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## **CAST ISSUE BRIEF: SUPPORTING FRAUD AS AN INDEPENDENT BASIS FOR A T VISA**

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### **EXECUTIVE SUMMARY**

Victims of a severe form of human trafficking may be eligible for immigration relief in the form of a T visa. Fraud is one of three means that can be used to show that an applicant is a victim of a severe form of human trafficking. This issue brief addresses challenges that may arise when a T visa application relies on fraud and offers advocacy strategies to avoid them.

T visa applications have been denied when the argument in support of the T visa rested on the basis of fraud. Some were denied when the application relied on the use of fraud alone. Others were denied where the applicant successfully showed a fraudulent scheme, but failed to demonstrate that the fraudulent scheme was used for the purpose of involuntary servitude, peonage, debt bondage, or slavery. In other cases, the applicant proved that a fraudulent scheme was used for the purpose of involuntary servitude, peonage, debt bondage, or slavery, but the application failed on other grounds—for example, because the applicant did not successfully tie the trafficking to the physical presence or the extreme and unusual hardship requirements.

### **TO IMPROVE THE SUCCESS OF T VISA APPLICATIONS BASED ON FRAUD:**

- **Structure the Argument by Element:** Use a sound, clear structure when organizing the T visa application.
- **Explain that Fraud is an Independent Basis:** Emphasize that, based on a plain language reading of the statute, fraud satisfies the means requirement.
- **Provide a Definition of Fraud:** Provide a definition of fraud and articulate facts supporting each element of that definition.
- **Link the Means to the Purpose:** In labor trafficking matters, clearly link the fraud to the purpose of subjection to a form of labor trafficking.
- **Emphasize the Connection Between Means and Physical Presence:** Explain the relationship between the fraud and the applicant's physical presence in the United States.



- **Articulate Non-Economic Hardships:** Refer to non-economic factors when arguing that the applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

## T VISA REQUIREMENTS

When applying for T nonimmigrant status, an applicant must submit evidence that fully supports each of four elements.<sup>1</sup> Specifically, an applicant is eligible for a T visa if he or she: (1) is or has been a victim of a severe form of trafficking in persons, as defined by 22 U.S.C. § 7102; (2) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking; (3) has complied with any reasonable request for assistance in the federal, state, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime, or that he or she is unable to cooperate with a request due to physical or psychological trauma, or that he or she has not attained eighteen (18) years of age; and (4) would suffer extreme hardship involving unusual and severe harm upon removal.<sup>2</sup>

The Trafficking Victims Protection Act (“TVPA”) defines “a severe form of trafficking in persons” as 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 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.<sup>3</sup>

An applicant submitting evidence of being a victim of sex trafficking must establish that the trafficker used force, fraud, or coercion to induce performance of a commercial sex act, unless the applicant has not attained eighteen (18) years of age.<sup>4</sup> An applicant submitting evidence of being a victim of labor trafficking must establish that the trafficker recruited, harbored, transported, provided, or obtained the applicant, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>5</sup>

Force, fraud, and coercion are often referred to as the “means” used to subject a person to human trafficking. Each of these three means is clearly listed in the statute as an

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<sup>1</sup> 8 C.F.R. § 214.11(f).

<sup>2</sup> 8 U.S.C. § 1101(15)(T)(i)(I-IV).

<sup>3</sup> 22 U.S.C. § 7102(9).

<sup>4</sup> 22 U.S.C. § 7102(9)(A).

<sup>5</sup> 22 U.S.C. § 7102(9)(B).

independent basis for human trafficking.<sup>6</sup> Of the three means, force and coercion have frequently been successfully used individually to satisfy the means element in T visa applications, but fraud has been less successful. Applicants and advocates using fraud as the primary or sole means to support a T visa application have encountered several problems.

