked persons find employment, secure job training and English language courses, access counseling and medical and mental health services.

Under these initial grants, service providers were restricted in who they could assist. Funds were available either to help a person report to law enforcement and become certified and help them once certified. This connection to certification ensured that service providers were only working with individuals willing to cooperate with law enforcement. If an individual made the decision not to assist law enforcement, the federal funding could no longer be used to help that person.

In 2006, ORR instituted a new method of funding services. Rather than through grants, ORR now has a per capita reimbursement system administered by the U.S. Conference of Catholic Bishops (USCCB).¹²² Service providers contract with USCCB and are then responsible for enrolling clients as they are identified. Reimbursement for services is on a monthly basis per client at a rate of \$700 if pre-certified and \$500 if certified.¹²³ There is also a restriction on the length of time a client may be assisted, as follows:¹²⁴

Pre-certified if identified by a non-law enforcement agency	8 months
Pre-certified if identified by law enforcement agency	5 months
Certified if received services in pre-certified phase	5 months
Certified if didn't receive services in pre-certified phase	7 months

¹¹⁹ Interview with Suzanne Quinn, Florida Freedom Partnership (June 17, 2005). Interview with Judy Okawa, The Center for Traumatic Stress Studies (Oct. 17, 2006).

¹²⁰ Hussein Sadruddin, Natalia Walter and Jose Hidalgo, *Immigration in the Twenty-First Century: Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379 (2005).

¹²¹ Office of Communications, Office of Justice Programs, U.S. Department of Justice (Nov. 7, 2006).

¹²² U.S. Conference of Catholic Bishops, *Anywhere Anytime: A Rapid Response Program for Adult Trafficking Victims: Information for Social Service Providers* (2005).

¹²³ U.S. Conference of Catholic Bishops, *Anti-Trafficking Services Contract: Program Operations Manual* 31 (Working Draft 2006)

¹²⁴ U.S. Conference of Catholic Bishops, *Anti-Trafficking Services Contract: Program Operations Manual* (Working Draft 2006) ("Extensions on service periods can be negotiated if the client has not demonstrated an ability to live independently or no other long-term program exists.").

At this point the implementation is too new to fully examine the program's effectiveness. However, service providers have serious concerns at the outset.¹²⁵ They are dismayed by the continuing limitation of only helping clients who choose to report to law enforcement. They are wary of the time restraints given how long it takes to obtain continued presence, certification and a T Visa which are dependent upon law enforcement. For example, it may not be possible to apply for a T Visa within the maximum 13 months because law enforcement is withholding the LEA Declaration. In this case, there will be no more funding for the attorney to assist. Service providers are also concerned that they no longer have funding to implement training and grassroots outreach as they did when grants were awarded. They believe this work was very effective in building relationships with law enforcement agencies as well as locating trafficked persons.¹²⁶ Additionally, while there is a stipend to cover administrative costs with the per capita system, it is not enough to maintain competent staff.¹²⁷ The monthly allotment per client is barely enough to cover housing in urban areas let alone all of a trafficked person's needs.¹²⁸ Programs take time to build and stabilize. The current per capita system does not allow a program to sustain itself during low identification periods. While this may seem like a reasonable way to save money in the short term, it is not a wise strategy. Programs are already feeling financial pressure and many have to close. The infrastructure that has taken years to develop may be lost and will be difficult to rebuild.¹²⁹

Alarming, ORR is considering not reimbursing legal services, seeing a conflict of interest in funding immigration attorneys who bring cases against the government in deportation proceedings.¹³⁰ The contract stresses that programs should make referrals to pro bono attorneys whom USCCB will provide with technical assistance and training as needed.¹³¹ During a conference call about the new contract, it was suggested that law enforcement or the trafficked person could prepare the T Visa application since it is a self-petitioning application.¹³² This is dangerous given the important role that trafficked persons' attorneys have played in counteracting the overbearing law enforcement approach. A 2005 government-funded survey showed that legal services ranks as the top service provided to trafficked persons.¹³³ As described in earlier sections, it is attorneys who are advocating for protections, navigating the criminal justice system, supporting the trafficked person during interviews, representing the

¹²⁵ Interview with Katherine Kaufka, National Immigrant Justice Center (Nov. 10, 2006) (stating that the Center has not applied for funding because the requirements are too arduous and time consuming and there is not enough funding to cover the expenses). Interview with Christa Stewart, The Door (Nov. 8, 2006) (stating that the Door has not applied for this funding because there is not enough money and because legal services and children under 18 are not covered).

