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August 12, 2024

Samantha Deshommes
Chief, Regulatory Coordinator
Division Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Comment in Response to the DHS/USCIS Agency Information Collection Activities;
Revision of a Currently Approved Collection: Application for T Nonimmigrant Status,
Application for Derivative T Nonimmigrant Status, and Declaration for Trafficking Victim,
USCIS–2006–0059; OMB Control Number 1615-0099

Dear Chief Deshommes,

The Immigrant Legal Resource Center (ILRC) submits the following supplemental comment in response to the U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security's (DHS) Revision of a Currently Approved Collection: Application for T Nonimmigrant Status, Application for Derivative T Nonimmigrant Status, and Declaration for Trafficking Victim, reopened on July 11, 2024.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC is also a leader in interpreting family-based immigration law as well as VAWA, U, and T immigration relief for survivors, producing trusted legal resources including webinars, trainings, and manuals such as Families & Immigration: A Practical Guide; The VAWA Manual: Immigration Relief for Abused Immigrants; The U Visa: Obtaining Status for Immigrant Victims of Crime; and T Visas: A Critical Option for Survivors of Human Trafficking. Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by vulnerable immigrant and low-income communities – including survivors of intimate partner violence, sexual violence, human trafficking, or other forms of trauma.

The ILRC previously submitted a comment on November 15, 2023, offering feedback on the T Nonimmigrant Forms Collection that the agency proposed to extend without change at that time. Since then, USCIS published revised T visa regulations, *Classification*

for Victims of Severe Forms of Human Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 89 Fed. Reg. 34864 (codified at 8 CFR §§ 212, 214, 245, 274a) (Apr. 30, 2024). The ILRC commends the agency for many of the changes implemented through these regulations, which will expand access to protection for trafficking survivors and simplify the application process for these vulnerable noncitizens. The ILRC welcomes the opportunity to provide this comment on the accompanying proposed changes to the T Nonimmigrant Forms Collection.

I. Improved Gender Inclusivity on Form I-914

In our November 2023 comment, the ILRC encouraged USCIS to amend Form I-914 to be more gender-inclusive, to be consistent with earlier changes to Forms I-914 Supplements A and B, and to better align with updated USCIS policy on gender inclusivity.¹ The ILRC commends the agency’s decision to amend Form I-914 to include a third gender category for individuals who do not self-identify as falling within the “female” and “male” gender categories. This inclusive gender designation will enhance the form’s accessibility to LGBTQIA+ individuals, including transgender and gender nonconforming people who are especially vulnerable to economic marginalization, workplace exploitation, and sexual and other forms of violence including human trafficking.²

II. The Agency Should Limit Required Disclosure of Certain Vacated Criminal Records and Juvenile Adjudications

In our November 2023 comment, the ILRC urged USCIS to strike language across all T Nonimmigrant Forms and Instructions requiring the disclosure of certain criminal records that have been vacated due to legal or constitutional invalidity. This recommendation was consistent with 2021 recommendations from several of our expert partners, including CAST and Freedom Network USA, that the agency should modify the disclosure requirements to account for vacatur that alleviate the immigration consequences of criminal court adjudications. The proposed modifications to the T Nonimmigrant Forms and Instructions do not include these recommendations.

Unlike expungement, vacatur is the recognition from the criminal justice system that a legal mistake was made that invalidates the underlying conviction. The criminal vacatur process retroactively eliminates a criminal record that should not have been created in the first place and alleviates the consequences of the conviction. The vast majority of states now have special post-conviction vacatur bills for trafficking survivors and more states are in the process of developing vacatur laws.³ For example, California Penal Code § 236.14, which went into effect on January 1, 2017, establishes a vacatur petition process for a person who has been arrested or convicted of a nonviolent crime while he or she was a victim of human trafficking, recognizing that these victims lack the necessary mental state to commit such crimes because of their victimization. Unlike traditional expungement or sealing

¹ USCIS, *USCIS Updates Policy Guidance on Self-Selecting a Gender Marker on Forms and Documents* (Mar. 31, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-guidance-on-self-selecting-a-gender-marker-on-forms-and-documents>. See also 1 USCIS-PM E.5(B)(2).

² See, e.g., U.S. Dep’t of State, *United States Advisory Council on Human Trafficking Annual Report 2020* (July 28, 2020), <https://www.state.gov/united-states-advisory-council-on-human-trafficking-annual-report-2020/>; Polaris Project, *Sex Trafficking and LGBTQ Youth* (2019), <https://polarisproject.org/wp-content/uploads/2019/09/LGBTQ-Sex-Trafficking.pdf>.

³ Survivor Re-Entry Project: <https://freedomnetworkusa.org/advocacy/survivor-reentry-project/>.

bills that pardon past criminal behavior, these vacatur bills completely eradicate a survivor's criminal history as if the arrest and conviction had not occurred and restore their status as a law-abiding citizen.

