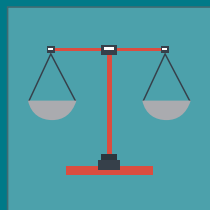


Almost 20 years later:

Trafficking survivors need more than a patchwork of benefits



Almost 20 years later: Trafficking survivors need more than a patchwork of benefits

AnnaMarie Bena, Esq.

Almost twenty years ago, Congress passed the Trafficking Victims Protection Act (TVPA), a trifecta of measures intended to address the rise in human trafficking—prevention, protection and prosecution.¹ The protection measures of the law were written to provide victims with services needed to rebuild their lives. For adult foreign national victims of trafficking, the law allows them, once certified by the U.S. Department of Health and Human Services (HHS), to be eligible for the same benefits accorded to refugees. It appears, however, that after nearly twenty years, the victim assistance provisions of the law have failed in their execution.

In fiscal year (FY) 2018, HHS issued 412 certification letters to adult foreign national victims of trafficking.² Based on that number, one might think we've almost eradicated human trafficking in the United States. We haven't. And although Congress has attempted with three reauthorizations to correct the problems with the assistance provisions of the original TVPA, the resulting patchwork of benefits falls short of

In this paper, the U.S. Committee for Refugees and Immigrants (USCRI) recommends an alternative to the certification process and other changes to provide the necessary care and services trafficking survivors require to live healthy and productive lives.

what trafficking survivors need to rebuild their lives. It doesn't provide the assistance originally intended by the certification process—benefits to the same extent as a refugee, which are the most comprehensive benefits available for any immigrant group.³ In this paper, the U.S. Committee for Refugees and Immigrants (USCRI) recommends an alternative to the certification process and other changes to provide the necessary care and services trafficking survivors require to live healthy and productive lives.

¹ Since the release of the 10th annual U.S. Department of State Trafficking in Persons Report, a fourth P – partnership – is now recognized.

² "Certification and Eligibility Letters Issued." ACF. December 26, 2017. <https://www.acf.hhs.gov/otip/resource/lettersissued>.

³ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Welfare Reform Act") restricted immigrant eligibility for many federal and state public benefits. Even lawful permanent residents (green card holders), who are considered "qualified aliens" under the law, face restrictions. However, refugees were exempted from most of the Welfare Reform Act restrictions and are also eligible for specialized refugee programming. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996).

ABOUT THE AUTHOR

AnnaMarie Bena, who wrote the first policy letter on certifications for the U.S. Department of Health and Human Services in 2001, now serves as Vice President of USCRI.

Of the many immigrants coming to the United States, this group needs targeted support and access to short and long-term benefits and services. Traffickers sexually assault or physically abuse victims and inflict psychological pain and manipulation. In both labor and sex trafficking situations, traffickers terrorize and threaten victims with death, harm to their families, deportation, and arrest. They create drug dependencies and use other fraudulent and abusive methods, including beatings and torture, to maintain control over their victims and make them fearful of asking for help.

In 2003, Congress added a provision to the law to allow HHS “to assist potential victims of trafficking in achieving certification...”⁴ This provision allowed HHS to work with community organizations through comprehensive service grants to provide essential services to trafficking survivors before certification. And Congress continues to appropriate funds for other federal agencies, including the Department of Justice, to provide additional services for trafficking victims without a certification. However, Congress is

circling around the problem—the certification provisions—and putting in stop gaps, as opposed to fixing the problem.

USCRI, with a track record of over 100 years of addressing the needs and advocating on behalf of refugees and immigrants, has a history of challenging the status quo. In the 1990s when refugees were being held in camps for decades, USCRI launched its global anti-warehousing campaign, objecting loudly and asking where in any international or domestic law does it suggest refugees should be kept in camps.

Now, USCRI believes there’s a need to question the status quo in the care of survivors of trafficking. USCRI, with grant funding from HHS, provides care and services to trafficking survivors throughout the United States through a network of over 200 providers. We know the reality for trafficking survivors, and what follows are our suggestions for shaking up a system that has become dulled to the special needs of this population.