¹²⁶ Interview with Melynda Barnhart, International Rescue Committee (Oct. 27, 2006).

¹²⁷ Interview with Florrie Burke, Safe Horizon (Aug. 4, 2005).

¹²⁸ Interview with Joy Zarembka, Break the Chain Campaign (Oct. 18, 2006).

¹²⁹ Interview with Melynda Barnhart, International Rescue Committee (April 18, 2006 and May 8, 2007).

¹³⁰ Interview with Jean Bruggeman, Boat People SOS (Sept. 21, 2006) & Interview with Joy Zarembka, Break the Chain Campaign (Oct. 18, 2006). Interview with Julianne Duncan, U.S. Conference of Catholic Bishops' Migration and Refugee Service (Oct. 20, 2006). Interview with Melynda Barnhart, International Rescue Committee (Oct. 27, 2006).

¹³¹ U.S. Conference of Catholic Bishops, *Anti-Trafficking Services Contract: Program Operations Manual 20-21* (Working Draft 2006).

¹³² Interview with Joy Zarembka, Break the Chain Campaign (Oct. 18, 2006).

¹³³ Heather J. Clawson, Caliber, an ICF International Company, *Providing Services to Victims of Human Trafficking: How Far Have We Come?* U.S. Department of Justice, National Conference on Human Trafficking: What We Know and How We Can Work Together, New Orleans, LA (Oct. 3, 2006).

trafficked person's legal interests, and building relationships with law enforcement to ensure future cases go smoothly. It would be difficult for ever-changing pro bono attorneys to assist in this part of the effort. Moreover, the legal requirements of a T Visa are beyond what law enforcement or a trafficked person could meet without the assistance of an experienced attorney. Trafficked persons also need an immigration attorney to help assess which immigration option is most appropriate. Without funded legal services, trafficked persons will be less protected, receive fewer services and be even more vulnerable to coercion or control by law enforcement.

Service providers also cite the critical need for dedicated trafficking shelters. Once trafficked persons are discovered, there is usually a frantic scramble to determine where they can stay. The Coalition to Abolish Slavery and Trafficking operates the only trafficking shelter in the country in Los Angeles, California. Other service providers use homeless shelters, domestic violence shelters or leased apartments as their housing options. However, homeless shelters are typically not appropriate for women and children and tend not to provide enough security or stability, since the "residents" must return to the street during the day.¹³⁴ Domestic violence shelters are more appropriate for women and are beneficial because of 24-hour staff and security; language and cultural issues are difficult, but can sometimes be overcome through training and interpretation.¹³⁵ The leased apartment works well for men, families and children, but this option tends to be less convenient for providing services and can be isolating because it is more difficult to develop a social support network.¹³⁶

Dedicated trafficking shelters around the country funded by the government would provide:

- the reassurance that a newly discovered trafficked person will have a safe place to stay;
- majority of services in one location;
- culturally appropriate services;
- a balance of support and independence; and
- a shared experience among residents that is crucial to recovery.¹³⁷

Overall, government-funded services to trafficked persons are shrinking. This is alarming particularly given the success that the service organizations have had with identifying trafficked persons when compared with identification statistics overall.¹³⁸ The government made an investment in building the capacity of many service organizations that were beginning to see results and then took away the funding.¹³⁹ There is a trend and shift away from services as more

¹³⁴ Interview with Melynda Barnhart, International Rescue Committee (April 18, 2006). Interview with Suzanne Quinn, Florida Freedom Partnership (June 17, 2005).

¹³⁵ Interview with Melynda Barnhart, International Rescue Committee (April 18, 2006). Interview with Suzanne Quinn, Florida Freedom Partnership (June 17, 2005).

¹³⁶ Interview with Melynda Barnhart, International Rescue Committee (April 18, 2006).

¹³⁷ Interview with Melynda Barnhart, International Rescue Committee (April 18, 2006). Interview with Annie Heirendt, Coalition to Abolish Slavery and Trafficking (April 24, 2006).

¹³⁸ Free the Slaves & Human Rights Center, University of California, Berkeley, *Hidden Slaves: Forced Labor in the United States* 9 (Sept. 2004) ("U.S. nongovernmental organizations (NGOs) deserve the lion's share of credit for exposing the existence of forced labor in the United States.").

¹³⁹ Interview with Florrie Burke, Safe Horizon (Nov. 8, 2006). Interview with Katherine Kaufka, National Immigrant Justice Center (Nov. 10, 2006) (stating that the funding shift away from services does not make sense in terms of the great need).

and more federal dollars are invested in law enforcement task forces around the country.¹⁴⁰ Therefore, in a country where there was already a distinct imbalance between protections and prosecutions, the scale is perhaps being tipped entirely in favor of law enforcement.