### **PROBLEMS THAT MAY ARISE WHEN USING FRAUD AS A “MEANS”**

T visa applications have been denied when they rested on the basis of fraud. Some were denied when the application relied on the use of fraud alone. Others were denied where the applicant successfully showed a fraudulent scheme, but failed to demonstrate that the fraudulent scheme was used for the purpose of involuntary servitude, peonage, debt bondage, or slavery. In other cases, the applicant proved that a fraudulent scheme was used for the purpose of involuntary servitude, peonage, debt bondage, or slavery, but the application failed on other grounds—for example, because the applicant did not successfully tie the trafficking to the physical presence or the extreme and unusual hardship requirements.

In some labor trafficking cases, applicants succeeded in showing that they were recruited through the use of fraud, but failed to show that they were recruited for the purpose of involuntary servitude, peonage, debt bondage, or slavery. For example, one applicant, a native and citizen of the Philippines, was recruited to come to the United States to work as a teacher in Texas.<sup>7</sup> The agents arranged for the applicant to borrow funds at a high interest rate to pay approximately \$10,000 as a fee for the placement services.<sup>8</sup> However, the recruiter failed to provide the applicant a teaching position once she arrived in the United States.<sup>9</sup> She and several other teachers were forced to stay in a small apartment without their own transportation.<sup>10</sup> The applicant submitted primary evidence that she was a victim of a severe form of human trafficking, a Declaration of Law Enforcement Officer for Victim of Trafficking In Persons, which explained that she was defrauded of \$10,000 to \$12,000, transported around in search of mostly non-existent jobs, and that she was placed in a position of dependency on her traffickers.<sup>11</sup> The applicant also submitted copies of articles regarding instances of human trafficking and the scheme conducted by the recruiter.<sup>12</sup> The adjudicator determined that, “the record shows that [the recruiter] defrauded the applicant by collecting a high fee from her in exchange for a teaching position that did not yet exist. The applicant traveled to the United States pursuant to this fraudulent scheme. However, the applicant has not

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<sup>6</sup> 22 U.S.C. § 7102(9).

<sup>7</sup> 2007 WL 5328555 (DHS) \*5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*4.

<sup>12</sup> *Id.* at \*1.

established that she was brought to the United States ‘for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.’”<sup>13</sup>

In making the determination that the applicant was recruited by the employer through the use of fraud, but not for the purpose of trafficking, the adjudicator relied heavily on the fact that “the record suggest[ed] that [the employer] did intend to arrange employment for the applicant[,]” evidenced by the fact that other Filipino teachers who were brought to the United States as part of the same scheme were given teaching positions.<sup>14</sup> Because the applicant did not establish that the employer subjected her to, or intended to subject her to, involuntary servitude, peonage, debt bondage, or slavery, her visa application was denied.<sup>15</sup> Evidence that the other teachers were subjected to involuntary servitude, peonage, debt bondage, or slavery was not enough to prove that the employer intended to subject this applicant to it.

Other applicants have proved that they were recruited through a fraudulent scheme for the purpose of human trafficking, but were unable to adequately demonstrate that their physical presence in the United States was on account of the human trafficking. One applicant responded to an advertisement for fitters and welders to work in the United States and receive “green cards”.<sup>16</sup> He was told that he would get an H2-B visa and that it would be renewed three times.<sup>17</sup> He was also told that he would then receive a work permit and eventually a green card, all within three years.<sup>18</sup> The recruiter took the applicant’s passport, and required him to pay a large fee before he could get his passport back.<sup>19</sup> Because of this, the applicant withdrew his retirement savings and borrowed money from his parents to pay the fee.<sup>20</sup> The applicant arrived in the United States on March 28, 2007, but no one met him at the airport; he called the recruiter and was told that the company no longer needed workers, the company was not responsible for him, and that he should not return to India.<sup>21</sup>

The applicant reported himself as a human trafficking victim to the United States Department of Justice in March of 2008.<sup>22</sup> In his T visa application, the applicant successfully used agency law to tie the recruiter in India to the company in the United States, thus making the company accountable for the actions of the recruiter.<sup>23</sup> The adjudicator determined that, “the preponderance of the evidence demonstrates that the applicant was recruited for his labor by [the company], through its agent[s] fraudulent

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<sup>13</sup> *Id.* at \*5.

