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RE: T Visa Certification and Continued Presence Applications by Equal Employment Opportunity Commission

Dear Ms. Berrien and Mr. Lopez:

On behalf of immigrant worker advocates around the country, this letter requests that the Equal Employment Opportunity Commission (EEOC) issue agency procedures for T Nonimmigrant Classification (T visa) Certification as well as officer guidance on how EEOC investigators can help support Continued Presence Applications for trafficking survivors.

Congress created the T visa (as well as the U visa) as part of the Victims of Trafficking and Violence Protection Act in 2000. To be eligible for a T visa, an applicant must show, among other things, that he or she is a victim of a “severe form of trafficking,” that he or she would face extreme hardship if forced to leave the United States, and that he or she is willing to comply with reasonable requests of law enforcement to assist in investigation or prosecution of the perpetrator(s).¹ A “severe form of human trafficking,” is defined to include the crimes of

¹ Pursuant to INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T), to receive a T-visa, an applicant must show that he or she: (I) is or has been a victim of severe form of trafficking in persons as defined in Section 103 of the Trafficking Victims Protection Act of 2000, (II) is physically present in the United States . . . or at a port of entry . . . on account of such trafficking, (III) (aa) 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 . . . (cc) has not attained 18 years of age, and (IV) would suffer extreme hardship involving unusual and severe harm upon removal.

involuntary servitude, peonage, and trafficking.² Continued presence (CP) is a temporary immigration status provided to individuals identified by law enforcement as victims of human trafficking, and allows victims to remain in the U.S. temporarily during the ongoing investigation into the human trafficking related crimes.³

EEOC has led federal agencies in its protection of immigrant workers. As early as 2008, EEOC published procedures for certification of U visa petitions in EEOC cases—the first of federal agencies to do so.⁴ On February 5, 2013, the agency released revised procedures for requesting EEOC U visa certification, greatly streamlining its certification process.⁵ Our organizations applaud EEOC’s efforts to protect undocumented workers and victims of crime and abuse in the United States. However, we also encourage EEOC to comprehensively protect human trafficking victims by conclusively offering similar protection in the T visa context.

In our recent communications with EEOC regional attorneys around the country, we have received conflicting reports as to the agency’s practices for T visa certification. Some attorneys have found T visa certification to be a useful tool in cases involving victims of human trafficking; others were unfamiliar with T visas. Although several EEOC Regional Attorneys have certified T visas, others have declined to do so, stating that EEOC attorneys should only certify U visas under current protocol.

As discussed below, the EEOC should build upon its work of protecting immigrant workers by issuing a T visa certification protocol. EEOC’s statutory authority to provide certification for both T and U visa applicants is unambiguous. Signing both types of certifications falls squarely within EEOC’s mission to protect some of the most vulnerable workers in the United States and ensure their availability as witnesses for criminal and civil actions.

The T and U visa options are separate and distinct legal avenues available to trafficking survivors. While the U visa is available to victims of many different crimes, including trafficking, the T visa is specifically tailored for trafficking survivors. It has benefits that the U visa does not. The choice of pursuing a T or U visa when the crime of human trafficking has occurred should be that of the victim and the victim’s advocate and should be supported by agency protocol.

EEOC has the statutory authority to sign both T and U visa certifications.

U visa petitioners must support their applications for status with certification by law enforcement agencies of the applicant’s willingness to provide assistance in the detection, investigation or prosecution of the underlying criminal act. Without this certification, an

² Victims of Trafficking and Violence Prevention Act of 2000 (TVPA), Pub. L 106-386, § 103(8), 114 Stat. 1464 (2000).

³ 22 U.S.C. § 7105(c).

⁴ See Naomi Earp, Chair, U.S. Equal Employment Opportunity Commission, EEOC Procedures for U Nonimmigrant Classification Certification (Jul. 3, 2008).

⁵ Equal Employment Opportunity Commission, EEOC Procedures: Requesting EEOC Certification for U Nonimmigrant Classification (U Visa) Petitions in EEOC Cases, Feb. 5, 2013.

applicant is ineligible for a U visa. Under the T visa regulations, law enforcement certification is not mandatory, but is “strongly advised.”⁶

EEOC is a “Law Enforcement Agency” within the meaning of both the T and U visa implementing regulations.

The U visa regulations specifically identify EEOC as a certifying agency. 8 C.F.R. § 214.14(a)(2). EEOC meets the requirements for this designation due to its “responsibility for the investigation or prosecution of a qualifying crime or criminal activity” (QCA). *Id.* The requisite “investigation or prosecution” authority is further defined in the regulations to include “the *detection* or investigation” of a QCA. 8 C.F.R. § 214.14(a)(5)(emphasis added).