CHILDREN¹⁴¹

Trafficked children are the least protected class of trafficked persons in the United States. They face immense difficulties in accessing benefits and are often deported.

All service providers pointed to the disturbing fact that while children are not required to cooperate with law enforcement by law,¹⁴² they are in fact forced to cooperate because of a policy established through a Memorandum of Understanding (MOU) between HHS, DHS and DOJ.¹⁴³ The MOU reads, “After a recommendation from DOJ or DHS, ORR will issue an eligibility letter to a person who has not attained 18 years of age, stating that the person has been subjected to a severe form of trafficking in persons.” This policy forces law enforcement involvement because in order to make any recommendation, DOJ or DHS believes it must, at a minimum, interview the child. Even one interview with DOJ or DHS (both law enforcement bodies) constitutes law enforcement cooperation. In this interview, children are forced to talk about what happened to them, which in the majority of cases, they simply cannot do.¹⁴⁴ These children, who cannot initially self-identify to law enforcement, are then ineligible for benefits through ORR.

To complicate matters further, no one, not even licensed child welfare agencies, can legally provide services to trafficked children without the ORR eligibility letter or a state court order establishing guardianship. Service providers do not seek guardianship because law enforcement assures them that they will make the request to ORR imminently. This assurance often lasts days or sometimes weeks before a child actually receives an ORR eligibility letter, so in the interim, there is no legal guardian, no protection, no services and no representation. The states’ Children’s Protective Services have largely declined to fill this role to help trafficked children, seeing their mandate as limited to intervening when parents are abusing or harming children.¹⁴⁵

¹⁴⁰ Funding totals \$21 million for 42 task forces. U.S. Department of Justice, *Attorney General’s Annual Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons Fiscal Year 2005* 23 (June 2006) (reporting that 32 task forces have been formed with \$13 million). U.S. Department of Justice, Press Release, *Attorney General Alberto R. Gonzales Announces Enhanced Programs to Combat Human Trafficking* (Oct. 3, 2006) (announcing 10 more task forces funded with \$8 million).

¹⁴¹ For a detailed discussion of and recommendations on misidentification, deportation and service delivery problems, see Micah Bump et. al., *Second Conference on Identifying and Serving Child Victims of Trafficking*, 43 *International Migration* 343 (Sept. 2005).

¹⁴² Trafficking Victims Protection Act, Pub. L. 106-386, 114 Stat. 1464, 1475 § 107(b)(1)(C) (2000).

¹⁴³ Interagency Memorandum of Understanding Between the Department of Health and Human Services, the Department of Homeland Security and the Department of Justice (July 9, 2004) (see Appendix).

¹⁴⁴ Interview with Julianne Duncan, U.S. Conference of Catholic Bishops’ Migration and Refugee Service (Oct. 20, 2006). Interview with Judy Okawa, The Center for Traumatic Stress Studies (Oct. 17, 2006).

¹⁴⁵ Interview with Julianne Duncan, U.S. Conference of Catholic Bishops’ Migration and Refugee Services (Oct. 20, 2006). Interview with Christa Stewart, The Door (Nov. 8, 2006) (recommending systemic change in the child welfare system to identify and assist trafficked children). Interview with Vanessa Garza, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Nov. 16, 2006). It is concerning that Ms. Garza, the

The consequences of this process are devastating for children who are indeed trafficked yet simply cannot tell anyone at that point what happened to them. The all-too-common response, unfortunately, is for DHS to put these children into removal proceedings and the juvenile detention system, known as “DUCS,” Division of Unaccompanied Children’s Services.¹⁴⁶ DUCS is a nationwide system of 35 shelters with more than 1,300 beds, which served approximately 8,000 children in 2005.¹⁴⁷ While case managers have been trained throughout the shelters and trafficking-related questions have been added to the initial intake,¹⁴⁸ it is unclear whether they are trained to help the child recount the experience and whether that is even advisable. Given the program length, trafficked children have just 45 days during which to speak out and become eligible for the benefits and protections. ORR acknowledges that this is not enough time to establish trust with a caregiver and be ready to recount the experience.¹⁴⁹ Therefore, trafficked children are not only left without services and put into the removal system, but they are also returned to their country of origin without regard to whether or not they may be re trafficked.¹⁵⁰