<sup>14</sup> *Id.* at \*6.

<sup>15</sup> *Id.* at \*7.

<sup>16</sup> 2012 WL 8524628 (INS) \*2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

promise of permanent residency in the United States and for the purpose of the applicant's subjection to involuntary servitude.<sup>24</sup> Accordingly, the applicant has established . . . that he was a victim of a severe form of trafficking in persons . . .”<sup>25</sup>

Despite establishing that he was recruited through the use of fraud for the purpose of involuntary servitude, peonage, debt bondage, or slavery, the applicant was unable to show that his physical presence in the United States between March of 2007 and March of 2008 was on account of the human trafficking.<sup>26</sup> To prove that his physical presence in the United States was on account of the human trafficking, the applicant needed to show that he did not have a clear chance to leave between March of 2007 and March of 2008.<sup>27</sup> The adjudicator is required to consider whether the applicant had a clear chance to leave in light of the individual applicant's circumstances—which includes, but is not limited to, trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.<sup>28</sup> The applicant stated that he felt helpless after his arrival because he did not speak English fluently, he lost weight, suffered from insomnia, headaches and fevers, and lived in fear that he would be sent back to India.<sup>29</sup> But the Administrative Appeals Office (AAO) determined that these circumstances were outweighed by his age (he was 38 when he arrived in the United States), that he retained all of his own documents, and that he was able to secure employment with three different employers during the applicable period.<sup>30</sup> In sum, the applicant was recruited through the use of fraud, for the purpose of trafficking, but he “escaped his traffickers” upon his arrival in the United States, which, according to the AAO, provided a clear chance to leave the United States.<sup>31</sup> When trafficking victims are recruited through the use of fraud yet escape their traffickers soon after their arrival in the United States, it may be difficult to show the necessary criteria to prove physical presence on account of the human trafficking.

## ADVOCACY STRATEGIES

As an advocate, there are several steps you can take to help avoid fraud-related problems from occurring with your client's T visa application.

- **Structure Your Argument by Element**

When framing your argument, organize the cover letter using the four primary elements as headings, elaborating on each sub-element and listing fraud in its own sub-

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.* at \*5.

<sup>27</sup> 8 C.F.R. § 214.11(g)(2).

<sup>28</sup> *Id.*

<sup>29</sup> 2012 WL 8524628 (INS) \*5.

<sup>30</sup> *Id.* at \*6.

<sup>31</sup> *Id.*

section. This approach will provide a clear roadmap for the adjudicator reading the application, while keeping each requirement and the evidence of each requirement distinct. This approach is particularly important with fraud, as it will ensure that the facts and argument regarding fraud as a means are considered independently.

The roadmap alleviates any need for the adjudicator to form an argument for you and provides each piece of evidence relevant to each element in one place. The structure will also provide a section where you can explain and emphasize that fraud is an independent basis for human trafficking, and to provide the evidence in support of the argument that fraud was used to induce the particular applicant into the trafficking situation.

- **Emphasize that Fraud is an Independent Basis**

To be deemed a “victim of a severe form of human trafficking,” the applicant must show that the trafficker used one of three means: force, fraud, or coercion.<sup>32</sup> It is important to clearly state that, according to a plain language reading of the statute, only one of these three means is required.

- **Provide a Clear Definition of Fraud**

Fraud is not defined in the TVPA. However, it is essential to provide a clear, defensible definition of fraud. Offering a definition of fraud emphasizes that it is an independent basis for human trafficking, provides the adjudicator with a clear understanding of what it is, and helps to organize the facts to meet the statutory requirements. As no definition is provided by statute, you can use the definition you think best supports your client’s application.

Black’s Law Dictionary defines fraud as “a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.” Black’s Law Dictionary (10<sup>th</sup> ed. 2014).

