



MEDINA TOVAR AND T VISA ELIGIBILITY FOR DERIVATIVE SPOUSES

By K.D. Harbeck, Yuxi Han, Christopher McKeon, Andrew Craycroft, and Alison Kamhi

T nonimmigrant status, or the “T visa,” is an immigration benefit that enables certain survivors¹ of severe forms of trafficking in persons to remain in the United States. The T visa is a temporary nonimmigrant status that allows the survivor to remain in the United States for up to four years, receive employment authorization, and qualify for refugee benefits and services. Although the T visa itself is temporary, T visa holders may be able to apply to adjust status to become lawful permanent residents (LPRs) if certain conditions are met.² T visa holders may also apply for derivative T nonimmigrant status for certain family members, including their spouses.

This practice advisory³ discusses the changes to eligibility for derivative T nonimmigrant status for after-acquired spouses in the wake of the ruling in *Medina Tovar v. Zuchowski*.⁴ USCIS regulations required that the principal T visa applicant’s relationship to their spouse exist at the time of filing their T visa application for the spouse to be eligible for derivative status. In *Medina Tovar*, the Ninth Circuit found this requirement to be arbitrary and capricious for U nonimmigrant spousal derivatives.⁵ USCIS announced that it will adopt the ruling and apply it nationwide for

¹ Please note that the ILRC often uses the terms “victim” and “survivor” interchangeably. Because a “victim” is typically defined by harm done to them, many advocates choose to instead use the word “survivor” to refer to clients. “Survivors” are defined by their lives *after* the harm, allowing them to reclaim control of their lives and their recovery. While our goal as advocates is to help community members survive and thrive despite harms they have suffered, we sometimes use the term “victim” when referring to a particular aspect of the criminal legal system, penal code, or immigration law; when describing someone recently affected by crime; when talking about the actions of a perpetrator; or when discussing the harm inflicted on those who did not survive.

² INA § 245(l); 8 U.S.C. § 1255(l).

³ KD Harbeck, Yuxi Han, and Christopher McKeon wrote the first version of this advisory as part of the Berkeley Anti-Trafficking Project, under the direction of ILRC Supervising Attorney Alison Kamhi.

⁴ *Medina Tovar v. Zuchowski*, 982 F.3d 631 (9th Cir. 2020).

⁵ See ILRC, ASISTA, and Catholic Legal Immigration Network, *Updated Practice Alert: U Visa and T Visa ‘After-Acquired Spouse’ Cases*, Jun. 11, 2021, <https://asistahelp.org/wp-content/uploads/2021/06/Updated-Practice-Alert-Regarding-Certain-U-and-T-After-Acquired-Spouse-Cases-1.pdf>.

both U and T visas.⁶ For spouses seeking derivative status based on T visa applications, the spousal relationship does not need to have existed prior to the T visa application filing, so long as it existed prior to the T visa adjudication.

I. T Visa Requirements

To qualify for a T visa, the applicant must:

- (1) Be or have been the victim of a “severe form of trafficking in persons;”
- (2) Be in the United States, American Samoa, the Northern Mariana Islands, or at a U.S. port of entry on account of the trafficking;
- (3) Have cooperated with reasonable requests from law enforcement or are excused from cooperation due to trauma or being under eighteen years of age;
- (4) Show they would suffer “extreme hardship involving unusual and severe harm” if removed from or forced to leave the United States;
- (5) Be admissible to the United States or eligible for a waiver of inadmissibility.⁷

A severe form of trafficking in persons includes both labor and sex trafficking. Labor trafficking is defined as the “harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion” for the purposes of involuntary servitude, peonage, or debt bondage.⁸ Sex trafficking is defined as the harboring, transportation, provision, obtaining, patronizing, or soliciting for the purpose of inducing a commercial sex act through the use of force, fraud, or coercion; or where the person being induced to perform the act is under eighteen years of age.⁹

In determining whether someone has been the victim of a severe form of trafficking, it is not necessary that they actually have performed the labor or commercial sex act to be eligible for a T visa.¹⁰ For example, the person may have been recruited for trafficking and escaped their traffickers before performing the labor for which they were recruited. The T visa sections of the USCIS policy manual, updated on October 20, 2021, contain some examples and definitions of labor trafficking concepts, including harboring, coercion, involuntary servitude, peonage, debt

⁶ 3 USCIS-PM B.2.

⁷ INA § 101(a)(15)(T).

⁸ 22 U.S.C. § 7102(11).

⁹ *Id.*

¹⁰ 3 USCIS-PM B.2(B)(6).

bondage, and slavery.¹¹ It also contains further guidance on USCIS's interpretation of the eligibility criteria for T nonimmigrant status.

II. Applying for Derivative Status

A trafficking survivor who applies for or has been granted T nonimmigrant status is referred to as the principal applicant. A principal applicant applies for a T visa on Form I-914 and their visa is coded as "T-1." A principal T visa applicant may apply for certain family members to receive T nonimmigrant status as derivatives. T visa holders may petition for a derivative T visa for their spouse (T-2) and children (T-3).¹² If they are under the age of twenty-one, they may also petition for their parents (T-4) and any unmarried siblings under the age of eighteen (T-5).¹³ Under certain circumstances, the adult or minor child of a derivative family member may be eligible for derivative status if they are in danger of retaliation because of the principal applicant's escape from trafficking or cooperation with authorities (T-6).¹⁴