Advocacy efforts to amend this troubling process for trafficked children have been unsuccessful to date. However, recent changes in ORR staff that indicate that the situation may be improving in many respects, particularly regarding the Memorandum of Understanding. In other areas the situation remains problematic. It has been ORR’s policy to place trafficked children into the Unaccompanied Refugee Minors (URM) Program, which is a culturally appropriate foster care program where they receive all necessary services and benefits.¹⁵¹ However, the recent change of staff at ORR may indicate a new policy direction. ORR’s new anti-trafficking director has indicated that an alternative to an eligibility letter and placement into the URM Program, is for trafficked children to avail themselves of alternatives to the URM Program that do not require an eligibility letter such as state Children’s Protective Services or shelter within DUCS.¹⁵² This proposal does not address the obstacles related to Children’s Protective Services concerns involving the use of DUCS shelters for trafficked children.

The results of this system indicate that the United States is failing to offer protection to trafficked children and should amend it. The Women’s Commission offers the following recommendations:

Director of ORR’s Anti-Trafficking Program, does not understand the problems with the state systems as she believes that trafficked children should access Children’s Protective Services.

¹⁴⁶ Interview with Julianne Duncan, U.S. Conference of Catholic Bishops’ Migration and Refugee Services (Oct. 20, 2006). Interview with Ken Tota, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Oct. 25, 2006) (noting that although practitioners commonly refer to the system as “DUCS” the official program title is the Unaccompanied Alien Children Program within the Division of Unaccompanied Children’s Services.)

¹⁴⁷ Interview with Ken Tota, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Oct. 25, 2006).

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Interview with Julianne Duncan, U.S. Conference of Catholic Bishops’ Migration and Refugee Services (Oct. 20, 2006).

¹⁵¹ U.S. Department of Justice, *Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2005* 4 (Sept. 2006).

¹⁵² Interview with Vanessa Garza, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Nov.16, 2006).

1. **The system must be amended to remove law enforcement's involvement with trafficked children as intended by law.** ORR is well aware of these difficulties and should institute its authority to change the cooperative agreement with DHS and DOJ. As administrator of the benefits by law, ORR is responsible for removing the barriers to services it helped put in place through the MOU. The TVPA is clear that law enforcement interests do not trump a child's welfare and ORR should honor that, regardless of pressure or the existence of an MOU with DHS and DOJ.
2. **ORR should issue an interim eligibility letter immediately upon discovery of any potentially trafficked child, giving the benefit of the doubt to the child until law enforcement, an attorney or advocate can more accurately assess the situation.**¹⁵³ This would establish custody so that children could receive services. The child's welfare should not hang in the balance.
3. **Attorneys and advocates, rather than law enforcement, must be able to request an interim eligibility letter or eligibility letter.**
4. **Potentially trafficked children should not be put into removal proceedings and the DUCS system until it can be confirmed that they are not trafficked.**
5. **ORR should establish dedicated trafficking shelters for potentially and confirmed trafficked children within the URM program alone, with trained therapists, social workers and attorneys all trained and experienced in working with trafficked children.**¹⁵⁴ Placing potentially trafficked children here would increase the likelihood of children talking about their experience and give them more than 45 days to do so. The shared experience among them alone could help them to speak out. The URM program was adapted for trafficked children's participation and can be adapted again for potentially trafficked children. ORR has indicated a belief that this recommendation would meet strong resistance from DOJ and DHS; already inconvenienced when the children are removed to the nearest of the 35 DUCS shelters, increasing that distance would not be welcome.¹⁵⁵ However, law enforcement considerations should not be relevant to the protection of children.

RETURN/REINTEGRATION/RESETTLEMENT

Conspicuously absent from the TVPA is any programming for the reintegration of trafficked persons found in the United States. Truly comprehensive trafficking legislation would have made provisions for reintegration. Its absence indicates a non-rights based approach to human trafficking.

¹⁵³ Interview with Julianne Duncan, U.S. Conference of Catholic Bishops' Migration and Refugee Services (Oct. 20, 2006).

¹⁵⁴ Ibid.

¹⁵⁵ Interview with Ken Tota, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Oct. 25, 2006).