The ILRC acknowledges that the inadmissibility waiver available to T visa applicants is generous as to inadmissibility grounds caused by or incident to the trafficking. However, the current language requires the trafficking survivor to disclose criminal convictions that should never have been imposed in the first place, as determined by a court of competent jurisdiction. The current language undermines the intention of many states' vacatur laws, and in particular trafficking-specific vacatur laws, to eliminate convictions that were invalid due to legal or constitutional error. Requiring disclosure of these determinations serves no adjudicative purpose since they do not constitute convictions for immigration purposes.

The ILRC and expert partners have also long urged USCIS to cease the consideration of juvenile records in applications for relief and to that end make clear on the Form I-914 and instructions that juvenile arrests, charges, and dispositions need not be disclosed, and juvenile records need not be provided. The current collection has again declined to adopt these common-sense modifications. Across the United States, juvenile justice systems – civil systems that adjudicate violations of the law by children – recognize the significant developmental differences between children and adults and accordingly focus on early intervention, community-based resources, and rehabilitative efforts rather than punishment. In fact, most juvenile justice systems, including the federal system, have confidentiality provisions to protect young people from collateral consequences of juvenile court involvement that can occur when information and records from juvenile court proceedings are publicly available.⁴ Requiring people to disclose their youthful violations of the law to USCIS is at odds with the law and policy undergirding juvenile justice systems.

Immigration law does not support consideration of juvenile justice records to determine inadmissibility or as a matter of discretion in immigration adjudications. In *Matter of Devison*, the Board of Immigration Appeals stated, “We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.”⁵ Nor are juvenile delinquency adjudications an appropriate consideration in the well-established rubric for discretionary determinations in immigration proceedings, set forth in *Matter of Marin*.⁶ *Marin* lists several factors that could be deemed adverse for purposes of discretionary determinations: “the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.”⁷ Juvenile delinquency adjudications do not fit anywhere within these factors. First, juvenile justice systems are civil in nature and accordingly state laws forbid the consideration of juvenile

⁴ See Juvenile Law Center, *Youth in the Justice System: An Overview*, <https://jlc.org/youth-justice-system-overview>.

⁵ *Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000), citing, e.g., *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981).

⁶ *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); see also 1 USCIS-PM E.8(C)(2).

⁷ 16 I&N Dec. 581, 584 (BIA 1978)

delinquency adjudications as “crimes” or youth adjudicated delinquent as “criminals.” Second, evidence of a juvenile record simply is not evidence of “bad character.” Even the Supreme Court has recognized that youthful violations of the law may not be indicative of adult character and behavior.⁸

This longstanding recognition of the distinctions between criminal and juvenile proceedings should be especially upheld in T visa adjudications. Child victims of trafficking are particularly vulnerable to criminalization and should not be required to disclose events and records that in many states are sealed, and in any case have no bearing on their eligibility for relief, their character, or their likely behavior in the future. The ILRC asks that Form I-914 and the instructions be modified to reflect this.

Suggested Language: (Form I-914, Part 4, Processing Information)

Answer the following questions about yourself. Responses are intended to cover any activity you have committed under your legal name or any aliases. **Do not include activity that occurred when you were a minor and for which your case was handled in a juvenile court system.** For purposes of this application, you must answer "Yes" to the following questions, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record. (If your answer is "Yes" to any one of these questions, explain in the space provided in **Part 9**.

Additional Information. Additionally, explain if any of the acts or circumstances below are related to you having been a victim of a severe form of trafficking. Answering "Yes" does not necessarily mean that you will be denied T nonimmigrant status or are not entitled to adjust your status or register for permanent residence. **If you were granted a legal vacatur for your conviction, you may answer “No” to questions 1.A.- 1.I and answer “N/A” to the questions in the chart.)**

III. Implement Uniform Confidentiality and Privacy Language Throughout Forms and Instructions

The ILRC also previously recommended changes to the forms’ and instructions’ language regarding Confidentiality and Routine Uses to be uniform throughout all forms and instructions and explicitly reference VAWA confidentiality provisions (8 USC § 1367) and USCIS Policy Manual protections against the unauthorized disclosure of protected information to third parties. The proposed changes do modify some language to be more consistent, but the ILRC believes that further modifications would help applicants better understand their confidentiality protections and the limits of those protections.