⁴ Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. § 7105(b)(1)(B) (2003).

⁵ During FY 2018, DOJ provided \$31.2 million for 45 victim service providers offering comprehensive and specialized services across the United States. See also “2019 Trafficking in Persons Report - United States Department of State.” Pg. 486. U.S. Department of State. June 2019. <https://www.state.gov/reports/2019-trafficking-in-persons-report/>.



Remove the law enforcement and immigration components from the process for victims to receive certification for benefits and services

USCRI recommends the removal of the law enforcement and immigration components of the certification process, which allows trafficking victims to receive the same benefits and services as refugees. The original intent of the certification process was twofold: to expand benefits and services for victims and to assist prosecutors.⁶ Unfortunately, the assistance for victims is not as intended.

Here’s a quick review of the requirements for survivors of trafficking to obtain benefits and services. A person without immigration status who meets the definition of a “victim of a severe form of trafficking in persons...shall be eligible for benefits and services under any Federal or State program or activity...to the same extent as...a refugee.”⁷ That is significant because refugees are eligible for mainstream federal benefits programs, like Temporary Assistance for Needy Families (TANF), Medicaid, and the Supplemental Nutrition Assistance Program (SNAP). In addition, refugees are eligible for specialized programs run by the HHS Office of Refugee Resettlement (ORR) and the Department of State’s Bureau of Population, Refugees and Migration (PRM).⁸ As noted above, there are other forms of assistance for trafficking victims, but Congress, through the original TVPA certification provisions discussed below, clearly intended for victims to receive the full range of services available to refugees—emergency assistance,

Other funding now provided by Congress could then be used to *expand* trauma informed and trauma specific services and other benefits that address the unique needs of trafficking survivors.

medical care, food, housing, employment and language programs—to achieve self-sufficiency and create new lives in the United States. Through the certification provisions, survivors, at a minimum, should receive benefits and services that are available to refugees. Other funding now provided by Congress could then be used to expand trauma informed and trauma specific services⁹ and other benefits that address the unique needs of trafficking survivors, not pay for programs to replace services that survivors should already have access to.

To meet the definition of a victim of a severe form of trafficking in persons, an adult needs to be certified by HHS. HHS certifies an adult, who has been subjected to a severe form of trafficking in persons, after consultation with the Attorney General and the Secretary of Homeland Security, and who—

- (l) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons; and

⁶ “One of the most important of these provisions expands assistance and protection to victims of severe forms of trafficking, ensuring that they receive appropriate shelter and care, and are able to remain in the United States to assist in the prosecution of traffickers.” 146 Cong. Reg. S10164 (2000) (Statement of Sen. Ted Kennedy).

⁷ 22 U.S.C. § 7105(b)(1)(A) (2000).

⁸ USCRI believes that trafficking survivors are eligible for the Reception and Placement program for refugees run by the Department of State. “[t]he heads of other Federal agencies shall expand benefits and services to victims of severe forms of trafficking in persons...without regard to the immigration status of such victims.” 22 U.S.C. § 7105(b)(1)(B) (2000). USCRI is mindful that services should not be duplicated or create a situation of “double dipping” into benefits.

⁹ Clawson, Heather J., Ph.D., Amy Salomon, Ph.D., and Lisa Goldblatt Grace, LICSW, MPH. “Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking.” ASPE. March 15, 2008. <https://aspe.hhs.gov/report/treating-hidden-wounds-trauma-treatment-and-mental-health-recovery-victims-human-trafficking>.