Another potentially useful definition comes from the federal crime related to false statements made in any matter within the jurisdiction of the executive, legislative, or judicial branch of the U.S. government.<sup>33</sup> While not directly applicable to human trafficking, this crime occurs when one knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false

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<sup>32</sup> 22 U.S.C. § 7102(9).

<sup>33</sup> 18 U.S.C. § 1001.

writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.<sup>34</sup>

After choosing and providing a definition of fraud, ensure that you include facts that support each element of that definition.<sup>35</sup>

- **In Labor Trafficking Matters, Clearly Link the Means to the Purpose**

It is critical to show that the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of fraud was for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>36</sup> Precisely articulate as much evidence as possible to show that the actor who committed the fraud did so for the purpose of subjecting the applicant to a form of labor trafficking and link all of the relevant actors.

In labor trafficking matters involving recruitment, there may be multiple actors involved, including a recruiter in the country of origin and an employer in the U.S. In situations where there are multiple actors, it is important to connect the actor who committed the fraud to the actor who subjected or intended to subject the applicant to involuntary servitude, debt bondage, peonage, or slavery. For example, if the applicant was recruited through the use of fraud by Trafficker A, but was subjected to involuntary servitude by Trafficker B, it is important to trace the fraud committed by Trafficker A to the involuntary servitude utilized by Trafficker B. A few applicants have been successful in using agency law to establish that Trafficker A was an agent of Trafficker B at the time the fraud was committed, and as such Trafficker B may be held accountable for the actions of its agent, Trafficker A.<sup>37</sup>

A plain language reading of the statute reveals that “for the purpose of subjection” does not mean the subjection actually had to occur.<sup>38</sup> However, in labor trafficking cases, an applicant may have difficulties if he or she was not actually subjected to any involuntary servitude, debt bondage, peonage, or slavery. This problem arose in the case of the teacher from the Philippines who was never placed in a teaching position when she arrived in the United States.<sup>39</sup> The adjudicator determined that the applicant traveled to

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<sup>34</sup> *Id.*

<sup>35</sup> Although the Federal Rules of Civil Procedure (“FRCP”) do not govern visa application adjudications, FRCP 9(b) provides a helpful guide for how to thoroughly show that fraud was used. FRCP (9)(b) describes the heightened pleading standard applied when alleging fraud in federal civil litigation. It requires that all circumstances constituting fraud are presented with particularity, and explains that conclusory allegations that an actor committed fraud will not sufficiently support a claim for fraud. See *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 611 (9<sup>th</sup> Cir. 1977).

<sup>36</sup> *Id.* (emphasis added)

<sup>37</sup> See 2012 WL 8524628 (INS) at \*3-\*4.

<sup>38</sup> 22 U.S.C. § 7102(9)(B).

<sup>39</sup> 2007 WL 5328555 (DHS) \*5.

the United States as a result of a fraudulent recruiting scheme, but she failed to show that the fraudulent recruitment scheme was conducted for the purpose of subjection to involuntary servitude, debt bondage, peonage, or slavery because the recruitment agency would have placed her in a teaching position if there was a position available.<sup>40</sup> The Filipino teacher presented a Law Enforcement endorsement and several articles explaining that other teachers had been recruited by the same company, through the use of fraud, and had been subjected to involuntary servitude, but the adjudicator determined that evidence was not enough to show that in her particular case, the actions were conducted for the purpose of subjecting her to involuntary servitude.<sup>41</sup> As this case demonstrates, proving that the purpose of the fraudulent scheme was subjection to involuntary servitude, peonage, or slavery, will require a significant amount of evidence showing the intent of the trafficker was for the purpose of subjecting the applicant to involuntary servitude, peonage, or slavery. Obtaining this evidence may be extremely difficult.

- **Emphasize the Connection Between the Means and Physical Presence**

In some cases, applicants proved that they were victims of a severe form of human trafficking because they were recruited through the use of fraud for the purpose of subjection to a form of labor trafficking, but then failed to prove that their physical presence in the United States was on account of the trafficking.