A principal T visa holder may petition for a T-2 visa for their spouse by filing Form I-914, Supplement A (I-914A). To qualify as a derivative spouse, the marriage creating the spousal relationship must be legally valid in the location in which it was performed and celebrated. The marriage must also have been entered into in "good faith," not simply to obtain an immigration benefit. Additionally, if the principal applicant and spouse divorce, thus ending the spousal relationship, the spouse will not be approved if their application is still pending, and if already approved, the spouse's T-2 status may be revoked.¹⁵

III. After-Acquired Spouses and *Medina Tovar v. Zuchowski*

Generally, a T visa derivative's familial relationship to the principal applicant must exist at multiple stages of the process. This included at the time that the principal's I-914 is filed, the time the principal's I-914 is adjudicated, the time that the derivative's I-914A is filed, the time the I-914A is adjudicated, and the time when the eligible family member is admitted to the United States if they were residing abroad.¹⁶ This general requirement is subject to certain age-out protections.¹⁷

¹¹ 3 USCIS-PM B.2.

¹² INA § 101(a)(15)(T)(ii)(II).

¹³ INA § 101(a)(15)(T)(ii)(I).

¹⁴ INA § 101(a)(15)(T)(ii)(III). Where there is a threat of retaliation, a T-1 principal applicant over the age of twenty-one may also request derivative status for their parents or unmarried siblings under the age of eighteen.

¹⁵ 8 C.F.R. § 214.11(m)(2)(ii).

¹⁶ 8 C.F.R. § 214.11(k)(4).

¹⁷ 8 C.F.R. § 214.11(k)(5).

Consequently, for a spouse to be eligible for a derivative T visa, USCIS's regulations required that the marriage exist at the time of filing the T visa application.¹⁸ After-acquired spouses, or spouses who were married to the principal applicant after the T visa application had already been filed, were not eligible for derivative status.

In *Medina Tovar v. Zuchowski*, the en banc Ninth Circuit heard a challenge to a similar regulation that restricted derivative status for after-acquired spouses of U visa applicants.¹⁹ On December 3, 2020, the court held that USCIS's requirement that the spousal relationship exist at the time of filing the application was arbitrary and capricious. It found that the regulation was not a permissible interpretation of the governing statute because the nothing in the statute requires a person to have been married to the principal applicant at the time the application was filed, so long as the marriage exists when the application is adjudicated. The court pointed out that the statute expressly provides that an unmarried sibling must have been younger than eighteen years of age at the time that the U visa is filed, but there was no other similar reference to requirements at the time of filing with respect to other derivative family members.²⁰

The effective date for the decision is May 2, 2021, or 150 days following the ruling.²¹ After the decision, USCIS announced that it would adopt the holding and apply it nationwide. It also announced that the decision would apply in both U and T visa cases. Although the regulations still contain the pre-*Medina Tovar* requirements, the updated language in the USCIS policy manual reflects its adoption of the ruling.²² USCIS has not yet indicated how the ruling will be applied in cases for after-acquired spouses who should have been eligible for derivative status where the principal has already adjusted to LPR status or naturalized.

Another key advantage of this decision is that it allows principal applicants who intend to get married to file their application sooner. The processing time for T visa adjudications is currently about eighteen to thirty-nine months. Now principal applicants can file for a T visa as soon as they are prepared to file rather than having to wait until their marriage date and thus postpone their relief.

¹⁸ 8 C.F.R. § 214.11(k)(4).

¹⁹ 8 C.F.R. § 214.14(f)(4).

²⁰ *Medina Tovar v. Zuchowski*, 982 F.3d 631, 635 (9th Cir. 2020).

²¹ The court ruling itself became effective in the Ninth Circuit on January 25, 2021.

²² 3 USCIS-PM B.4(D)(2).

IV. Examples and Scenarios

A. Yvette and Sam: Married before Filing

Yvette's traffickers recruited her to come work in the United States. They promised her a substantial salary and to help her apply to become a lawful permanent resident. When she arrived in the United States, her trafficker took her documents and forced her to perform domestic work in his house. Yvette escaped her trafficker's house and is preparing to file a T visa. Yvette and Sam have been married for a few years. Can Sam be included as a derivative in Yvette's T visa application?

Yes, Yvette's spouse was already eligible for derivative status under the pre-*Medina Tovar* regulation, as their marriage existed before Yvette filed the T visa application. *Medina Tovar* does not change Sam's eligibility

B. Ana and Sofia: Married after Filing but before Adjudication

After Ana's father passed away, a loan shark began harassing her saying that she was now responsible for her father's outstanding debts. Ana did not know of her father's debts and had never agreed to take them on. The loan shark demanded that she pay off the debt by doing bookkeeping work for him and threatened to go after other family members of her father if she refused. Ana was able to escape and filed for a T visa on June 16, 2021. She married Sofia in July while her application was still pending. Can Sofia now be included as a derivative?

Yes. Sofia is eligible to apply because she married Ana, the T-1 principal, before Ana's T visa application was adjudicated.

C. Andrea and Alex: Married after T Visa Approval

When she was sixteen years old, Andrea's boyfriend forced her into sex work. Several months later, she was able to escape him. Andrea filed for a T visa and received an approval several months later. Two weeks after her approval, she married Alex. Can Alex now be added as a derivative spouse?

No. Andrea's T visa application was adjudicated before she married Alex. Although *Medina Tovar* extends eligibility for spouses acquired after the *filing* of a T visa application, spouses that are acquired after the *adjudication* of the application are still ineligible. Andrea will have to wait until she obtains her green card to petition for Alex.



San Francisco

1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

ilrc@ilrc.org
www.ilrc.org

Washington D.C.

600 14th Street NW
Suite 502
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio

500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

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