While the T visa regulations do not specifically list EEOC as a certifying agency, they define a qualifying entity as one “that has the responsibility and authority for the *detection*, investigation, or prosecution of severe forms of trafficking in persons.” 8 C.F.R. § 214.11(a)(emphasis added). The legal standard for status as a “certifying agency” for both T and U visa applications is thus identical. Thus EEOC’s ability to “detect” these crimes is sufficient to qualify it as a certifying agency under the U visa and T visa regulations. The failure of T visa regulations to explicitly name EEOC as a certifying agency does not exclude the agency from coverage. EEOC meets the regulatory requirements of a “certifying agency” for purposes of both T and U visa certifications because of its acknowledged ability to “detect” trafficking crimes, the underlying substantive requirement of both sets of regulations. To fulfill its mandate to optimally protect workers, EEOC should interpret and implement these responsibilities in a consistent and equally vigorous manner.⁷

EEOC’s certification of crimes involving involuntary servitude, peonage, and trafficking under its U visa provisions demonstrates relevance of T visas.

As previously noted, U visas are available to individuals who are victims of “qualifying crime or criminal activity.” *See* 8 C.F.R. 214.14(a)(2). This list of qualifying criminal activities is extensive, covering violations of federal, state or local criminal law as well as any activities that are “similar” to the designated crimes.⁸ These include crimes including involuntary servitude, peonage, and trafficking, which the EEOC has certified in U visa cases.

⁶ See Instructions for I-918, Supplement B, U Nonimmigrant Status Certification and Instructions for Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.

⁷ Additionally, it should be noted that the U visa regulations are a more recent interpretation of the law than the T visa regulations. The U visa regulations were published in 2007, while the T visa regulations were published in 2002. The latter have not been updated, and are, in fact, no longer correct with regard to the standard for T visa certification. For example, the updated I-914 T visa Supplement B Form Instructions specify that the certifying agency can be a federal, state, or local law enforcement agency, while the outdated regulations indicate that only a federal law enforcement agency qualifies. *Compare* I-914 T visa Supplement B Form Instructions to 8 C.F.R. § 214.11(a). The USCIS’s current policy is thus one favoring a broad interpretation of the “law enforcement agency” designation.

⁸ Under 8 C.F.R. § 214.14 (a)(9), a “[q]ualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious

To be eligible for a T visa, an applicant must show, among other criteria, that he or she is a victim of a “severe form of trafficking.”⁹ This is defined to include the crimes of involuntary servitude, peonage, and trafficking.¹⁰

EEOC’s certification of T visas would provide important protections for victims of trafficking.

While T visa applicants are not required to submit a Supplement B certification, such certification is considered “primary evidence of victim status.”¹¹ An inability to secure T visa certification when EEOC has detected cases of trafficking, peonage, or involuntary servitude means that victims and their advocates will have to decide between submitting a T visa application without certification or submitting a U visa application with certification instead. As detailed below, the benefits that accompany the grant of a T visa exceed those of the U visa. Thus, by refusing to consider T visa certifications, EEOC may potentially limit a survivor’s options in a way that contravenes the TVPA, and severely limits the benefits and protections to which trafficking survivors in the United States are otherwise entitled.

Many of the benefits provided to T visa holders, but denied to U visa holders, are essential to supporting a trafficking survivor’s full recovery. For example, only those individuals granted T visas are eligible for federal public benefits.¹² These benefits include access to medical care, food stamps, and cash assistance. T visa holders may also include visa protection for additional family members (parents and minor siblings of adult victims), when it can be shown that the family members are in imminent danger of retaliation. These family members of adult U visa holders do not have the same protections—only minor U visa holders can sponsor parents and minor siblings.¹³ T visa holders are also eligible to apply for adjustment of status as soon as the related criminal case is closed. U visa holders are not. From a practical perspective, this means that U visa trafficking survivors will be denied the additional benefits available to legal permanent residents longer than their T visa-based peers. Finally, although there are annual caps on the number of both T and U visas that can be granted,¹⁴ only U visa applications have ever exceeded this cap. Indeed, the annual cap on U visa approvals for fiscal year 2012 was

assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. The term ‘any similar activity’ refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.”

⁹ Pursuant to INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T), to receive a T-visa, an applicant must show that he or she: (V) is or has been a victim of severe form of trafficking in persons as defined in Section 103 of the Trafficking Victims Protection Act of 2000, (VI) is physically present in the United States . . . or at a port of entry . . . on account of such trafficking, (aa) 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 . . . (cc) has not attained 18 years of age, and (VII) would suffer extreme hardship involving unusual and severe harm upon removal.

¹⁰ TVPA § 103(8).

¹¹ 8 C.F.R. §§ 214.11(f)1-3.

¹² See 22 U.S.C. § 7105(b)(1)(A).

¹³ 8 C.F.R. § 214.14(f)(4)(ii).