The VAWA confidentiality provisions were created to “ensure that abusers and criminals cannot use the immigration system against their victims.”⁹ But the agency’s interpretation of these provisions can change, and survivors should have access to clear, up-to-date information on how USCIS will protect their confidentiality. For example, just this year, USCIS changed its interpretation of Section 1367, now reading this statute to automatically cease to apply once the individual has become a U.S. citizen, with no exceptions or option maintain confidentiality in unique circumstances. This overbroad change will have

⁸ See *Roper v. Simmons* 543 U.S. 551, 570 (2005) (stating “The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”)

⁹ “Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402” H.R. Rep. No. 109-233, at 120 (2005), <https://www.congress.gov/109/crpt/hrpt233/CRPT-109hrpt233.pdf>.

real impacts on trafficking survivors, particularly those who continue to face threats or harm by their traffickers. It is therefore crucial that applicants understand the protections that will be in place throughout the adjudication process to encourage trafficking survivors to come forward to access the relief and benefits they are entitled to receive.

In addition, in April 2023, USCIS updated its Policy Manual to provide guidance on mailing address procedures for persons eligible for victim-based immigration relief, including T visa applicants.¹⁰ This guidance, which took effect on March 29, 2024, provides:

- 8 USC § 1367(a)(2) prevents DHS from disclosing any personal information related to a person who is protected under VAWA, subject to certain limited exceptions;
- USCIS officers must review each form to ensure that all communications are sent to the preferred, safe mailing address of a VAWA-protected applicant;
- USCIS may not make adverse case determinations in any application, including non-victim-based applications, based on information from the applicant's abuser, family of the applicant's abuser, or other perpetrator of crime or trafficking against the applicant; and
- USCIS officers must follow specific mailing address procedures for protected persons who are represented, unrepresented, and who have multiple pending forms.

USCIS should now update all confidentiality disclosures and certifications throughout the T Nonimmigrant Forms and Instructions to reference these policy updates. Clear, consistent guidance and reference to public resources will help trafficking survivors understand the protections available to them and further encourage these individuals to apply for benefits without fear of harm by their traffickers.

Suggested language:

- **Confidentiality (Instructions, page 16)**

Information concerning principal applicants for T nonimmigrant status and the family members they apply for is protected under **the Violence Against Women Act**, 8 U.S.C. Section 1367, **and implementing regulations, 8 CFR § 214.14(e)**. The disclosure of information relating to an individual with a pending or approved application for T nonimmigrant status is prohibited except in certain limited circumstances. These circumstances may include, but are not limited to, disclosure of information to law enforcement agencies with the authority to detect, investigate, or prosecute severe forms of trafficking in persons; non-governmental victims' service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims; and for purposes of national security. **These confidentiality protections apply until the individual attains U.S. citizenship. More information on USCIS policy implementing these protections is available in the USCIS Policy Manual, Volume 1, Part A, Chapter 7.**

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¹⁰ USCIS, *USCIS Updates Policy Guidance on Safe Mailing Address and Case Handling Procedures for Certain Protected Persons* (Apr. 11, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-guidance-on-safe-mailing-address-and-case-handling-procedures-for-certain>; USCIS-PM Vol. 1, Part A, Ch. 7.E. <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7>.

- **Routine Uses (Instructions, page 17)**

The information you provide in the application is confidential and protected from disclosure under the Violence Against Women Act, 8 USC §1367, unless and until you become a U.S. citizen. Your information will be used to determine eligibility, to investigate fraudulent claims, to assist in the investigation and prosecution of trafficking and related crimes. The information will be used by and disclosed to DHS personnel and contractors or other agents in accordance with approved routine uses described in the associated published system of records notices . . . DHS which you can find at www.dhs.gov/privacy. DHS may also share this information, as appropriate, with other Federal, state, local, and foreign government agencies and authorized organizations, for law enforcement purposes or in the interest of national security. More information on USCIS policy protecting against the unauthorized disclosure of confidential information is available in the USCIS Policy Manual, Volume 1, Part A, Chapter 7.

- **Applicant's Declaration and Certification (Form I-914, Part 6; Supplement A, Part 6)**

I further authorize USCIS to release information to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits pursuant to 8 USC 1641(c). Any disclosure shall be in accordance with the VAWA confidentiality provisions at 8 USC § 1367 and 8 CFR § 214.14(e). I understand that these confidentiality protections under 8 USC §1367 will cease to apply if and when I become a U.S. Citizen.

IV. Conclusion

The ILRC thanks USCIS for the opportunity to comment on the T Nonimmigrant Forms and Instructions and for the recent policy updates that inform these suggestions. We appreciate the agency's adoption of several of the ILRC's prior suggestions, and its consideration of suggestions regarding further improvements to this set, as well as the comments of other expert organizations and colleagues who submitted comments in 2021 that remain unimplemented. Please feel free to contact us if we can provide further comments or assist in any other way.

Sincerely,

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Immigrant Legal Resource Center

/s/Jennefer Canales-Pelaez
Jennefer Canales Pelaez
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