- (II) (aa) has made a bona fide application for a visa under section 1101(a)(15)(T) of Title 8 that has not been denied; or
- (bb) is a person whose continued presence in the United States the Attorney General and the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.¹⁰

Bona fide T visas and continued presence

We will look at the second part of the requirement first. To receive a certification letter and have access to the same benefits and services as a refugee, an adult must have made a bona fide application for a T visa¹¹ or have been granted continued presence.¹² Bona fide applications for T visas and continued presence are issued through law enforcement and immigration authorities. A T visa is a temporary immigration benefit that enables certain trafficking victims to remain in the United States for up to four years. A bona fide T visa application is recognition from U.S. Citizenship and Immigration Services (USCIS) that the T visa application has been reviewed, was found to be complete and properly filed, contained proper evidence, and was clear of fraud. Continued presence is a temporary immigration status provided to individuals identified by law enforcement as victims of trafficking, and it allows victims to stay in the United States temporarily and assist with an investigation or prosecution.

After 2010, the number of adults given certification based on a bona fide T visa application flat-lined. In a 2017 fact sheet, HHS noted there were essentially no certifications based on bona fide T visa applications from 2001–2017.¹³ Similarly, the number of certifications based on continued presence was low. The number of certification recipients

who had continued presence decreased by 61% from FY 2011–2017.¹⁴ The number of certification recipients with actual T nonimmigrant visas on average increased 63% annually from FY 2010. Therefore, it appears that survivors must wait until they have gone through the entire T visa application process before they receive a certification from HHS. This was clearly not the intention of the original provisions, which required less than a completed and approved T visa application prior to receiving certification.

Willingness to assist

We will now look at the first requirement: willingness to assist. The original TVPA required trafficking victims to be willing to assist in the investigation and prosecution of a trafficking crime. This provision reinforces one of the three Ps of the TVPA—prosecution. However, USCRI finds the benefits from this provision for the prosecution do not outweigh the negatives for the trafficking survivor, particularly because prosecutors have other methods for ensuring assistance with prosecution.¹⁵

Trafficking survivors who refused to assist with a prosecution under the original TVPA would be denied certification and access to benefits and services. Restricting victims' access to benefits and services until they agree to testify against their trafficker is especially egregious—allowing the trafficker to again hold them hostage. It pushes survivors to do something that may retraumatize them in exchange for the assistance they desperately need.

In 2008, Congress attempted to remedy this situation for victims who could not participate in an investigation or prosecution due to trauma. They inserted new language in the certification provision.¹⁶ The provision states that the victim must be willing to assist in every reasonable

¹⁰ 22 U.S.C. § 7105(b)(1)(E)(i) (2000).

¹¹ 8 C.F.R. § 214.11(e) 2012.

¹² 28 C.F.R. § 1100.35 2012.

¹³ "CERTIFICATION FOR ADULT VICTIMS OF HUMAN TRAFFICKING, FY 2001 – 2017 DATA FACT SHEET." Doc No: OTIP-FS-18-02. April 30, 2018. https://www.acf.hhs.gov/sites/default/files/otip/otip_fact_sheet_on_certification_data.pdf.

¹⁴ Id.

¹⁵ Prosecutors could obtain testimony through a subpoena or a material witness warrant. See Song, Charles, and Suzy Lee. "BETWEEN A SHARP ROCK AND A VERY HARD PLACE: THE TRAFFICKING VICTIMS PROTECTION ACT AND THE UNINTENDED CONSEQUENCES OF THE LAW ENFORCEMENT COOPERATION REQUIREMENT." IHRLR 16 SONG 6-04-06, June 5, 2006.

¹⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008).

Forcing a survivor to commit to assisting in the prosecution or testifying against their trafficker may retraumatize the victim and is not in the spirit of the TVPA's other P – protection.

way in the investigation and prosecution of a trafficking case or *be unable to cooperate with such a request due to physical or psychological trauma*.¹⁷ Should victims of trafficking need to make the case that they have undergone damaging psychological trauma? We need to make the assumption that all survivors have undergone psychological trauma. The degree, timing, and outcomes for recovery may vary, but it seems clear that the very definition of human trafficking implies a condition of psychological trauma. Moreover, it is unclear how this provision is being interpreted in practice, and the effects it is having on victims.