The TVPA's only mention of reintegration is within the duties of Interagency Task Force to Monitor and Combat Trafficking. These duties include the creation of overseas initiatives that "enhance cooperative efforts between destination countries and countries of origin and assist in the appropriate reintegration of stateless victims of trafficking."¹⁵⁶ Various U.S. federal agencies have funded *overseas* initiatives supporting return and reintegration since 2001, yet nothing within the United States until 2005.¹⁵⁷

In January 2005, the U.S. Department of State funded the International Organization of Migration to launch the "Return, Reintegration, and Family Reunification Program for Victims of Trafficking in the United States."¹⁵⁸ As of October 2006, this program has assisted just five trafficked persons in returning to their country of origin.¹⁵⁹ It has been used more frequently by the family members of T Visa recipients, 43 to date, who travel to the United States to be reunited.¹⁶⁰

It is difficult to assess the return program's effectiveness when just five individuals have availed themselves of the services. The International Organization for Migration (IOM) reports that the level of assistance is dependent upon available resources and the returnee's wishes. Information provided by the trafficked person is shared with IOM staff in-country and run against a database of known trafficking networks and traffickers.¹⁶¹ IOM then tries to find an appropriate NGO to provide reintegration assistance and follows up with returnees after three months.

In one instance, a woman did not return to her home country after extensive discussions between her attorney and law enforcement in the United States and law enforcement and the IOM in her home country.¹⁶² This woman is still believed to be in the United States since it is not safe to return to her home country and there are no third country resettlement options for trafficked persons. Third country resettlement, as evidenced by this example, is another issue not provided for under the TVPA. When asked if it would assume this role as it has with return and reintegration, IOM stated that it has no plans to include this kind of assistance in its current program and that it would be difficult to do so without long-term funding.¹⁶³

AN EXAMPLE TO OTHER COUNTRIES

The United States holds out the TVPA as a model while engaging in a multitude of international efforts to assist other countries in their anti-trafficking efforts such as training law enforcement, assisting with drafting legislation, developing national action plans and funding projects. The Women's Commission is particularly concerned about this for four reasons:

¹⁵⁶ Pub. L. 106-386, 114 Stat. 1464, 1473 (2000).

¹⁵⁷ U.S. Department of State, *Government Funded Anti-Trafficking Programs* at <http://state.gov/g/tip/c12606.htm>.

¹⁵⁸ For program details, see the IOM website at <http://www.iom.int/unitedstates/home.html>.

¹⁵⁹ Interview with Carson Osberg, International Organization for Migration (October 11, 2006).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

- 1) As this report indicates, the TVPA's protections provisions are largely inaccessible except for the small subset of trafficked persons willing and able to assist law enforcement. Without adopting a rights-based approach that would alter eligibility criteria for benefits and protections, the TVPA's protection provisions should not be used as a model for other countries.
- 2) The U.S. government's stated policy to focus on prostitution detracts attention and resources from other forms of trafficking, as previously discussed. This example will lead other nations to focus on sex trafficking alone or confuse sex trafficking with prostitution.
- 3) The U.S. definition of trafficking differs from the Protocol's definition. Therefore, the U.S. is promoting a narrower definition of trafficking and undermines the international norm agreed upon in the Protocol.
- 4) By using the TVPA as a model for other countries, the U.S. is encouraging a law enforcement approach to human trafficking and, therefore, assisting in the proliferation of that flawed approach.
- 5) The U.S. imposes a law enforcement framework and approach to trafficking on other countries through its annual Trafficking in Persons report. All but one of the criteria used to rank countries in the report is law enforcement related.¹⁶⁴ This report categorizes countries into three tiers and a special watch list according to their efforts to combat trafficking.¹⁶⁵ As any country listed in Tier 3 may be subject to sanctions of non-humanitarian, non-trade-related foreign assistance, the report inspires action and compliance with the listed criteria.¹⁶⁶

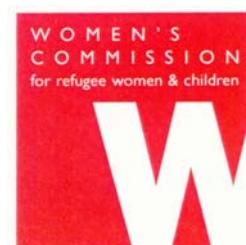
CONCLUSION

While the U.S. has made great efforts to address trafficking, particularly related to law enforcement, to date it has failed to take adequate steps to ensure the protection of trafficked persons. It has addressed trafficking as a law enforcement issue rather than as a human rights issue. The consequences of this approach are grave: few trafficked persons are willing to take the risks of reporting to law enforcement, protections are only offered to witnesses rather than all trafficked persons, identified trafficked persons are deported and law enforcement manipulates the system to secure cooperation by withholding benefits from potential witnesses.

¹⁶⁴ U.S. Department of State, *Trafficking in Persons Report* (June 2006).

¹⁶⁵ For a detailed discussion and critique of the report, see Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006).

¹⁶⁶ 22 U.S.C. § 7107(b)(1)(a)-(c) (2006).



Women's Commission
for Refugee Women and Children
122 East 42nd Street
New York, NY 10168-1289
tel. 212.551.3115 or 3000
fax. 212.551.3180
wcrwc@womenscommission.org
www.womenscommission.org