For an applicant to receive T nonimmigrant status, they must be physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of the severe form of trafficking in persons.<sup>42</sup> To meet the physical presence requirement, applicants who escaped their traffickers prior to law enforcement involvement must show that they did not have a clear chance to leave the United States in the interim.<sup>43</sup> This can pose a significant problem for an applicant who uses fraud as his or her only means to prove that he or she is a victim of a severe form of human trafficking.

When reviewing a T visa application, the adjudicator should consider whether an applicant had a clear chance to leave in light of the individual applicant's circumstances. Relevant information may include, but is not limited to, circumstances attributable to the trafficking, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.<sup>44</sup> The adjudicator should also consider when the applicant

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<sup>40</sup> *Id.* at \*6.

<sup>41</sup> *Id.* at \*6.

<sup>42</sup> 8 U.S.C. § 1101(15)(T)(i)(II).

<sup>43</sup> 8 C.F.R. § 214.11(g)(2).

<sup>44</sup> 8 C.F.R. § 214.11(g)(2).



escaped from the trafficker, what activities the applicant has undertaken since escaping from the trafficker, and the applicant's ability to leave the United States.<sup>45</sup>

If an applicant was recruited through the use of fraud for the purpose of involuntary servitude, but retained his or her travel documents, was never physically harmed or threatened with serious harm, physical restraint, or abuse of the legal process, an applicant may have a much more difficult time explaining why he or she did not have a clear chance to leave in the interim.

Explaining the hardships the applicant would face if forced to return home may not be helpful to explaining physical presence unless those hardships prevent the applicant from returning to their home country.<sup>46</sup> In these instances, it is particularly important to emphasize the mental or physical trauma that the applicant suffered as a result of the actions of the human trafficking, as well as any lack of resources necessary to return home.

- **Articulate Non-Economic Hardships**

Economic harm is often a serious aspect of the harm an applicant may face. In one case, the applicant lost between \$10,000 and \$12,000 as a result of the fraud used by her traffickers.<sup>47</sup> Although the economic harm caused by fraud can be very severe, it is important to emphasize non-economic harms the applicant will experience upon removal. In order to obtain a T visa, the applicant must also prove that he or she would suffer extreme hardship involving unusual and severe harm upon removal.<sup>48</sup> A finding of extreme hardship involving unusual and severe harm may not be based upon current or future economic detriment, or the lack of, or disruption to, economic opportunities.<sup>49</sup>

A non-exhaustive list of non-economic factors considered when determining whether or not the applicant would suffer extreme hardship involving unusual and severe harm includes: the age and personal circumstances of the applicant; serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country; the nature and extent of the physical and psychological consequences of severe forms of trafficking in persons; the impact of loss of access to the United States courts and the criminal justice system; and the likelihood of re-victimization.<sup>50</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> 2012 WL 8524628 (INS) \*6.

<sup>47</sup> 2007 WL 5328555 (DHS) \*5.

<sup>48</sup> 8 U.S.C. § 1101(15)(T)(i)(IV).

<sup>49</sup> 8 C.F.R. § 214.11(i)(1).

<sup>50</sup> 8 C.F.R. § 214.11(i)(1).

As an advocate, you should take extra care to articulate all of the non-economic extreme hardships involving unusual and severe harm that your client would face upon removal.

## **CONCLUSION**

Applicants and advocates have faced several problems when using fraud as the basis for T visa applications. To try to avoid those problems, it may help to: use a sound, clear structure when organizing the T visa application; emphasize that fraud satisfies the means requirement; provide a definition of fraud and articulate facts demonstrating that fraud occurred; in labor trafficking matters, clearly link the fraud to the purpose of subjection to a form of labor trafficking; explain that the relationship between the fraud and the applicant's physical presence in the United States; and refer to non-economic factors arguing that the applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States.