USCRI strongly believes the “willingness to assist” provision is unnecessary at the time of certification. The victims are most vulnerable immediately after release from their trafficking situation. This is the time when they are urgently in need of benefits and services. Forcing a survivor to commit to assisting in the prosecution or testifying against their trafficker may retraumatize the victim and is not in the spirit of the TVPA's other P—protection. After their situation has stabilized and support systems are in place, the trafficking survivor may then be voluntarily willing to come forward and testify against their trafficker, without the need to withhold benefits and services. In addition, complying with requests from law enforcement for assistance in the investigation or prosecution of a trafficking case remains a requirement for the T visa. Social services and assistance should not be conditioned on being willing to assist with an investigation or prosecution. “Victims of

human trafficking should be empowered with choice whenever possible, including the ability to determine whether to participate in the criminal justice process.”¹⁸

Certifications

The number of certifications overall is so small, it suggests that this mode of assistance is not even relevant to actual victim assistance. In 2001, one year after the original TVPA was passed, HHS issued 195 certification letters. The number has grown slowly with HHS issuing 412 certification letters in 2018. Although there is no official estimated number of individuals trafficked in the United States each year, various organizations place the number in the tens of thousands. At USCRI alone, in fiscal year 2018, our social services network served 1,012 survivors.¹⁹ Moreover, in 2018, there were 580 T visas approved and 1,930 pending, which means we are clearly issuing fewer certifications than there are actual, identified trafficking victims. These low certification numbers suggest not only a broken system, but that Congress' intent to give trafficking victims access to mainstream benefits and services is not happening.

Based on these staggering numbers, USCRI recommends that Congress eliminate the need for willingness to assist, continued presence and bona fide T visas. Adult victims of human trafficking should receive certifications under a process similar to the eligibility letter process for children under 18 years of age.²⁰ We should allow social workers from NGOs to assess the victim's eligibility based on their trafficking experience, make a recommendation to HHS, and have HHS make the determination on its own without input from law enforcement or immigration authorities.

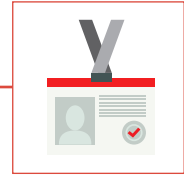
The number of certifications overall is so small, it suggests that this mode of assistance is not even relevant to actual victim assistance.

¹⁷ Id.

¹⁸ “2018 Trafficking in Persons Report - United States Department of State.” U.S. Department of State. June 28, 2018. <https://www.state.gov/reports/2018-trafficking-in-persons-report/>.

¹⁹ In fiscal year 2018, the USCRI network did not cover the entire country.

²⁰ 22 U.S.C. § 7105(b)(1)(C)(ii)(I) (2008). See “Request for Assistance Form.” ACF. August 14, 2018. <https://www.acf.hhs.gov/otip/resource/rfa-0>.



Provide work authorization

With the immigration system in its current, broken condition, trafficking survivors cannot wait for the processing of a T visa application to receive work authorization. Applicants for a T visa should be given work authorization prior to the final adjudication of their T visa application. USCIS posts estimated processing times for applications on its website, and the current length of time it takes for a T visa is 17.5 to 34 months.

Trafficking survivors have escaped forced labor or sexual exploitation. The opportunity to work legitimately for a fair wage is part of the care and recovery, along with mental health services, education, a safe place to live, and other services. These individuals, particularly survivors of labor trafficking, want to work and not be dependent on receiving public benefits. In fact, many were trafficked because they wanted to work, but that does not mean they wanted to be exploited.

USCRI recommends that applicants for T visas be granted the right to apply for work authorization within 150 days of submitting their application (if their case has not been decided). They should be eligible for their employment authorization document (EAD) within 180 days of submitting their application, like asylum seekers. Under section 208(d)(2) of the Immigration and Nationality Act (INA) “[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.” The regulations allow asylum applicants to apply at the 150-day mark.²¹ USCRI recommends similar statutory language be added to 22 U.S.C. § 7105 with an additional requirement for promulgating regulations to implement the provision, similar to the regulations for asylum seekers.