¹⁴ See 8 U.S.C. §1184(p)(2), indicating that no more than 10,000 principal aliens may be granted U nonimmigrant status in any given fiscal year. See 8 U.S.C. § 1184(o)(2) indicating that no more than 5,000 principal aliens may be granted T nonimmigrant status in any fiscal year.

reached, and no further U visa applications could be considered until the start of the next fiscal year.¹⁵ Given that year after year, U visa holders granted status have had to wait until visas become available, while T visa holders do not, trafficking survivors could find themselves waiting far longer for status than if they had filed for a T visa.

Given the above-listed concerns, we respectfully urge you to provide written guidance to EEOC Regional Attorneys in the context of T visa certification.

EEOC can assist trafficking victims to seek “continued presence” from federal law enforcement agents.

EEOC investigators can petition federal law enforcement officials to support applications by the Department of Homeland Security to grant trafficking victims continued presence in the United States, if the victims’ presence is necessary for prosecutorial efforts.¹⁶ Continued presence is a temporary form of relief. Persons receiving continued presence may remain only so long as the Attorney General determines that his or her presence within the United States is necessary. This status cannot be adjusted to permanent residency in the United States. Additional information about applying for Continued Presence for human trafficking victims is available at: <http://ipv6.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf>. At a minimum, information in this brochure should be brought to the attention of all EEOC investigators and attorneys.

Assistance in training EEOC personnel in identifying trafficking victims.

We have been pleased to work with the EEOC in its implementation of its U visa certification protocol. As experienced advocates and service providers working to strengthen protections for low-wage immigrant workers, we welcome the opportunity to provide our expertise in the development and implementation of any training program for EEOC staff.

Conclusion

EEOC is an important federal partner in the ongoing struggle to combat modern-day slavery in the United States. The effort to eradicate modern day slavery and human trafficking requires equal attention to involuntary servitude, forced labor, and sex trafficking. EEOC is one of the best-situated federal agencies to detect cases of human trafficking in our fields, factories, restaurants, and residences. We look forward to further partnering with you to better combat this pressing human rights violation and egregious crime.

If you have any questions, please contact Stephanie Richard at 214-465-1906 x 115, Stephanie@castla.org; Eunice Cho at 510-663-5705, echo@nelp.org; and Ruth Silver Taube, rsilvertaube@scu.edu, 408-737-2313.

¹⁵ See *USCIS Reaches Milestone for Third Straight Year: 10,000 U Visas Approved in Fiscal Year 2012* Available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

¹⁶ 22 U.S.C. § 7105(c)(3).

Sincerely,

/S/

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Coalition to Abolish Slavery and Trafficking

/S/

Eunice Hyunhye Cho
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National Employment Law Project

/S/

Ruth Silver Taube
Supervising Attorney
Workers' Rights Clinic
Katharine & George Alexander Community Law Center
Santa Clara University School of Law
Senior Staff Attorney, Legal Aid Society - Employment Law Center

Endorsing Organizations:

1. Advocates for Basic Legal Equality
2. American Civil Liberties Union
3. Americans for Immigrant Justice
4. Asian Law Caucus
5. Asian Pacific American Legal Center
6. Asian Pacific Islander Legal Outreach
7. The Bay Area Municipal Elections Committee
8. Bet Tzedek
9. Bilateral Safety Corridor Coalition
10. Break the Chain Campaign
11. California Labor Federation
12. California Rural Legal Assistance, Inc.
13. California Rural Legal Assistance Foundation
14. Centro de los Derechos del Migrante, Inc.
15. Centro Legal de la Raza
16. Chinese Progressive Association
17. Coalition to Abolish Slavery and Trafficking
18. Community Solutions
19. Employee Rights Center
20. Equal Rights Advocates
21. Free the Slaves
22. Friends of Farmworkers, Inc
23. Health Legal Services, Law Foundation of Silicon Valley
24. Immigrant Law Center of Minnesota
25. International Institute of Buffalo
26. Just Neighbors

27. Katherine and George Alexander Community Law Center
28. Kentucky Equal Justice Center
29. Labor and Employment Committee, National Lawyers' Guild
30. La Raza Centro Legal
31. Legal Advocates for Children & Youth, Law Foundation of Silicon Valley
32. Legal Aid Society—Employment Law Center (CA)
33. Legal Aid Society—New York, New York
34. Lutheran Social Services of New England
35. MFY Legal Services, Inc.
36. Mujeres Unidas y Activas
37. National Domestic Workers Alliance
38. National Employment Law Project
39. National Immigration Law Center
40. Next Door Solutions to Domestic Violence
41. Not For Sale, SF Bay Area Chapter
42. Out of Egypt Network
43. Polaris Project
44. Restore NYC
45. Southern Poverty Law Center
46. Vietnamese Bar Association of Northern California
47. Worker Justice Center of New York