²¹ 8 C.F.R. § 274a.12(c)(8) 2012.



Remove “force, fraud and coercion” from the labor definition for children

Children do not need to go through the certification process to receive benefits and services to the same extent as a refugee. HHS will issue an “eligibility letter” to a child if there is sufficient information to indicate that the child was trafficked.²² If there is information to indicate that the child *may have been* subjected to trafficking, HHS will issue an “interim assistance letter.”²³ The eligibility and interim assistance letters make children eligible for benefits and services to the same extent as refugees. For children, those benefits include the Unaccompanied Refugee Minor program, which provides specialized foster care.²⁴

The definitions of sex trafficking and labor trafficking for children are different.

The term “severe forms of trafficking in persons” means—

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, *or in which the person induced to perform such act has not attained 18 years of age*; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.²⁵

Under the definition, children who are subjected to sex trafficking do not need to show that

there was force, fraud or coercion. However, children subjected to labor trafficking do. USCRI recommends that the requirement for force, fraud or coercion be removed from the definition of labor trafficking for children. Whether it is for sexual exploitation or labor, children should not have to meet the higher standards for adults. Traffickers often target children because they consider them easier to manipulate. Adults, caretakers, parents, and guardians are in a position of power and authority both legally and socially, which can play a critical role in the force, fraud and coercion of minors. There is an underlying expectation that they should obey despite being under the legal age of consent or developmental ability to fully understand the complexities at hand. Adolescents, in particular, may succumb to grooming by traffickers because they are in a vulnerable place in their development.²⁶ We also note that federal law prohibits child soldiers, and the provision does not require force, fraud or coercion.²⁷ Children in any sort of involuntary servitude, peonage, debt bondage, or slavery, not only child soldiers, should be exempt from showing force, fraud or coercion.

The definition of trafficking should be changed so all children are exempt from showing force, fraud or coercion.

²² U.S.C. § 7105(b)(1)(C)(ii)(I) (2000). See “Request for Assistance Form.” ACF. August 14, 2018. <https://www.acf.hhs.gov/otip/resource/rfa-0>.

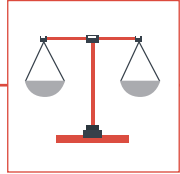
²³ 22 U.S.C. § 7105(b)(1)(F) (2008).

²⁴ See “Eligibility Letters.” ACF. March 1, 2019. <https://www.acf.hhs.gov/otip/victim-assistance/eligibility-letters>.

²⁵ 22 U.S.C. § 7102(8) (2000).

²⁶ “Risk Factors for Child Trafficking.” American Bar Association. November 1, 2015. https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/november-2015/risk-factors-for-child-trafficking/.

²⁷ 18 U.S.C. § 2442 (2008) (The definition applies to children under 15 years old.)



Provide child trafficking victims with attorneys

USCRI recommends that HHS provide attorneys for children who have been trafficked through the pendency of their immigration proceedings. Section 235(c)(5) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 directed HHS that unaccompanied alien children “who are or have been in the custody of the Secretary [of Health and Human Services] or the Secretary of Homeland Security...have counsel to represent them in legal proceedings...”²⁸ USCRI recommends that this provision work in unison with the provision concerning home studies and post-release services for a child who has been a

victim of a severe form of trafficking. HHS must provide child trafficking victims with a home study prior to their release, and it must provide follow-up services during the pendency of their removal proceedings.²⁹ USCRI recommends the modification of section 235(c)(5) to ensure that child trafficking victims receive legal representation while in federal custody, after release from federal custody, and through the pendency of their removal proceedings. USCRI also recommends that child trafficking victims have priority in receiving legal representation if funding for access to counsel is limited.

²⁸ 8 C.F.R. § 274a.12(c)(8) 2012.

²⁹ 8 U.S.C. § 1232(c)(3)(B) (2008).



Expand the definition

Sex trafficking and labor trafficking are not the only types of trafficking. USCRI recommends that we expand the definition of trafficking to include organ removal.

Organ Removal

Organ trafficking describes the phenomenon of trafficking in persons for the purpose of organ removal. According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime, trafficking in persons is defined as follows:

“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 purpose 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**.³⁰

Despite strategies to increase organ donations, organ scarcity is a global problem. In its 2018 Global Report on Trafficking in Persons, the U.N. Office on Drugs and Crime (UNODC) indicated that between 2014 and 2017, about 100 cases of trafficking for organ removal were detected and reported. Over the last 13 years, UNODC has collected information on about 700 victims of trafficking in persons for removal of organs detected in 25 countries. In general, the pace of the crime is dictated by the shortage of organs on the global market. Similar to the reported numbers for other forms of trafficking, this number is likely low because of the nature of the crime.

Knowing that removal of organs is included in the definition of trafficking internationally and that the international community is working to uncover the crime, USCRI recommends that U.S. law adopt removal of organs as part of its trafficking definition at 22 U.S.C. § 7102(8).

³⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, November 15, 2000, 2237 U.N.T.S. 319.

³¹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, September 7, 1956, 266 U.N.T.S. 3.



Create identification documents for benefits and services purposes

Traffickers use various methods to keep victims under their control. One way that is particularly difficult for foreign national victims is the confiscation of their identity documents, such as their passport or visa. In some cases, even if a survivor has his/her passport returned after being released from the trafficking situation, the passport has already expired. For survivors without immigration status and without a passport, day-to-day activities become more challenging. When these survivors attempt to get housing, medical care, and other assistance, they are turned away because they do not have government-issued identification. This occurs whether they have a certification or not.

Between the time when victims are freed from the trafficking situation until they receive a T visa or other immigration status, they need some type of temporary identification. We recommend that HHS issue identification documents with photos to potential trafficking victims. At a minimum, we recommend that children receive identification documents with photos.

Conclusion

With today's immigration system in the United States needing an overhaul, we believe strongly that our system for benefits and services for trafficking survivors should be more straightforward and streamlined so that they can quickly find a safe place and access to the care

they need. As they go through the immigration system, we want to help survivors as they continue to heal and create new lives.

There is general agreement in the United States that our current immigration system is not meeting the daunting challenges posed in the 21st century. The historically ad hoc and piecemeal approach to immigration has resulted in a dysfunctional system with anomalies and gaps that fall short of reflecting our values or our needs. USCRI supports an open and robust process of immigration reform that builds on what works in our current system and fixes what is not working.

In the meantime, USCRI recommends that the process for survivors of trafficking to receive benefits and services be less onerous so that they can quickly access the assistance they need to rebuild their lives. These recommendations address both our values and our needs. For over 100 years, USCRI has advanced the rights and lives of those who have been forcibly or voluntarily uprooted. We serve people who have endured extraordinary hardships and are fighting for a chance at a new beginning. When they become self-sufficient, they become contributing members of their communities, bringing their voices, their unique perspectives, their resilience and their courage.

The U.S. Committee for Refugees and Immigrants (USCRI), established in 1911, is a nongovernmental, not-for-profit international organization dedicated to addressing the needs and rights of refugees and immigrants. Through its network of field offices and affiliates, USCRI provides America's newcomers with a comprehensive package of essential services to meet their basic needs upon arrival. USCRI protects immigrant children who arrive in the U.S. without parents or resources, ensuring that the children receive the legal, social and health services they require. In addition, USCRI works with survivors of human trafficking across a multi-regional network of service providers in every state—providing emergency assistance including: access to housing; healthcare; education; employment opportunities; legal assistance; and language training. USCRI advocates for the rights of refugees and immigrants both nationally and globally, helping to drive policies, practices and law.

U.S. Committee for Refugees and Immigrants

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